Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice

Peter Van Elsuwege* and Femke Gremmelprez**

The rule of law as one of the core constitutional values of the EU legal order – The rule of law in the case law of the Court of Justice of the European Union – Jurisdiction of the Court on the basis of a combined reading of Articles 2 and 19 TEU – Protecting the rule of law in the Common Foreign and Security Policy – Protecting the rule of law in the member states in order to safeguard the structure and functioning of the EU legal order – Limits to the scope of application of EU law

Introduction

For a long time, Article 2 TEU seemed nothing more than a mere proclamation of values with only limited direct legal implications.[1] Of course, the EU institutions as well as the EU member states are bound to respect and promote the EU's values, yet it is generally argued that a violation of Article 2 TEU cannot *in itself* be a ground for judicial action.[2] In this respect, a distinction can be made between EU norms, which are in principle subject to full judicial scrutiny, and EU values, which are subject to political supervision. The latter evidently follows from the procedure of Article 7 TEU, which leaves the assessment of member states' compliance with the values referred to in Article 2 TEU essentially in the hands of the Council and the European Council. Moreover, Article 269 TFEU explicitly excludes the

*Professor of EU law and Jean Monnet Chair, Ghent European Law Institute (GELI), Ghent University

**Academic Assistant and PhD candidate, Ghent European Law Institute (GELI), Ghent University

[1]D. Kochenov, 'On Policing Article 2 TEU Compliance. Reversing Solange and Systemic Infringements Analysed', 33 *Polish Yearbook of International Law* (2013) p. 148.

[2]D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', 11 *EuConst* (2015) p. 520; J.W. Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?', 21 *European Law Journal* (2015) p. 141 at p. 145.

European Constitutional Law Review, 16: 8–32, 2020
 doi:10.1017/S1574019620000085

jurisdiction of the Court of Justice of the European Union (henceforth 'the Court') to adjudicate on the lawfulness of acts adopted on the basis of Article 7 TEU, with the exception of the purely procedural aspects.[3] However, the political procedure of Article 7 TEU does not preclude the parallel application of legal routes to ensure compliance with the obligations of EU law, as provided under the conditions set out in the Treaties.[4]

In other words, the task of the Court to 'ensure that in the interpretation and application of the Treaties the law is observed' is subject to certain limitations as far as respect for the EU's values is concerned.[5] It follows from Article 13(2) TEU that the Court can only act within the competences conferred upon it by the Treaties. Arguably, this entails that the Court cannot directly adjudicate on values such as respect for the rule of law or democracy. Nevertheless, respect for the rule of law is a cornerstone of the EU's legal order and, as such, it is used as a key reference for the interpretation of EU legal acts.[6] The Court's seminal conclusion in the landmark *Les Verts* case of 1986 demonstrates how the rule of law, as a fundamental constitutional principle, has been used to avoid certain lacunae in the system of judicial protection.[7] Of course, this 'rule of law'-friendly form of teleological interpretation is not unlimited, as the case law regarding the conditions for direct access to the Court demonstrates.[8] Hence, the search for the right balance between ensuring respect for the EU's values, on the one hand, and the limits of the Court's jurisdiction, on the other, has always existed in the process of European integration.[9]

Arguably, this old debate about how far the Court's jurisdiction can be stretched in order to protect fundamental constitutional principles has gained new momentum following the entry into force of the Treaty of Lisbon and against

[3]ECJ 2 April 2004, Case T-337/03, *Bertelli Galvez* v *Commission*, EU:T:2004:106, para. 15.

[4]*See* the Opinion of AG Tanchev in ECJ 24 June 2019, Case C-619/18, *Commission* v *Poland (Independence of the Supreme Court)*, EU:C:2019:325, para. 50 regarding the relationship between Art. 258 TFEU and Art. 7 TEU.

[5]Art. 19(1) TEU.

[6]W. Schroeder, 'The European Union and the Rule of Law – State of Affairs and Ways of Strengthening', in W. Schroeder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Bloomsbury Publishing 2016) p. 3 at p. 4; T. von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ', in Schroeder (ed.), ibid., p. 155 at p. 155.

[7]ECJ 23 April 1986, Case 294/83, *Parti écologiste 'Les Verts'* v *European Parliament*, EU:C:1986:166.

[8]ECJ 25 July 2002, Case C-50/00 P, *Unión de Pequeños Agricultores* v *Council*, EU:C:2002:462, para. 44; and ECJ 1 April 2004, Case C-263/02 P, *Commission* v *Jégo Quéré*, EU:C:2004:210, para. 36. *See also* ECJ 3 October 2013, Case C-583/11 P, *Inuit Tapiriit Kanatami et al.*, EU:C:2013:625, para. 98.

[9]K. Lenaerts and J. Gutiérrez-Fons, 'To say what the law is: Methods of interpretation and the European Court of Justice', 20 *Columbia Journal of European Law* (2014) p. 3.

the background of the rule of law crisis in several EU member states. It will be argued that the strengthening of the EU's foundational principles to core constitutional values with the Treaty of Lisbon is more than a formal amendment, which allowed the Court to play a role in protecting the rule of law in the EU legal order even in those areas where its jurisdiction is not always straightforward. This point will be illustrated with respect to the Court's jurisdiction in the area of Common Foreign and Security Policy (henceforth CFSP) and in relation to the independence of the national judiciary of EU member states.

Whereas both dimensions may seem to address entirely different issues, this contribution claims that there is a clear connection in the sense that the Court uses the EU's constitutional value of respect for the rule law as a point of reference for asserting its own jurisdiction.[10] In particular, the common thread is that both in its recent case law in relation to CFSP matters and in disputes related to rule of law problems in EU member states, the Court proceeds from the EU law requirement of effective judicial protection – as a core element of respect for the rule of law under Article 2 TEU – to adjudicate on issues which were claimed to fall outside the scope of its jurisdiction.[11] Hence, the main point is that the EU's values, defined in Article 2 TEU, play an increasingly important role in the case law of the Court and at various levels. Accordingly, it is argued that the Court operates along the lines of a federal constitutional court, in the sense that it acts as the guardian of the rule of law in the EU legal order, both with respect to actions of the EU institutions and of the member states acting within the scope of EU law.[12] Whereas this may not come as a surprise in light of the Court's older case law,[13] it is argued that the post-Lisbon legal framework allowed the Court to further stretch the boundaries of its own powers.

[10]In this respect, it is noteworthy that Court judgments in connection with rule of law questions in EU member states explicitly refer to the case law in relation to CFSP-related matters, as far as the references to Art. 2 TEU and the principle of effective judicial protection under EU law are concerned. *See*, for instance, the references to the *Rosneft* case in the *Associação Sindical dos Juízes Portugueses* judgment (ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, para. 36).

[11]For CFSP matters, the limitation to the Court jurisdiction in this area is explicitly included in Art. 24(1) TEU and 275 TFEU; in terms of questions related to national judiciaries, EU member states have argued that such questions fall outside the scope of EU law. *See* for instance MFA statement on the Polish government's response to Commission Recommendation of 27.07.2016, 27 October 2016, ⟨www.msz.gov.pl/en/p/msz_en/news/ mfa_statement_on_the_polish_government_ s_response_ to_commission_ recommendation_of_27_07_2016⟩, visited 24 March 2020; and ECJ 24 June 2019, Case C-619/18, *Commission* v *Poland (Independence of the Supreme Court)*, EU:C:2019:531, para. 38.

[12]On the role of the ECJ as a federal constitutional court and its limitations, *see* M. Claes and M. De Visser, 'The Court of Justice as a Federal Constitutional Court: A Comparative Perspective', in E. Cloots et al. (eds.), *Federalism in the European Union* (Hart Publishing 2012) p. 83.

[13]*See*, in particular, *Parti écologiste 'Les Verts'* v *European Parliament*, *supra* n. 7, para. 23.

After a brief introduction to the place of the rule of law in the EU Treaty framework, recent evolutions in the Court's case law are illustrated. First, how the EU's constitutional value of the rule of law determines a rather broad interpretation of the Court's limited jurisdiction in the area of CFSP is clarified. Second, it is demonstrated how this interpretation of Article 2 TEU, and its concomitant requirement of effective judicial review to ensure compliance with provisions of EU law, affects the Court's case law on matters related to the state of the rule of law in EU member states. In this respect, procedural developments, such as the broad interpretation of the scope of interim measures adopted under Article 279 TFEU, as well as more substantive evolutions such as judicial review of the independence of national judiciaries, are linked to the rule of law in the EU legal order. Taken together, these case studies thus illustrate a rather general trend in the Court's case law in the sense that Article 2 TEU – in combination with Article 19 TEU – is increasingly used as a crucial point of reference for strengthening the Court's constitutional role.[14] Finally, the contribution critically reflects on the implications of this evolution, in particular in light of the limits imposed on the scope of application of the Charter of Fundamental Rights of the European Union (henceforth the Charter) and the EU's preliminary reference procedure.

The role of the rule of law in the EU's constitutional order

Respect for the rule of law has always played an important role in the case law of the Court, long before the concept was explicitly referred to in the EU Treaties. Based upon the common constitutional traditions of the member states, the Court identified a wide range of principles which form an integral part of the rule of law.[15] Reference can be made to the principles of legality,[16] legal certainty,[17] the prohibition of arbitrariness in executive powers,[18] the right to a fair trial before independent

[14]While this contribution focuses on the value of respect for the rule of law, it is noteworthy that in Case C-502/19 (*Oriol Junqueras*), the Court refers to the value of democracy, which is mentioned in Art. 2 TEU and given concrete expression in Art. 10(1) TEU: *see* ECJ 19 December 2019, Case C-502/19, *Oriol Junqueras*, EU:C:2019:1115, para. 63.

[15]*See* Annex I 'The Rule of Law as a foundational principle of the Union' to the Communication from the Commission to the European Parliament and the Council, 'A new framework to strengthen the Rule of Law', COM(2014)158 final, 11 March 2014, p. 2-3; and von Danwitz, *supra* n. 6, p. 155-169.

[16]ECJ 29 April 2004, Case C-496/99 P, *Commission* v *CAS Succhi di Frutta*, EU:C:2004:236, para. 63.

[17]ECJ 12 November 1981, Joined Cases C-212 to 217/80, *Amministrazione della finanze dello Stato* v *Salumi*, EU:C:1981:270, para. 10.

[18]ECJ 15 May 1986, Case 222/84, *Johnston*, EU:C:1986:206, para. 18; ECJ 21 September 1989, Joined Cases C-46/87 and 227/88, *Hoechst* v *Commission*, EU:C:1989:337, para. 19.

and impartial courts,[19] separation of powers,[20] and equality before the law.[21] The Court does not regard those principles as purely formal and procedural requirements but as the cornerstone of a 'union based on the rule law'.[22] Moreover, respect for those principles is intrinsically linked to the other foundational values, in particular democracy and fundamental rights.[23]

The significance of the rule of law was given due consideration in light of the EU's enlargement policy vis-à-vis the countries of Central and Eastern Europe.[24] In this context, the European Council established a pre-accession process of unprecedented length and complexity, as a consequence of which candidate countries were subjected to the EU values' scrutiny and intervention before their entry to the EU.[25] At the same time, the rule of law and the other core values were consolidated as 'founding principles' in the EU Treaties.[26] As a result of the fear that the transformation of the countries of Central and Eastern Europe into liberal democracies upholding the rule of law would reverse at a certain point in time after their accession, Article 7 TEU, the procedure to sanction member states breaching one of the founding EU values, was added to the Treaties.[27] In other words, the Article 7 TEU procedure seeks to secure respect for the conditions of EU membership.[28]

[19] *Inuit Tapiriit Kanatami*, *supra* n. 8, para. 91; ECJ 29 June 2010, Case C-550/09, *E and F*, EU:C:2010:382, para. 44; and *Unión de Pequeños Agricultores* v *Council*, *supra* n. 8, paras. 38-39.

[20] ECJ 22 December 2010, Case C-297/09, *DEB*, EU:C:2010:811, para. 58; and ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, *A.K.*, EU:C:2019:982, para. 124.

[21] ECJ 14 September 2010, Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, EU:C:2010:512, para. 54.

[22] *See*, for instance, *Unión de Pequeños Agricultores* v *Council*, *supra* n. 8, paras. 38-39; ECJ 3 September 2008, Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461, para. 316; and *Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 11, para. 46.

[23] Communication from the Commission to the European Parliament and the Council, 'A new framework to strengthen the Rule of Law', COM(2014)158 final 2, 19 March 2014, p. 4.

[24] Respect for the rule of law constitutes one of the conditions for EU membership, as defined in the June 1993 Copenhagen European Council conclusions, *Bull. EC.*, 6-1993, point I.13. *See also* von Danwitz, *supra* n. 6, p. 156.

[25] A. Albi, 'Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums', 15 *European Law Review* (2009) p. 46 at p. 48.

[26] Art. J(1) Maastricht Treaty, Art. 6(1) Amsterdam Treaty and Art. 6(1) Nice Treaty.

[27] *See* Reflection Group's Report, Messina - 2 June 1995 and Brussels - 5 December 1995, part I.I and part II.II, paras. 32-33, available at ⟨www.europarl.europa.eu/enlargement/cu/agreements/reflex1_en.htm#1⟩ visited 24 March 2020; and W. Sadurski, 'Adding a bite to a bark? A story of Art. 7, the EU enlargement, and Jorg Haider', 16 *Columbia Journal of European Law* (2010) p. 385 at p. 391-392.

[28] Communication from the Commission to the Council and the European Parliament on Art. 7 of the Treaty on European Union, Respect for and promotion of the values on which the Union is based, COM(2003)606, 15 October 2003, p. 5.

The Treaty of Lisbon further reinforced the constitutional role of the rule of law as a keystone of the EU legal order. First, Article 2 TEU defines the rule of law as one of the EU's foundational 'values' which are 'common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.[29] Moreover, references to the rule of law can be found in the preambles to the EU Treaty and to the Charter. Second, the Treaty of Lisbon consolidated the promotion of its values as the primary objective of the EU, besides creating an area of freedom, security and justice without internal frontiers, an internal market, and an economic and monetary union.[30] As a consequence, the promotion and respect for the rule of law and the other EU values is connected to the principle of sincere cooperation entailing that the member states have to refrain from adopting measures which could jeopardise one of these objectives.[31] Third, due to the abolition of the pillar structure, the EU's constitutional values are horizontally applicable in relation to all areas falling within the scope of EU law. This implies that respect for the rule of law fully applies in relation to the CFSP, notwithstanding the limited jurisdiction of the Court in this area.[32] Moreover, it is a cornerstone of the Area of Freedom, Security and Justice. The latter is based on the principle of mutual trust, which basically means that each member state can be confident that the other member states respect and ensure the protection of the values mentioned in Article 2 TEU.[33] When a member state no longer complies with the rule of law, the fundamental premise upon which the principle of mutual trust is built can no longer be upheld. The far-reaching consequence of such a situation is 'an acute disruption of the very basis of the system of EU law at both the national and the supranational level'.[34] Last but not least, the rule of law is operationalised by the Charter, which has been granted the status of primary law by the Treaty of Lisbon.[35] In particular, the principle of the right to an effective remedy and to a fair trial, enshrined in Article 47 Charter, is an essential requirement of the principle of

[29]However, the transformation from 'principles' to 'values' is somewhat ambiguous, in the sense that the latter may be regarded as less legally enforceable. *See* the textual differences between Art. 6 TEU (old version – as amended by the Amsterdam Treaty), which referred to the EU's foundational 'principles' which are common to the member states and Art. 2 TEU (as amended by the Treaty of Lisbon).

[30]Art. 3(1) TEU.

[31]Art. 4(3) TEU. *See Associação Sindical dos Juízes Portugueses*, *supra* n. 10, para. 34.

[32]ECJ 19 July 2016, Case C-455/14 P, *H* v *Council*, EU:C:2016:212, para. 41.

[33]S. Prechal, 'Mutual trust before the Court of Justice of the European Union', 2 *European Papers* (2017) p. 81.

[34]D. Kochenov, 'Europe's Crisis of Values', 15 *University of Groningen Faculty of Law Research Paper Series* (2014) p. 4

[35]Art. 6 TEU.

effective judicial protection as foreseen in Article 19(1) TEU, which is, in turn, of 'cardinal importance' to and a concretisation of the rule of law.[36]

The increased focus devoted to the EU's values in the Treaty of Lisbon, as well as the political developments in certain EU member states, thus provide the background for an increased constitutional role of the Court. As argued in the following sections, there is a clear tendency in the Court's case law to explicitly refer to Article 2 TEU, in conjunction with the principle of effective judicial protection pursuant Article 19 TEU, where this was barely the case before the adoption of the Treaty of Lisbon.[37] This is visible both at the level of the EU, in relation to the CFSP, and at the level of the member states, when it concerns the independence of the national judiciary.

The EU dimension: protecting the rule of law in the Common Foreign and Security Policy

Since the entry into force of the Treaty of Lisbon, the CFSP is no longer a separate pillar but an integral part of the integrated EU legal order. At the same time, the CFSP remains subject to specific rules and procedures.[38] This implies, *inter alia*, that the Court has, in principle, no jurisdiction with respect to this area with the exception of questions concerning the delimitation between CFSP and non-CFSP matters and the legality of restrictive measures against natural or legal persons.[39] Accordingly, the jurisdictional 'carve-out' in relation to the CFSP derogates from the general jurisdiction which Article 19(1) TEU confers on the Court to ensure that the law is observed in the interpretation and application of the Treaties.[40] Moreover, it raises questions concerning the relationship between the general assertion in Article 2 TEU that the EU is a union based upon the rule of law and the right to an effective remedy as guaranteed under Article 47 Charter.

[36]ECJ 25 July 2018, Case C-216/18 PPU, *LM*, EU:C:2018:586, para. 49; and *Associação Sindical dos Juízes Portugueses*, *supra* n. 10, para. 41. On this issue, *see also* below under the heading 'Limits to the scope of application of the Charter'.

[37]A noticeable exception is *Kadi and Al Barakaat International Foundation* v *Council and Commission*, *supra* n. 22, para. 303, in which the Court explicitly referred to ex Art. 6(1) TEU.

[38]Art. 24(1) TEU. On the particular position of CFSP in the EU legal order, *see* P. Van Elsuwege, 'EU External Action after the collapse of the pillar structure: In search of a new balance between delimitation and consistency', 47 *CMLR* (2010) p. 987; I. Govaere, 'Multi-faceted single legal personality and a hidden horizontal pillar: EU external relations post-Lisbon', 13 *CYELS* (2011) p. 87; R. Wessel, '*Lex Imperfecta:* Law and integration in European Foreign and Security Policy', 2 *European Papers* (2016) p. 439.

[39]Art. 24(1) TEU and Art. 275 TFEU.

[40]Opinion of AG Wathelet in ECJ 28 March 2017, Case C-72/15, *Rosneft*, EU:C:2016:381, para. 41.

Against this background, it is not surprising that questions about the scope for judicial review in relation to the CFSP have come before the Court on several occasions. In *Opinion 2/13*, the Court simply observed that 'as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court' without, however, clarifying what type of acts precisely escape from the Court's judicial control.[41] In subsequent cases, the Court clarified that it has jurisdiction to deal with the procedural requirements regarding the conclusion of international agreements pertaining to the field of CFSP[42] and with respect to the application of the EU's public procurement rules in the framework of a CFSP mission.[43] In *H* v *Council*, it further decided to hear an action for annulment directed against decisions taken by the Head of an EU mission established under the CFSP[44] and in *Rosneft*, the Court confirmed its capacity to give a preliminary ruling on the validity of CFSP acts.[45] Taken together, this series of judgments reveals a clear trend in the sense that the Court adopts a broad interpretation of its limited jurisdiction in the field of CFSP. This is a direct consequence of the abolition of the pillar structure and the integration of the CFSP in the post-Lisbon EU legal order. The latter implies that general principles of EU law, including the right to an effective judicial remedy, also apply to the CFSP. Hence, notwithstanding the specific nature of the CFSP and the Treaty-based limitations to the Court's jurisdiction, the post-Lisbon case law reveals that the Court is not entirely powerless in this field.[46]

It is noteworthy that this approach largely derives from the essential role attributed to the EU's values laid down in Art. 2 TEU, in particular the rule of law. This is made explicitly clear in *Rosneft*, where the Court referred to the principle of effective judicial protection – as an inherent aspect of the rule of law – to conclude that 'the exclusion of the Court's jurisdiction in the field of

[41]ECJ 18 December 2014, Opinion 2/13 *(Accession to ECHR)*, EU:C:2014:2454, para. 251.

[42]ECJ 24 June 2014, Case C-658/11, *European Parliament* v *Council (Pirate Transfer Agreement with Mauritius)*, EU:C:2014:2025; and ECJ 14 June 2016, Case C-263/14, *European Parliament* v *Council (Pirate Transfer Agreement with Tanzania)*, EU:C:2016:435.

[43]ECJ 12 November 2015, Case C-439/13 P, *Elitaliana* v *Eulex Kosovo*, EU:C:2015:753.

[44]*H* v *Council*, *supra* n. 32.

[45]ECJ 28 March 2017, Case C-72/15, *Rosneft*, EU:C:2017:236.

[46]On this evolution *see also* G. Butler, 'The Coming to Age of the Court's Jurisdiction in the Common Foreign and Security Policy', 13(4) *EuConst* (2017) p. 673; M. Cremona, '"Effective Judicial Review is of the Essence of the Rule of Law"; Challenging Common Foreign and Security Policy Measures before the Court of Justice', 2 *European Papers* (2017) p. 671; C. Hillion and R. Wessel, '"The Good, the Bad and the Ugly": Three Levels of Judicial Control over the CFSP', in S. Blockmans and P. Koutrakos, *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar 2018) p. 65.

the CFSP should be interpreted strictly'.[47] Significantly, the Court's approach contrasts with the perspective of several Advocates General. In *Opinion 2/13*, Advocate General Kokott pointed out that a very wide interpretation of the Court's jurisdiction in relation to the CFSP is not necessary for the purpose of ensuring effective judicial protection for individuals.[48] This is because individuals may seek recourse to national courts or tribunals of EU member states. The latter are also entrusted with responsibility for ensuring judicial review in the EU legal order.[49] Of course, the absence of jurisdiction for the Court implies that the uniform interpretation and application of EU law cannot be ensured in the context of the CFSP. This is, to use the words of Advocate General Kokott, 'highly regrettable from the aspect of integration policy' but nevertheless 'the logical consequence of the decision by the Treaty legislature to continue to configure the CFSP essentially along intergovernmental lines'.[50] Advocate General Wahl followed a largely similar line of argumentation when he highlighted in *H* v *Council* that the system of judicial review in relation to the CFSP is 'the result of a conscious choice made by the drafters of the Treaties', implying that the Court may not broaden its jurisdiction beyond the explicit limits laid down in the Treaties even if this raises concerns regarding the rule of law at EU level.[51] To the contrary, Advocate General Wathelet observed in *Rosneft* that a restrictive approach of the Court's jurisdiction in relation to CFSP matters would be difficult to reconcile with the fact that the EU's international action is subject to its foundational principles, including respect for the rule of law and fundamental rights such as the right of access to a court and effective legal protection.[52] A similar position is adopted by Advocate General Bobek in the pending *European Union Satellite Centre* case.[53]

Hence, the discussion regarding the jurisdiction of the Court in relation to CFSP matters reveals what may be called a 'rule-exception dilemma': is the absence of a role for the Court as foreseen under Article 24 TEU the rule (with certain exceptions in relation to Article 40 TEU and Article 275 TFEU), or is

[47] *Rosneft*, *supra* n. 45, para. 74. In fact, the Court for the first time referred to the narrow interpretation of the exceptions to its jurisdiction in CFSP matters in the *Pirate Transfer Agreement with Mauritius* judgment, *supra* n. 42. However, on this occasion, it did not make a link with Art. 2 TEU: ibid., para. 70.

[48] View of AG Kokott in ECJ 18 December 2014, Opinion 2/13 *(Accession to the ECHR)*, EU: C:2014:2475, para. 95.

[49] *See* on this point also *Associação Sindical dos Juízes Portugueses*, *supra* n. 10, para. 32.

[50] View of AG Kokott in Opinion 2/13, *supra* n. 48, para. 101.

[51] Opinion of AG Wahl in *H* v *Council*, *supra* n. 32, para. 49.

[52] Opinion of AG Wathelet in *Rosneft*, *supra* n. 40, para. 66.

[53] Opinion of AG Bobek in Case C-14/19 P, *European Union Satellite Centre (SatCen)* v *KF*, EU: C:2020:220, paras. 64-73.

the Court's general jurisdiction as defined in Art. 19 TEU the rule, and the derogations with respect to CFSP the exception?[54] The answer to this question largely depends upon which method of interpretation is used. A teleological approach implies that the exclusion of the Court's jurisdiction in relation to CFSP acts is to be exceptional in light of the EU's rule of law objectives, whereas a textual interpretation with reference to the *travaux préparatoires* may point in a different direction.[55] It is noteworthy that the Treaties do not provide any guidance as to which method of interpretation is to be preferred. This means that the Court, in principle, is free to opt for the method which best serves the EU legal order as long as the principles of inter-institutional balance and mutual sincere cooperation are observed.[56] Proceeding from this interpretative discretion and taking into account the fundamental importance of the rule of law as a cornerstone of the EU legal order, the Court's deliberate choice for a broad interpretation of its general jurisdiction as the main rule does not come as a surprise. It builds upon the tradition of *Les Verts* to ensure, as far as possible, an effective system of judicial protection in a Union which is based on respect for the rule of law.[57] Even under the old pillar structure, the Court interpreted its limited jurisdiction in relation to the former third pillar (police and judicial cooperation in criminal matters) broadly in light of its task to ensure that in the interpretation and application of the treaties the law is observed.[58] The Treaty of Lisbon, with the codification of the EU's foundational values in Article 2 TEU and the

[54]Butler, *supra* n. 46, p. 673 at p. 684.

[55]*See* e.g. the supplementary report on the question of judicial control relating to the Common Foreign and Security Policy, discussed within the European Convention, CONV 689/1/03, 16 April 2013, which revealed that there was no consensus to significantly extend the Court's jurisdiction in relation to CFSP-related matters. For a more detailed analysis of the discussions on this issue, *see also* L. Saltinyte, 'Jurisdiction of the European Court of Justice over issues relating to the Common Foreign and Security Policy under the Lisbon Treaty', *Jurisprudencija* (2010) p. 261. However, *see also* the Opinion of AG Bobek in *European Union Satellite Centre (SatCen)* v *KF*, *supra* n. 53, para. 72, where he argues that a historical examination of Art. 24(1) TEU and Art. 275 TFEU does not support a broad interpretation of the CFSP derogation.

[56]Lenaerts and Gutiérrez-Fons, *supra* n. 9, p. 4.

[57]P. Van Elsuwege, 'Upholding the Rule of Law in the Common Foreign and Security Policy: H v. Council', 54(3) *CMLR* (2017) p. 855.

[58]Pursuant to ex Art. 35(1) TEU, member states could make a declaration regarding the acceptance of preliminary rulings by the Court of Justice in relation to certain acts adopted under Title VII (provisions on police and judicial cooperation in criminal matters). In this context, the ECJ clarified that 'the right to make a reference to the Court of Justice for a preliminary ruling must [. . .] exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties'. *See* ECJ 27 February 2007, Case C-354/04 P, *Gestoras Pro Amnistia et al.*, EU:C:2007:115, para. 53; and ECJ 27 February 2007, Case C-355/04 P, *Segi* v *Council*, EU:C:2007:116, para. 53.

abolition of the pillar structure, provided the Court with an additional tool to stretch the boundaries of its jurisdiction.

While this evolution may be regarded as a sign that the Court takes its task as guardian of the EU's foundational values seriously, it is also subject to criticism. In particular, it has been argued that the Court disrespects the intention of the drafters of the Treaties to retain a separate constitutional status for the CFSP, including, *inter alia*, the absence of a broad judicial review at EU level.[59] Moreover, the Court's reference to Article 47 Charter (right to an effective remedy and a fair trial) as a justification for its own jurisprudence has been criticised in light of Article 51(2) Charter, which provides that the Charter cannot modify the powers and tasks defined by the Treaties. Hence, one may argue that the Charter cannot be used to circumvent the absence of the Court's jurisdiction in relation to the CFSP.[60] Though the Court in *Rosneft* explicitly admits that 'Article 47 Charter cannot confer jurisdiction on the Court where the Treaties exclude it', it nevertheless concludes that the principle of effective judicial protection as enshrined in this provision 'implies that the exclusion of the Court's jurisdiction in the field of the CFSP should be interpreted strictly'.[61] It further emphasised once again that 'the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law'.[62] Hence, the Court's preoccupation with the values of Article 2 TEU, in particular respect for the rule of law, in the post-Lisbon case law on CFSP-related matters is remarkable. It may be regarded as an answer to pre-Lisbon criticism that the self-imposed claim of respect for the rule of law in *Les Verts* was perhaps valid for the Community but not for the EU as such.[63] With its *Rosneft* judgment, the Court has put into perspective the limits to the Court's jurisdiction in relation to the CFSP. As far as the judicial review of restrictive measures against natural or legal persons is concerned, the coherence of the EU system of judicial protection is preserved and there is no difference when compared to other areas of EU law.[64]

[59]*See*, for instance, the position of P. Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy', 67(1) *ICLQ* (2018) p. 1.

[60]*See*, on this point, Butler, *supra* n. 46, p. 691.

[61]*Rosneft*, *supra* n. 45, para. 74.

[62]Ibid., para. 73.

[63]W. Van Gerven, *The European Union. A Polity of States and Peoples* (Hart Publishing 2005) p. 118.

[64]*See further* S. Poli, 'The Common Foreign and Security Policy after *Rosneft*: Still Imperfect but Gradually Subject to the Rule of Law', 54(6) *CMLR* (2017) p. 1799; G. Butler, *Constitutional Law of the EU's Common Foreign and Security Policy. Competence and Institutions in External Relations* (Hart Publishing 2019) p. 179.

The member states dimension: protecting the structure and functioning of the EU legal order

It is noteworthy that the Court's references to Article 2 TEU and the requirement of effective judicial protection in the EU legal order, as developed in judgments such as *Rosneft* and *H* v *Council*, have been used in the entirely different context of the so-called 'rule of law backsliding'[65] in some EU member states.[66] Also in this context, the Court's jurisdiction has been subject to discussion.[67] According to certain member states, the organisation of their national judiciaries has to be considered as a purely internal matter falling within the scope of their national procedural autonomy and, thus, falling outside the scope of EU law.[68] In addition, one may argue that Article 7 TEU is the *lex specialis* to deal with breaches of the EU values enshrined in Article 2 TEU.[69] Indeed, Article 7 TEU provides only a limited jurisdiction to the Court in accordance with Article 269 TFEU, in comparison with the Court's general jurisdiction. However, in a series of judgments,[70] the Court has countered this argument and underlined that the values enshrined in Article 2 TEU, and the rule of law in particular, constitute the cornerstone of

[65]Rule of law backsliding has been defined by Pech and Scheppele as 'the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party': *see* L. Pech and K.L. Scheppele, 'Illiberalism within: Rule of Law Backsliding in the EU', 19 *Cambridge Yearbook of European Legal Studies* (2017) p. 3 at p. 10.

[66]Reasoned Proposal in accordance with Article 7 of the Treaty on European Union regarding the Rule of Law in Poland – Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the Rule of Law, COM(2017)835 final, 20 December 2017; European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), P8_TA-PROV(2018)0340.

[67]von Danwitz, *supra* n. 6, p. 156.

[68]*See* for instance MFA statement on the Polish government's response to Commission Recommendation of 27.07.2016, 27 October 2016, ⟨www.msz.gov.pl/en/p/msz_en/news/mfa_statement_on_the_polish_government_s_response_to_commission_recommendation_of_27_07_2016⟩, visited 24 March 2020; and *Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 11, para. 38.

[69]Editorial Comments, 'Safeguarding EU values in the Member States – Is something finally happening?', 52 *CMLR* (2015) p. 619 at p. 626-627.

[70]ECJ 20 November 2017, Case C-441/17 R, *Commission* v *Poland (Puszcza Białowieska)*, EU:C:2017:877; *Associação Sindical dos Juízes Portugueses*, *supra* n. 10; ECJ 6 March 2018, Case C-284/16, *Achmea*, EU:C:2018:158; *LM*, *supra* n. 36; *Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 11. *See also* Opinion of AG Tanchev in *Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 4, paras. 48-51.

the EU legal order. Accordingly, the Court utilised and, at the same time, operationalised the rule of law as part of the EU *acquis*.

The broad interpretation technique with regard to the competences of the Court in CFSP-related matters (*cf supra*) can be viewed by analogy in the matters relating to the state of the rule of law in EU member states. In particular, the nexus between the rule of law enshrined in Article 2 TEU and the proper functioning of the EU's judicial system in accordance with Article 19(1) TEU have become key to the Court's reasoning.[71] On the ground of effective application of EU law and effective judicial protection, significant procedural and substantive developments can be witnessed in the recent case law of the Court. This involves establishing the Court's jurisdiction to adopt periodic penalty payments at an early stage of the procedure for interim measures, and the jurisdiction to review the organisation of the national judiciary of the member states.

Procedural developments: the interim measures procedure as an instrument to ensure respect for the rule of law

At the procedural level, the Court established its jurisdiction regarding the adoption of pecuniary measures as part of an interim measures procedure in *Commission* v *Poland (Puszcza Białowieska)*.[72] The case concerned Poland's alleged failure to comply with its obligations under the EU's environmental *acquis* in allowing the logging of trees in the Białowieska forest. After the Polish authorities ignored an order of the Vice-President of the Court to stop the logging in anticipation of the final judgment,[73] the Commission applied for additional interim measures, including a periodic penalty payment if Poland continued to disrespect the order. In an exceptional Grand Chamber formation, the Court granted the interim relief requested by the Commission on the basis of an *effet utile* reasoning of Article 279 TFEU, which has to be read in conjunction with the rule of law enshrined in Article 2 TEU and the effective application of EU law as an essential component thereof.[74] The Court read in 'any necessary interim measures' provided by Article 279 TFEU a broad discretion to adopt 'any ancillary measure intended to guarantee the

[71]As regards the principle of effective application of EU law, *see Commission* v *Poland (Puszcza Białowieska)*, *supra* n. 70, para. 102; and *Achmea*, *supra* n. 70, para. 36. As regards the principle of effective judicial protection, *see* ECJ 19 July 2016, Case C-445/14, *H* v *Council and Commission*, EU:C:2016:569, para. 36; *Rosneft*, *supra* n. 45, para. 73; and *Associação Sindical dos Juízes Portugueses*, *supra* n. 10, para. 36.

[72]*Commission* v *Poland (Puszcza Białowieska)*, *supra* n. 70.

[73]ECJ 27 July 2017, Case C-441/17 R, *Commission* v *Poland (Puszcza Białowieska)*, EU:C:2017:622.

[74]*Commission* v *Poland (Puszcza Białowieska)*, *supra* n. 70, paras. 99, 100 and 102.

effectiveness of the interim measures it orders'.[75] As the rule of law requires the effective application of EU law, the effectiveness of interim measures should be ensured, which may entail that provisions for a periodic penalty payment are imposed if necessary.[76] Waiting for penalty payments in the framework of an Article 260 TFEU proceeding to enforce compliance with the eventual judgment in this case would indeed lead to irreparable damages, since Poland continued logging the forest despite the Vice-President's order.[77] Significantly, the Court stressed that the periodic penalty payment cannot be seen as a punishment but rather as an instrument to guarantee the effective application of EU law and *a fortiori* the rule of law in the EU legal order.[78]

However, the adoption of pecuniary measures on the basis of Article 279 TFEU cannot be considered self-evident, taking into account the scheme of the EU Treaties.[79] In particular, the possibility to adopt financial sanctions is explicitly foreseen in the framework of infringement procedures. Pursuant to Article 260(2) TFEU, penalty payments can be adopted to sanction non-compliance with a judgment adopted on the basis of Article 258 TFEU. In addition, Article 260(3) TFEU envisages an explicit exception, which allows the direct adoption of financial sanctions under Article 258 TFEU for failing to transpose EU directives, without requiring a procedure under Article 260(2) TFEU.[80] It could thus be argued, as Poland did in the *Puszcza Białowieska* case, that Article 260 TFEU provides an exhaustive list of possibilities to adopt sanctions in relation to infringement actions.[81] Instead of following this textual interpretation, the Court used its traditional teleological interpretation technique. Whereas this could be seen as 'judicial law-making' in response to a particular political context,[82] the Court's approach is consistent with other cases where respect for the rule of law is at stake.

The significant procedural developments become all the more pertinent in cases involving questions about respect for the rule of law in EU member states, such as the case *Commission* v *Poland* (*independence of the Supreme Court*).[83]

[75]Ibid., para. 99.

[76]Ibid., paras. 100 and 102.

[77]L. Krämer, 'Injunctive Relief in Environmental Matters', 15 *Journal for European Environmental and Planning Law* (2018) p. 259 at p. 262.

[78]*Commission* v *Poland (Puszcza Białowieska)*, *supra* n. 70, para. 102.

[79]P. Wennerås, 'Saving a forest and the rule of law: Commission v. Poland', 56 *CMLRev* (2019) p. 541 at p. 545.

[80]*See* in this regard, E. Várnay, 'Sanctioning under Article 260(3) TFEU: much ado about nothing?', 23 *European Public Law* (2017) p. 301.

[81]*Commission* v *Poland (Puszcza Białowieska)*, *supra* n. 70, para. 101.

[82]Wennerås, *supra* n. 79, p. 547.

[83]*Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 11. Another example is the pending Case C-791/19, *Commission* v *Poland (Independence of the Disciplinary Chamber of the*

In this context, the Vice-President of the Court ordered Poland to immediately suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges, implying that the judges who had been forced into retirement could return to their positions.[84] This order, as requested by the Commission, was adopted on the grounds of Article 160(7) Rules of Procedure of the Court, which implied that the interim measures could be ordered before Poland submitted its observations. Such an exceptional action was justified due to the immediate risk of serious and irreparable damage to the principle of effective judicial protection.[85] In a subsequent order of the Court, adopted in Grand Chamber formation after an oral hearing and under the expedited procedure, the provisional interim relief was confirmed.[86] In the Court's view, applying the provisions of the contested national legislation pending delivery of the final judgment is 'likely to cause serious damage to the EU legal order and thus to the rights which individuals derive from EU law and to the values, set out in Article 2 TEU, on which the EU is founded, in particular the rule of law'.[87] Hence, the application of interim measures is an increasingly important tool to protect the core values of the EU. The importance of this development can hardly be underestimated.[88] In order to avoid a *fait accompli* situation as was the case after the *Commission* v *Hungary* judgment,[89] interim measures combined with the possibility of invoking pecuniary sanctions allow a prompt reaction in order to prevent the harm that the rule of law violations will possibly cause to the legal system of the member state concerned.[90]

Supreme Court), in which the Commission requested interim measures for provisional suspension of the functioning of the Disciplinary Chamber of the Polish Supreme Court.

[84]Order of the Vice-President of the Court of 19 October 2018 in Case C-619/18 R, *Commission* v *Poland*, EU:C:2018:852.

[85]Ibid.

[86]Order of the Court (Grand Chamber) of 17 December 2018 in Case C-619/18 R, *Commission* v *Poland*, EU:C:2018:1021.

[87]Ibid., para. 68.

[88]Daniel Sarmiento talks in this context about 'a revolution' and 'a ground-breaking precedent': *see* D. Sarmiento, 'Interim Revolutions', *Verfassungsblog*, 22 October 2018, ⟨verfassungsblog.de/interim-revolutions/⟩, visited 24 March 2020.

[89]*See* in this regard ECJ 6 November 2012, Case C-286/12, *Commission* v *Hungary*, EU:C:2012:687. Notwithstanding the fact that the Court found that Hungary failed to fulfil its obligations under EU law and Hungary allegedly implemented this judgment, the structural problems with regard to judicial independence were not resolved. The Hungarian government was able to replace the magistrates in office before the termination of their official term with magistrates whom the government preferred. *See* K.L. Scheppele, 'Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (with Special Reference to Hungary)', 23 *Transnational Law and Contemporary Problems* (2014) p. 51.

[90]P. Bárd and A. Śledzińska-Simon, 'Rule of Law infringement procedures: a proposal to extend the EU's Rule of Law toolbox', 9 *CEPS paper* (2019) p. 1 at p. 14.

Substantive developments: judicial review of the independence of national judiciaries

Apart from the remarkable procedural developments, the *Commission* v *Poland* (*independence of the Supreme Court*) case also brought a significant substantive evolution.[91] For the first time, the Commission brought an infringement action against a member state on the basis of an alleged violation of Article 19(1), second paragraph, TEU and Article 47 Charter. It is noteworthy that with respect to a largely similar problem regarding the reform of Hungary's judiciary in 2012, the Commission at that time limited its infringement action to a review of compliance with Directive 2000/78 and discrimination on grounds of age.[92] The Commission only focused on specific infringements of the EU *acquis*, notwithstanding the structural problems regarding the rule of law.[93] Arguably, the evolution in the Commission's approach was provoked by the groundbreaking reasoning of the Court in its *Associação Sindical dos Juízes Portugueses* judgment,[94] in which it constructed a general jurisdiction to review national measures related to the functioning of the judiciary of the EU member states on the basis of Article 19(1) TEU.[95] In particular, the Court established a general obligation for member states to guarantee and respect the independence of their national courts and tribunals, on the basis of a combined reading of Articles 2, 4(3) and 19(1) TEU. The principle of effective judicial protection should be understood by reference to Article 47 Charter, which entails that everyone is entitled to a fair hearing by an independent and impartial tribunal.[96] Hence, the Court provides a verifiable criterion in order to observe whether the national judiciary fulfils the requirements of the principle of effective judicial protection.[97]

[91] *Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 11.

[92] *Commission* v *Hungary*, *supra* n. 89. Another example of a case in which the Commission adopted a comparable line of reasoning is ECJ 8 April 2014, Case C-288/12, *Commission* v *Hungary*, EU:C:2014:237.

[93] European Commission for Democracy through law (Venice Commission), Opinion on the Act CLXII of 2011 on the legal status and remuneration of judges and the Act CLXI of 2011 on the organisation and administration of Courts of Hungary, CDL-AD(2012)001, Strasbourg, 19 March 2012, available at ⟨www.venice.coe.int/webforms/documents/CDL-AD%282012%29001-e.aspx⟩, visited 24 March 2020.

[94] *Associação Sindical dos Juízes Portugueses*, *supra* n. 10.

[95] F. Gremmelprez, 'The legal vs. political route to rule of law enforcement', *Verfassungsblog*, 29 May 2019, ⟨www.verfassungsblog.de/the-legal-vs-political-route-to-rule-of-law-enforcement/⟩, visited 20 March 2020.

[96] *A.K.*, *supra* n. 20, paras. 119-122 and 168. *See also* S. Adam and P. Van Elsuwege, 'L'exigence d'indépendence du juge, paradigme de l'Union européenne comme union de droit', 9 *Journal de Droit Européen* (2018) p. 334.

[97] The Court clarified in its *Associação Sindical dos Juízes Portugueses* judgment that national courts which may rule on questions concerning the application or interpretation of EU law, have to meet

The Court's general jurisdiction to verify the organisation of the national judiciary of member states, and the independence of the national judges in particular, has been confirmed in the *Commission* v *Poland* cases.[98] Notwithstanding the member states' competence with regard to the organisation of national justice, they must comply with their obligations under EU law in exercising their competences.[99] Moreover, following the rule-exception approach preferred by the Court in the *Rosneft* judgment (*cf supra*), Article 19(1), first subparagraph TEU confers on the Court a general jurisdiction to ensure that in the interpretation and application of the EU Treaties the law is observed.[100] In turn, on the basis of Article 19(1), second subparagraph TEU, member states are obliged to ensure effective judicial protection in fields covered by EU law. As the Court has the competence to verify whether the law is observed, it should have the competence to verify whether member states fulfil their obligation under Article 19(1), second subparagraph TEU, and, consequently, whether the member states fulfil their obligation to guarantee the principle of effective judicial protection, which entails the independence of their national courts and tribunals. Moreover, the EU Treaties do not restrain, nor exclude, jurisdiction of the Court in relation to Article 19 TEU.[101] The only express limitations to the competences of the Court concern the CFSP, save where the rights of individuals have been

the requirements essential to effective judicial protection, in accordance with Art. 19(1), second subparagraph, TEU. This 'may' formulation suggests that each court, within the meaning of EU law, has to fulfil the requirement of effective judicial protection when potentially confronted with questions concerning EU law. As Pech and Platon state, 'most if not all national courts are, at least theoretically, in this situation': *see* L. Pech and S. Platon, 'Judicial Independence Under Threat: The Court of Justice to the Rescue in the ASJP Case', 55 *CMLRev* (2018) p. 1827 at p. 1848-1849; M. Bonelli and M. Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary', 14 *EuConst* (2018) p. 622 at p. 623; M. Krajewski, 'Associação Sindical Dos Juízes Portugueses: The Court of Justice and Athena's Dilemma', 3 *European Papers* (2018) p. 395 at p. 402.

[98] *Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 11; and ECJ 5 November 2019, Case C-192/18, *Commission* v *Poland (Independence of the lower courts)*.

[99] *Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 11, para. 52; and *Commission* v *Poland (Independence of the lower courts*, *supra* n. 98, para. 102. This is a confirmation of long-standing case law: *see*, for instance, ECJ 2 February 1989, 186/87, *Cowan*, EU:C:1989:47, para. 19; and ECJ 19 January 1999, C-348/96, *Calfa*, EU:C:1999:6, para. 17. For a recent application in relation to obligations under EU primary law, *see* ECJ 13 November 2018, C-247/17, *Raugevicius*, EU:C:2018:898, para. 45 and ECJ 26 February 2019, C-202/18 and C-238/18, *Rimšēvičs and EC* v *Lithuania*, EU:C:2019:139, para. 57.

[100] *H* v *Council and Commission*, *supra* n. 71, para. 40.

[101] C. Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) p. 59 at p. 66.

restricted, and the review of the validity or proportionality of operations carried out by national police or law enforcement authorities in the context of the Area of Freedom, Security and Justice.[102] Even in this regard, the Court – referring to the rule of law – held that derogations of its jurisdiction should be interpreted in a restricted sense (*cf supra*).[103] *A fortiori*, the EU member states could have adopted an explicit exclusion of the Court's jurisdiction for the interpretation of Article 19(1) TEU in the EU Treaties, had such a restriction been intended.[104] As a consequence, the member states must ensure that national courts and tribunals within the meaning of EU law[105] meet the requirements of effective judicial protection.[106] Hence, this broad interpretation of Article 19(1), second subparagraph, TEU cannot be considered to be an extension of the competences of the Court but is, rather, a consequence of the Court's task to ensure the protection of the rule of law in the EU legal order.[107]

Protecting the rule of law and respecting limits to the scope of application of EU law: a difficult balancing act

The combined reading of Article 2, Article 4(3) and Article 19(1) TEU in conjunction with Article 47 Charter allows the Court to play its constitutional role in the EU legal order. Nevertheless, this approach raises some questions, in particular as regards the limits to the scope of application of the Charter, on the one hand, and the preliminary reference procedure, on the other.

Limits to the scope of application of the Charter

The delimitation between the application of Article 47 Charter and Article 19(1) TEU respectively is uncertain, as both provisions 'share common legal sources and

[102]Art. 275 TFEU and Art. 276 TFEU.

[103]*Rosneft*, *supra* n. 45, para. 74; and *H* v *Council and Commission*, *supra* n. 71, para. 40.

[104]Hillion, *supra* n. 101, p. 66.

[105]The following factors should be taken into account in assessing whether a body can be considered to be a 'court' or 'tribunal' within the meaning of EU law: 'whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent'. (*See*, for instance, *Associação Sindical dos Juízes Portugueses*, *supra* n. 10, para. 38; and ECJ 16 February 2017, Case C-503/15, *Margarit Panicello*, EU:C:2017:126, para. 27 and the case law cited.)

[106]*Associação Sindical dos Juízes Portugueses*, *supra* n. 10, para. 37.

[107]*See* Opinion of AG Tanchev in Joined Cases C-558/18 and C-563/18, *Miasto Łowicz*, EU:C:2019:775, para. 92; and *Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 11, paras. 42-48, 54, 55, 57 and 58.

are circumscribed by the broader matrix of general principles of EU law'.[108] Yet, a clear delimitation appears important due to the different scope of application of both provisions with respect to acts of EU member states.[109] The scope of application of the Charter is delimitated by Article 51(1) Charter, entailing that only situations in which a member state is implementing EU law fall within the scope of the Charter. It has been argued that an extensive interpretation of the Charter's scope could be regarded as an unjustified intervention in the member states' national affairs, endangering the sovereignty of national constitutional courts to observe the rule of law and fundamental rights enshrined in the national constitutions.[110] Aware of these limitations, but without entering into a detailed discussion about the interpretation of Article 51(1) Charter, the Court designated in the *Associação Sindical dos Juízes Portugueses* judgment a broader scope of application to Article 19(1) TEU in the sense that Art. 19(1) TEU applies to all fields covered by EU law, irrespective of whether the member states are implementing EU law within the meaning of Article 51(1) Charter.[111] This entails that Article 19(1) TEU has to be fulfilled by all courts and tribunals that 'may, in that capacity, be called upon to rule on questions relating to the application or interpretation of EU law'.[112] Article 47 Charter is then used as a tool for the interpretation of Article 19(1) TEU, which provides useful information on the concrete implementation of the principle of effective judicial protection, with the principle of independence of the judiciary as a crucial component.[113]

In this regard, Advocate General Bobek is of the opinion that:

> A detailed discussion about the exact scope of Article 51(1) Charter when contrasted with Article 19(1) TEU looks a bit like a debate on what colour to choose for the tea cosy and the dining set to be selected for one's house, coupled with a passionate exchange about whether that tone exactly matches the colour of curtains already selected for the dining room, while disregarding the fact that the roof leaks, the doors and windows of the house are being removed, and cracks are appearing in the walls. However, the fact that there is rain coming into the house

[108]In this regard, AG Tanchev speaks of a '*constitutional passerelle*' between Art. 47 Charter and Art. 19(1) TEU. *See* Opinion of AG Tanchev in ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, *A.K.*, EU:C:2019:551, para. 85.

[109]*See* in this regard: Opinion of AG Saugmandsgaard Øe in ECJ 6 April 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2017:395, para. 36.

[110]von Danwitz, *supra* n. 6, p. 165.

[111]*Associação Sindical dos Juízes Portugueses*, *supra* n. 10, para. 29; and *Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 11, para. 50; *A.K.*, *supra* n. 20.

[112]ECJ 5 November 2019, Case C-192/18, *Commission* v *Poland (Independence of the lower courts)*, para. 104.

[113]*Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 11, para. 49; *LM*, *supra* n. 36, para. 53; *Associação Sindical dos Juízes Portugueses*, *supra* n. 10, para. 41.

> and the walls are crumbling will always be structurally relevant to any discussion about the state of the judicial house, irrespective of whether the issue of the colour of the tea cosy will eventually be declared to be within or outside the scope of EU law under whatever provision of EU law.[114]

In other words, the significance of the delimitation between Article 47 Charter and the second subparagraph of Article 19(1) TEU should not be overestimated, in the sense that both provisions essentially serve the same purpose, which is 'to ensure effective judicial protection of EU law rights for individuals at national level'.[115] Arguably, the main difference is that Article 19(1) TEU is more broadly applicable to national measures of a structural or transversal nature which compromise the essence of judicial independence, implying that national judges can no longer fulfil their role as European judges. Article 47 Charter, however, is more narrowly applicable when there is 'a subject-matter nexus between the situation arising under member state law and the EU law measure relied on'.[116] Of course, there is an almost unavoidable connection between both provisions, raising a constant challenge for the Court to find an appropriate balance between respecting the limits of its own jurisdiction and its task to ensure that in the interpretation and application of the Treaties the law is observed.[117] In particular, there is a risk that Article 19(1) TEU may be used as 'a subterfuge to circumvent the limits of the scope of application of the Charter as set out in Article 51(1) Charter'.[118]

In practice, however, making a neat distinction between the material scopes of application of Articles 19(1) TEU and 47 Charter is not always straightforward, and an overlap between both provisions is perfectly possible. This may be illustrated with a reference to the *A.K.* judgment, which concerned the compatibility of national measures, relating to the formation and the appointment of the members of a disciplinary chamber of the Polish Supreme Court, with the requirements of effective judicial protection.[119] Taking into account that the national measures in this case had a clear link with Directive 2000/78 establishing a general framework for equal treatment and occupation, this is 'a textbook case' of a situation which falls within the scope of application of the Charter.[120] Consequently, the Court built its entire reasoning on an assessment of Article 47 Charter and

[114]Opinion of AG Bobek in ECJ 29 July 2019, Case C-556/17, *Alekszij Torubarov*, EU:C:2019:339, para. 55.

[115]Ibid., para. 56.

[116]Opinion of AG Tanchev in *A.K.*, *supra* n. 108, para. 84.

[117]*See* Art. 19(1), first subparagraph TEU.

[118]Opinion of AG Tanchev in *Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 4, para. 57.

[119]*A.K.*, *supra* n. 20.

[120]Opinion of AG Tanchev in *A.K.*, *supra* n. 108, para. 84.

deemed it unnecessary to apply a separate test in relation to Articles 2 and 19(1) TEU. This may appear surprising in light of the structural implications of the contested measures for the organisation of the national judiciary but it is a natural consequence of the substantive overlap between the various provisions. In other words, the Court seemingly interprets Article 19(1) in the same way as Article 47 Charter, which makes a separate assessment of Article 19(1) TEU redundant, as it would render a similar conclusion.[121] Conversely, in situations where the Charter is not directly applicable, recourse to Article 19 TEU is still possible. Taking into account the fact that the Court essentially applies the same legal standards in both situations, the practical relevance of the limits imposed by Article 51(1) Charter may thus be called into question.

Limits to the preliminary reference procedure

As far as preliminary references are concerned, it is unclear how far the Court can go in answering questions when the underlying facts are not directly linked to national measures that potentially endanger the rule of law. Considering the specific aim of the preliminary ruling procedure, Article 267 TFEU foresees clear boundaries in terms of the Court's jurisdiction to answer questions on the one hand, and the admissibility of the preliminary references on the other,

In accordance with Article 19(1), first subparagraph, TEU in conjunction with Article 267(1) TFEU, the Court has jurisdiction, by means of a preliminary ruling, to rule on the interpretation of the EU Treaties and on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU. On this basis, the Court also has jurisdiction to give preliminary rulings as regards the interpretation of Article 19(1), second subparagraph, TEU, as confirmed by the Court.[122] However, a prudent approach is justified. In its recent case law, the Court seems to accept the limits of the preliminary ruling procedure by explicitly referring to these limitations and leaving to the referring court the question of whether the rules of EU law apply to the particular case in hand.[123] In its *Associação Sindical dos Juízes Portugueses* and *Carlos Escribano Vindel* judgments, however, the Court did not shy away from applying Article 19(1),

[121]S. Platon, 'Writing between the lines. The preliminary ruling of the CJEU on the independence of the Disciplinary Chamber of the Polish Supreme Court', *EU Law Analysis*, 26 November 2019, ⟨eulawanalysis.blogspot.com/2019/11/writing-between-lines-preliminary.html⟩, visited 24 March 2020.

[122]*See* in this regard *Associação Sindical dos Juízes Portugueses*, *supra* n. 10; and ECJ 7 February 2019, C-49/18, *Carlos Escribano Vindel*, EU:C:2019:106. This reasoning is also followed by AG Tanchev: *see* Opinion in *A.K.*, *supra* n. 108, paras. 86-89; and Opinion in *Miasto Łowicz*, *supra* n. 107, paras. 86-98.

[123]*A.K.*, *supra* n. 20, paras. 132 and 140.

second subparagraph, TEU directly, to conclude that the national measures at stake did not affect the independence of the judiciary and were, thus, in line with EU law and Article 19(1) TEU in particular.[124]

With respect to the admissibility of the request for a preliminary ruling, questions relating to EU law enjoy a presumption of relevance, as a consequence of which

> the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[125]

In conformity with the Court's settled case law, the preliminary reference cannot serve to deliver advisory opinions on general or hypothetical questions.[126]

However, certain preliminary references entail a difficult balance between the admissibility test of a preliminary reference pursuant to Article 267 TFEU and the requested support by the national judiciary, which is threatened by measures potentially limiting the independence of the judiciary and endangering the rule of law.[127] An example can be found in the *Miasto Łowicz* joint cases where the referring courts indicated that the introduction of a new regime for disciplinary proceedings against judges in Poland may affect their capacity to adjudicate independently.[128] Proceeding from the observation that the answer to the questions contained in the order for reference was as such not necessary for the effective resolution of the domestic disputes at stake – which did not concern questions relating to EU law[129] – the court declared the preliminary reference inadmissible. At the same

[124] *Associação Sindical dos Juízes Portugueses*, *supra* n. 10, para. 51; and *Carlos Escribano Vindel*, *supra* n. 122, para. 73.

[125] *See* for instance ECJ 16 December 1981, Case C-244/80, *Foglia* v *Novello*, EU:C:1981:302, as confirmed by the Court in ECJ 10 December 2018, C-621/18, *Wightman e.a.*, EU:C:2018:999, para. 27. On the issue of general and hypothetical questions, *see* M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press 2014).

[126] *Wightman*, *supra* n. 125, para. 28.

[127] *See* for instance the series of questions referred to the Court by the Polish Supreme Court: Case C-522/18, Case C-668/18, Case C-487/19 and Case C-508/19. A Hungarian judge also recently requested a preliminary reference as regards the independence of the judiciary (*see* Case C-564/19).

[128] Joined Cases C-558/18 and C-563/18, *Miasto Łowicz*, EU:C:2020:234.

[129] One case concerned an action brought by a Polish municipality against the State Treasury for a payment covering the costs of the performance of tasks delegated by the central government; another case concerned a criminal action brought by the General Prosecutor in response to the activities of members of an organised criminal group which carries out assassinations and kidnapping of persons with the aim of obtaining money for their release.

time, it also made it very clear that national judges cannot be exposed to disciplinary proceedings as a result of the fact that they submitted preliminary references.[130]

The reasoning of the Court can be followed in the sense that, *sensu stricto*, the substance of the case has indeed no link with the referred questions. However, it cannot be denied that the national measures as regards the disciplinary procedure against members of the judiciary may potentially influence the outcome of the judgment of the referring judge. Namely, the fear exists that a disciplinary proceeding will be started if the Minister of Justice does not agree with the decision of the referring judge. In other words, the issue clearly reveals a fundamental question about the protection of the rule of law in an EU member state, which by definition also affects the EU legal order, as follows from the combined reading of Articles 2, 4(3) and 19 TEU. However, this does not imply that all questions contained in the order for reference concerning the independence of the judiciary are by definition admissible. The specific objectives of the preliminary ruling procedure imply that the Court can only respond to questions which have a sufficiently clear link between the contested measures and the relevant provisions of EU law.

Of course, this does not prevent the same questions, such as the compatibility of the disciplinary regime against judges with the requirements of EU law, from reaching the Court via other procedures[131] or at a later stage, when the questions are no longer hypothetical. In any event, defining the precise boundaries of the Court's involvement in relation to the independence of national judiciaries is subject to discussion, and the rule of law problems in Poland and Hungary only seem to be the beginning of a broader reflection about the understanding and protection of the rule of law in the EU legal order.[132] It is clear that the Court is playing a crucial role in this process. Of course, there are important constitutional limits to what the Court can do within the margins of its competences. This implies, in particular, that the Court's role is essential in operationalising the meaning of the rule of law within the EU legal order,[133] whilst ensuring respect for the

[130] *Miasto Łowicz*, *supra* n. 128, paras. 52-54 and 57-58.

[131] For instance via the infringement procedure pursuant Art. 258 TFEU. *See* e.g. Case C-791/19, *Commission* v *Poland*, OJ C 413 from 9 December 2019, p. 36 concerning the disciplinary proceedings against judges.

[132] For instance, reference can be made to a pending preliminary request concerning the system of judicial appointments in Malta (Case C-896/19, *Repubblika*) or to the pending preliminary requests concerning disciplinary procedures against judges in Romania (Case C-83/19, *Asociația 'Forumul Judecătorilor Din România'*; Case C-291/19, *SO*; Case C-355/19, *Asociația 'Forumul Judecătorilor din România' and Others*).

[133] A good example is the recent *A.K.* judgment, *supra* n. 20, where the Court meticulously sets out the requirements of judicial independence as a crucial component of respect for the rule of law. In this respect, the Court also points out that each of the factors, examined in isolation, may not necessarily be problematic but that this may be different once they are taken together (para. 152).

application of these criteria remains the responsibility of the member states and all EU institutions.[134]

Conclusions

Although the discussion concerning the parameters of the Court's role in protecting the rule of law in the EU legal order is all but new, certain significant evolutions can be observed. In particular, the strengthening of the EU's core constitutional values with the Treaty of Lisbon, and the rule of law backsliding in certain EU member states provided the context against which the Court is increasingly discovering the potential of Article 2 TEU, in conjunction with Article 19(1) TEU, for ensuring respect for the rule of law in the EU legal order. Moreover, the Court reinforced its 'rule of law based community' statement in the old *Les Verts* judgment, and translated this to the post-Lisbon EU legal order. In a series of recent judgments, the Court essentially based its reasoning on the constitutional significance of the EU's values, and the rule of law in particular, in order to ascertain its own jurisdiction in areas where this is not always straightforward. This has been demonstrated with respect to the CFSP (as far as EU actions are concerned) and the organisation of the national judiciary (as far as actions of the member states are concerned). Taken together, this new line of case law developed after the entry into force of the Treaty of Lisbon has allowed the EU to further develop into a true 'union based on the rule of law'.[135]

The principles of effective application of EU law and effective judicial protection in the fields covered by EU law are increasingly used as the two main cornerstones of the rule of law in the EU legal order. It is noteworthy that the entire procedural toolbox has been used to defend these core principles. As well as infringement actions under Article 258 TFEU and the requests for preliminary reference under Article 267 TFEU, the use of interim measures under Article 279 TFEU is a significant development. In particular, the inclusion of pecuniary measures in interim relief proceedings and the possibility to act swiftly on the basis of its rules of procedure allow the Court to play a key role in confronting rule of law challenges. Based on its traditional teleological approach, and at a time when the political procedure of Article 7 TEU is facing its limits, the Court thus fulfils its constitutional role in protecting the rule of law in the EU legal order.[136]

[134]Pech and Scheppele, *supra* n. 65, p. 7.

[135]*Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 11, para. 49.

[136]On the Court's traditional teleological approach and its role in the process of European integration, *see* e.g. Lenaerts and Gutiérrez-Fons, *supra* n. 9; J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Clarendon 1993).

Significantly, the Court's clear stance towards the rule of law as one of the foundational values of the EU also influences the activities of the other institutions, in particular the Commission. The initiation of infringement procedures in relation to rule of law problems in Poland, in combination with the increased request of interim measures, illustrates the Commission's active approach to playing its role as guardian of the Treaties in line with its mandate under Article 17 TEU.[137] Moreover, the Commission's attempts to further strengthen the rule of law framework within the EU builds largely upon the case law of the Court.[138] This is also translated into new legislative initiatives, such as the proposal for a Regulation on the protection of the EU's budget in case of generalised deficiencies as regards the rule of law in the member states.[139]

Taken together, all these evolutions reveal the crucial role of the Court within the European integration process and the further evolution of the EU in the direction of a '*Europe des juges*'[140] where respect for the rule of law is more than a symbolic reference in the EU Treaties. Of course, such an evolution may be subject to criticism: the Court's extensive interpretation of its own jurisdiction in relation to CFSP matters, and member state measures concerning the organisation of the national judiciary, stand at odds with a strict, textual interpretation of the Treaty provisions. In particular, the Court's teleological approach raises questions regarding the limitations on the scope of application of the Charter and the preliminary reference procedure. However, if the Court is to fulfil its constitutional role within an autonomous EU legal order where respect for the rule of law is not an empty shell, there do not seem to be any workable alternatives to following the path of old landmark judgments such as *Van Gend and Loos, Les Verts* and others.

[137]Art. 17 TEU provides that the Commission 'shall ensure the application of the Treaties [. . .] it shall oversee the application of Union law under the control of the Court of Justice of the European Union'.

[138]Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Strengthening the Rule of Law within the Union. A Blueprint for Action', COM(2019)343 final.

[139]Commission, proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018)324 final, 2 May 2018.

[140]On the crucial role of the Court in the early stages of the European integration process, *see* R. Lecourt, *L'Europe des juges* (Bruylant 1976).