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# JUDICIAL INDEPENDENCE IN THE CASE LAW OF THE CJEU

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**Abstract:** This paper addresses the issue of judicial independence from the point of view of the CJEU's recent case law. First of all, the author presents the concept of judicial independence as well as points out its functions and relevance. Then, he moves on to the relevant case law, starting from the case of *Portuguese Judges* and finishing with *Romanian Judges Forum*. While giving this overview, the author focuses on the rulings of the CJEU and their importance in terms of judicial independence and its effective protection. He concludes that the CJEU plays a crucial role in solving problems in the Member States related to the independence of the judiciary.

**Key words:** Judicial independence, Court of Justice of the European Union, Rule of law, Art. 2 TUE, Art. 19 TUE, Art. 47 CFR

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## 1. Introduction

It is generally accepted that in democratic countries the independence of the courts and the judges is the pillar of the law-governed state, and the rule of law itself is the foundation of a democratic society, as it guarantees the equality of citizens before the law and ensures the protection of their rights and freedoms. It also safeguards impartial control over the exercise of power by the state. The concept of the rule of law, which originated in England, means above all that in a state governed by the rule of law no one is above the law. The existence of the rule of law requires that the law obedience is recognized by both citizens and all state authorities, regardless of their nature. This applies to the legislative, executive and judicial power. This kind of division in the exercise of state power is another feature of the rule of law. In a state system based on the principle of separation of powers, the independence of the judiciary is a key element of the rule of law.<sup>1</sup> Judicial independence is a foundation of the rule of law. The Court of Justice of the European Union (hereinafter referred to as 'CJEU') has often attended to judicial independence. Nevertheless, only lately it has connected judicial independence with the rule of law. The CJEU has changed its specific vision coupled to the EU notion of national court or tribunal into a constitutional dimension, namely it put a creative interpretation on the second subparagraph of Article 19(1) of the Treaty on European Union<sup>2</sup> (hereinafter referred to as 'TEU') acknowledging that the principle of judicial independence is inherent to this provision. By now, the contribution of the CJEU has proven the relevance of the judicial dimension to countervail the jeopardy to the independence of the judiciary.<sup>3</sup> A breakthrough in the development of the EU rule of law with regard to judicial independence and independence of judges can be found in the jurisprudence of the CJEU of 2018.<sup>4</sup>

## 2. Overview of recent judgments of the CJEU

### 2.1. Associação Sindical dos Juizes Portugueses (C-64/16)

The *Portuguese Judges*<sup>5</sup> was the pioneer in a series of court decisions in which the CJEU gave rise to its new, distinct doctrine of judicial independence. The case involved reduction in salary for judges at the Portuguese Court of Auditors. The Trade Union of Portuguese Judges (Associação Sindical dos Juizes Portugueses), a judicial trade union, brought an appeal against the Court of Auditors to the Supreme Court, claiming that the reduction of salaries would be a factor which challenges judicial independence. The Supreme Court of Portugal made a preliminary reference to the CJEU and despite the judges themselves were unsuccessful since the salary cuts were deemed not to undermine their independence, the CJEU used the

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<sup>1</sup> Zawistowski, D. (2016). *Niezależność sądów i niezawisłość sędziów z perspektywy prawa Unii Europejskiej*. Ruch prawniczy, ekonomiczny i socjologiczny, p. 7.

<sup>2</sup> European Union, *Treaty on European Union (Consolidated Version)*, *Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, available at: <https://www.refworld.org/docid/3ae6b39218.html> [accessed on 20 November 2022].

<sup>3</sup> Sáenz de Santa María, P. A. (2021). *Rule of Law and Judicial Independence in the Light of CJEU and ECtHR Case Law*, In *Fundamental Rights Challenges*. In: Izquierdo-Sans, C, Martínez-Capdevila, C., Nogueira-Guastavino, M. (eds). Springer, Cham, p. 167.

<sup>4</sup> Barcik, J. (2019). *Ochrona praworządności w Radzie Europy i Unii Europejskiej ze szczególnym uwzględnieniem niezależności sądów i niezawisłości sędziów*, p. 3.

<sup>5</sup> Judgment of 27 February 2018, *Portuguese Judges*, Case C-64/16, ECLI:EU:C:2018:117.

opportunity to express its opinion as regards the principle of judicial independence and its legal grounds within the Treaties, beginning a new era in the development of EU constitutional law.<sup>6</sup>

It cannot be overstated that the line of argument adopted by the CJEU in the relevant case is remarkable since it envisages an expansion of the value of Article 19(1) TEU. This interpretation could also constitute a future incentive for the European Commission to refer only to the discussed article while building infringement actions with the object of handling violations of the principle of effective judicial protection.<sup>7</sup> Moreover, the CJEU relied its reasoning on a strong reference to Article 2 TEU. It came to a decision to use the homogeneity clause as a fundament to strengthen its scrutiny, underlining that compatibility with those values is ‘the fundamental premise that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU’.<sup>8</sup> Afterward, the CJEU claimed that in order to safeguard the effective judicial, Member States must assure the independence of their courts provided that they are bodies which may rule ‘on questions concerning the application or interpretation of EU law’.<sup>9</sup> It also reinforced the relationship between the proper working of the preliminary ruling system pursuant to Article 267 TFEU and the independence of the judiciary.<sup>10</sup>

The *Portuguese Judges* ruling was both groundbreaking as well as surprising despite the predictability by virtue of the past decisions of other courts. The CJEU adjudicated that the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence is not impeded by a temporary salary cut regarding members of the Portuguese Court of Auditors due to austerity measures connected with an EU financial assistance program. It is notable that the CJEU assumed jurisdiction in the case at issue and addressed the second subparagraph of Article 19(1) TEU. As a matter of fact, by its decision the CJEU stretched the reach of EU law to an extreme, stressing that Article 19(1) TEU, which states that ‘the Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’, and thus brought the entire national judicial organization under its purview. Therefore, the Member States must assure those judges’ judicial independence, a rule that is deemed to be inherent to Article 19 TEU. To conclude, the provision in hand, first of all, sets the standard for review, namely it is the source of the principle of judicial independence and, secondly, it extends the jurisdiction of the CJEU on national judiciaries that may potentially act as European judges.<sup>11</sup>

## 2.2. Minister of Justice and Equality vs. LM (C-216/18)

On 25 July 2018, the CJEU gave its judgment in *Minister for Justice and Equality vs. LM*.<sup>12</sup> The issue concerned Mr. Artur Celmer (hereinafter referred as ‘LM’), a crime suspect. The

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<sup>6</sup> Mańko, R (2021). *European Court of Justice case law on judicial independence*. Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696173/EPRS\\_BRI\(2021\)696173\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696173/EPRS_BRI(2021)696173_EN.pdf), [accessed on 20 November 2022], pp. 2-3.

<sup>7</sup> Coli, M. (2018). *The Associação Sindical dos Juizes Portugueses judgment: what role for the Court of Justice in the protection of EU values?* available at: <https://www.diritticomparati.it/associac%CC%A7a%CC%83o-sindical-dos-juizes-portugueses-judgment-role-court-justice-protection-eu-values/>, [accessed on 22.11.2022], p. 3.

<sup>8</sup> *Portuguese Judges*, *supra* n. 5, para. 30.

<sup>9</sup> *Ibid.*, para. 41-42.

<sup>10</sup> *Ibid.*, para. 43.

<sup>11</sup> Bonelli, M. & Claes, M. (2018). *Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses*. *European Constitutional Law Review*, 14(3), p. 622-623.

<sup>12</sup> Judgment of 25 July 2018, *Minister for Justice and Equality vs. LM*, Case C-216/18 PPU, ECLI:EU:C:2018:586.

executing judicial authority had serious doubts whether LM should be surrendered from Ireland to Poland and if he, consequently, would receive a fair trial in the issuing state, due to the lack of independence of the judiciary due to changes to the Polish judicial system.<sup>13</sup> The case addressed the validity of the presumption of mutual trust between Member States. Furthermore, it concerned the extent to which cooperation based on the principle of mutual recognition, as implemented by the EU rules as regards surrender between Member States – the Framework Decision on the European Arrest Warrant (hereinafter referred as ‘EAW’). Finally,<sup>14</sup> it posed a question, namely which role should executing judicial authorities play in upholding the rule of law in the EU.<sup>15</sup>

In *Minister for Justice and Equality vs. LM* the CJEU, for the first time, explicitly admitted that rights which are not absolute in nature are capable of limiting the operativeness of mutual recognition. From this perspective, the CJEU’s decision in the case at issue can be perceived as a ‘genuinely ground-breaking decision, a new milestone leading to a turning point in the jurisprudence of the CJEU in the matter [of having the technical possibility to refuse an EAW on the grounds of a hazard for procedural rights].’<sup>16</sup> In the case at issue, the CJEU explained that there must be a substantial link between the refusal of fair trial rights in the concrete criminal proceedings and the general lack of judicial independence as well as disregard for fair trial standards.<sup>17</sup>

Thereby, existence of a systemic lack of the rule of law in the issuing Member State is insufficient. The executing judicial authority shall assess if the wanted person will, as an individual, deal with the risk of not having the right to a fair trial. Following the CJEU’s reply, the Irish Supreme Court heard the case and ruled that the deficiencies of the rule of law in Poland would not deprive the Polish national of his right to a fair trial in his individual situation.<sup>18</sup>

### 2.3. Commission vs. Poland – Retirements from Supreme Court (C-619/18)

On 24 June 2019, the CJEU gave the long-awaited ruling in *Commission vs. Poland*.<sup>19</sup> This judgment may be considered the most crucial offspring of *Portuguese Judges*. As a matter of fact, the CJEU, for the first time, adjudicated the incompliance of a national provision on the basis that it infringed Article 19 TEU. The discussed judgment is not a simple application of the principles laid out in *Portuguese Judges*. On the contrary, it clarifies that the legitimacy of any limitation of the principle of judicial independence shall be subject to a proportionality scrutiny, but, simultaneously, it makes an impression that it regards judicial independence as a quasi-absolute value. Moreover, the CJEU used this opportunity to specify the contours of

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<sup>13</sup> High Court of Ireland decision of 23 March 2018, *Minister for Justice and Equality vs. Celmer* [2018] IEHC 119.

<sup>14</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ L 190, 18 July 2002, pp. 1–20.

<sup>15</sup> Bárd, P. & van Ballegooij, W. (2018). *Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM*. *New Journal of European Criminal Law*, 9(3), 354.

<sup>16</sup> Ruiz Yamuza, F-G. (2020). *LM case, a new horizon in shielding fundamental rights within cooperation based on mutual recognition. Flying in the coffin corner*, ERA Forum, pp. 371, 388.

<sup>17</sup> Wahl, T. (2020). *Refusal of European Arrest Warrants Due to Fair Trial Infringements. Review of the CJEU’s Judgment in “LM” by National Courts in Europe*. *European Criminal Law Associations’ Forum*, p. 323.

<sup>18</sup> Mańko, R., supra n. 6, p. 4.

<sup>19</sup> Judgment of 24 June 2019, *Commission vs. Poland*, C-619/18, ECLI:EU:C:2019:531.

Article 19 TEU scope of applicability and thereby, it consolidated its case-law as regards the provision in hand.<sup>20</sup>

In its judgment the CJEU initially reminded that the EU law relies on the fundamental assumption that Member States cherish common values pursuant to Art. 2 TEU which they acknowledged<sup>21</sup>. Even though the Member States have jurisdiction regarding the organization of justice, they shall be compliant with their obligations deriving from EU law while exercising this competence. In order to safeguard effective judicial protection in areas governed by EU law as well as within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union<sup>22</sup> (hereinafter referred to as ‘Charter’) they shall provide legal remedies and other necessary means. In other words, the Member States shall ‘ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection’<sup>23</sup> pursuant to the second subparagraph of Article 19(1) TFEU. The CJEU has continuously underlined that the necessity of freedom of judges from any pressure or external interference imposes particular guarantees with the aim of preventing a situation where a disciplinary regime is used as a ‘system of political control of the content of judicial decisions’.<sup>24</sup> The CJEU clarified that the principle of the equality of judges is not wholly absolute thereby exceptions are allowed as long as they rely on legitimate and compelling reasons, which are subject to the principle of proportionality.<sup>25</sup>

Taking into consideration the foregoing, the CJEU stated that ‘the discretion held by the President of the Republic of Poland for the purposes of authorizing, twice and each time for a 3-year term, between the ages of 65 and 71, a judge of a national supreme court such as the Sąd Najwyższy (Supreme Court)’<sup>26</sup> may be the source of reasonable doubts, in particular among citizens, as regards *inter alia* the neutrality of the judges as regards the interests of those before whom they may be challenged as well as their impartiality concerned by external elements.

The *Commission vs. Poland* ruling is a landmark decision. The CJEU acknowledged that the law, according to which the retirement age of the judges of the Supreme Court was lowered, as well as the power to extend discretionarily their mandates given to the President of the Republic constitute a violation of Art. 19 TEU because they infringed the principle of irremovability of judges and judicial independence.<sup>27</sup>

The CJEU adjudicated for the first time on the compliance of national measures regarding the organization of the judicial system in hand with EU law in terms of an infringement action pursuant to Article 258 TFEU. The CJEU, also for the first time, ruled that a Member State had

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<sup>20</sup> Simonelli, M. A. (2019), *Thickening up judicial independence: the ECJ ruling in Commission v. Poland (C-619/18)*, available at: <https://europeanlawblog.eu/2019/07/08/thickening-up-judicial-independence-the-ecj-ruling-in-commission-v-poland-c-619-18/>, [accessed on 22 November 2022].

<sup>21</sup> *Commission vs. Poland*, *supra* n. 19, para. 42.

<sup>22</sup> European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1, available at: <https://www.refworld.org/docid/50ed4f582.html> [accessed on 22 November 2022].

<sup>23</sup> *Commission vs. Poland*, *supra* n. 19, para. 55.

<sup>24</sup> *Commission vs. Poland*, *supra* n. 19, para. 77.

<sup>25</sup> *Commission vs. Poland*, *supra* n. 19, para. 76.

<sup>26</sup> *Commission vs. Poland*, *supra* n. 19, para. 118.

<sup>27</sup> Rodríguez, P. M. (2020), *Poland Before the Court of Justice: Limitless or Limited Case Law on Art. 19 TEU?*, *European Papers*, 5(1), pp. 333.

failed in fulfilling its obligations under Article 19(1) TEU.<sup>28</sup> This ruling not only did stress the CJEU's clear position on the question of the EU principle, but also pointed out the role of the judge in European integration, making it more and more significant.<sup>29</sup>

#### **2.4. Commission vs. Poland – Retirement of ordinary judges (C-192/18)**

On 24 July 2017, the Polish President signed the amendments as regards the law on the ordinary courts in Poland. These laws, with an obvious aim of reforming the ordinary courts, involved paragraphs having an influence on the independence of the judicial power in Poland. Once more, the law included a dual mechanism. First of all, it lowered the retirement age of judges with the proviso of different retirement ages depending on the judge's gender. Secondly, it provided the Minister for Justice with a discretion to prolong a certain judge's mandate. The Commission reacted quickly and thereby brought a case under Article 258 TFEU.<sup>30</sup>

The Commission did not condemn the lowering of the retirement age itself, but rather the mechanism according to which the Minister for Justice had the competence to authorize judges in order to perform their judicial duties beyond the new retirement age. The criteria that the Minister had to apply were 'too vague and unverifiable'<sup>31</sup> and the time for which the judges had to await the decision of the Minister after a request for the extension had been made, were in his discretion.<sup>32</sup>

In the *Commission vs. Poland (Independence of ordinary courts)* the CJEU consented to the line of argument of the Commission and acknowledged that the mechanism for prolongation under the discretion of the Minister for Justice was contrary to the obligations stipulated in the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter since it violated the principle of effective judicial protection.<sup>33</sup>

#### **2.5. AK vs. Krajowa Rada Sądownictwa (C-585/18, C-624/18 & C-625/18)**

Starting from 2015, when the Law and Justice (Prawo i Sprawiedliwość) gained a majority in the Lower House of the Polish Parliament (Sejm) and started to carry out reforms which aimed at increasing the political control over the judiciary in Poland. The National Council of the Judiciary (Krajowa Rada Sądownictwa) was also affected by those reforms, namely appointing judges began to be dependent on the parliament and became subordinated to the ruling political party. It appointed a considerable number of judges to the Disciplinary Chamber, which was in charge of disciplinary actions against judges in Poland. Consequently, the independence of the Disciplinary Chamber started to be questioned.<sup>34</sup>

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<sup>28</sup> Bogdanowicz, P., & Taborowski, M. (2020). *How to Save a Supreme Court in a Rule of Law Crisis: The Polish Experience: ECJ (Grand Chamber) 24 June 2019, Case C-619/18, European Commission v Republic of Poland*. European Constitutional Law Review, 16(2), 326.

<sup>29</sup> Oikonomou, K. (2020). *Crisis of the Rule of Law in the EU through the Case Law of the ECJ: The Case of Poland*. HAPSc Policy Briefs Series, 1(2), p. 193.

<sup>30</sup> Kirst, N. (2020). *The Perspective from Luxembourg: How Does the European Court of Justice Respond to the Rule of Law Crisis within the Member States?*. Trinity College Law Review, 23, p. 119.

<sup>31</sup> Judgment of 5 November 2019, *Commission vs. Poland (Independence of ordinary courts)*, C-192/18, ECLI:EU:C:2019:924, para. 122.

<sup>32</sup> Mańko, R., *supra* n. 6, p. 5.

<sup>33</sup> Kirst, N., *supra* n. 30, p. 123.

<sup>34</sup> Grogan, J. (2020). *Introductory note to joined cases A. K. v. Krajowa Rada Sądownictwa (C-585-18) and CP (C-624-18), DO (C-625/18) v. Sąd Najwyższy*, (C.J.E.U.). International Legal Materials, 59(3), 459.

The *AK vs. Krajowa Rada Sądownictwa*<sup>35</sup> regarded the independence of the Disciplinary Chamber in Poland, namely a body which dealt with disciplinary cases of judges, prosecutors and lawyers, as well as with deciding on lifting judicial and prosecutorial immunity. The referring court had doubts as to whether that Chamber would provide sufficient guarantees of independence and impartiality.<sup>36</sup>

The ruling at issue is of great relevance with regard to the independence of judges and courts within the EU Member States and constituted a fundament on which the following judgments of the CJEU have been based. The CJEU adjudicated that if the circumstances in which the court was formed, its characteristics and the way in which its members have been appointed cause doubts in subject of the law as regards its independence from external interference, the court is not impartial and independent under EU law. Specifically, if it is directly or indirectly influenced by the legislative and/or executive power, or there are doubts about the neutrality regarding the interest before them. Such circumstances jeopardize the trust which justice shall inspire in subjects of the law in a democratic society.<sup>37</sup>

The discussed judgment constitutes a crucial statement as regards judicial independence in the context of several reforms which undermined the separation of powers and autonomy of judges in the EU. In Poland, this ruling does not apply only to the Disciplinary Chamber, but also to other courts dealing with judicial independence issues. However, it does not invalidate or set aside any ruling given by the National Council of the Judiciary, thereby, it could be a basis for a right of appeal.<sup>38</sup>

## 2.6. Miasto Łowicz vs. Wojewoda Łódzki (C-558/18 and C-563/18)

The request for a preliminary ruling in the first case (Case C-558/18) concerned the proceedings between Miasto Łowicz, a Polish town, and the Polish State Treasury as regards a claim for payment of public subsidies. The other request for a preliminary ruling concerned a case (Case C-563/18) related to criminal proceedings for participation in kidnappings for financial gain. In both cases the judges had to adjudicate on a case where the State was a party in the proceedings and they were concerned about disciplinary proceedings that could be brought against them provided that they ruled against the State. Therefore, they referred questions to the CJEU to evaluate the compliance of Polish Law with EU rules as regards judicial independence, in particular the second subparagraph of Article 19(1) TEU which, since its landmark ruling in *Portuguese Judges*, has been interpreted as requiring the Member States to assure the independence of the judges who may rule on questions of EU law.<sup>39</sup>

In *Miasto Łowicz*,<sup>40</sup> the CJEU declared the requests inadmissible since they did not contain any connecting factors between the disputes and EU law. However, the Court did not miss the opportunity to acknowledge its interpretation of Article 19 TEU by repeating that it was

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<sup>35</sup> Judgment of 19 November, 2019, *Joined Cases A. K. vs. Krajowa Rada Sądownictwa* (C-585/18) and *CP* (C-624/18), *DO* (C-625/18) vs. *Sąd Najwyższy*, ECLI:EU:C:2019:982.

<sup>36</sup> Mańko, R., *supra* n. 6, p. 6.

<sup>37</sup> Uhma, P. (2020). *Joined Cases C-585/18, C-624/18, C-625/18*. *American Journal of International Law*, 114(4), p. 743.

<sup>38</sup> Grogan, J., *supra* n. 34, p. 460.

<sup>39</sup> Platon, S. (2020). *All Bark and No Bite. Another Case of Mixed Signals From the Court of Justice Regarding the Independence of National Courts* (CJEU, Grand Chamber, 26 March 2020, *Miasto Łowicz, Joined Cases C-558/18 and C-563/18*), A revised version of this paper has been accepted by the *Common Market Law Review*, Forthcoming. Available at: <https://ssrn.com/abstract=3686497>, [accessed on 23 November 2022], p. 6.

<sup>40</sup> Judgment of 26 March 2020, *joined cases C-558/18 and C-563/18, Miasto Łowicz vs. Wojewoda Łódzki*, ECLI:EU:C:2020:234.



intended to ‘apply to any national body which can rule, as a court or tribunal, on questions concerning the application or interpretation of EU law and which therefore fall within the fields covered by that law’,<sup>41</sup> and added that ‘although the organization of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law’.<sup>42</sup> Moreover, it addressed Poland implicitly and expressed its objection against assaults to judicial independence. At the end of the judgment, it alerted that a disciplinary chamber such as the one provided for the Polish reform would not be accepted pursuant to EU law. Specifically, the CJEU underlined that ‘provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot therefore be permitted.’<sup>4344</sup>

## 2.7. VQ vs. Land Hessen (C-272/19)

This request is part of the proceedings between VQ and Land Hessen and concerns the lawfulness of the rejection by the President of the Parliament of the Land Hessen (Hessischer Landtag) of an application for access to personal data held by the Petition Committee of the Parliament. The request was based on Article 15 of the General Data Protection Regulation (hereinafter referred to as ‘GDPR’), which gives the right to access personal data concerning the interested person.

In light of the foregoing, the Administrative Court posed two preliminary questions to the CJEU, from which one concerned the independence and impartiality of the referring court under Articles 267 TFEU and 47 of the Charter.<sup>45</sup>

On 20 July 2020 the CJEU gave its judgment in the case C-272/19 *VQ vs. Land Hessen*<sup>46</sup> according to which, the documents delivered by the Administrative Court did not comprise ‘indication as to how the manner in which the executive uses its powers in that regard are such as to engender legitimate doubts, particularly in the minds of litigants, concerning whether the judge concerned is impervious to external elements and whether he or she is impartial with respect to the opposing interests that may be brought before him or her’<sup>47</sup>. As regards the factors recalled in the preliminary reference, the CJEU concluded that they ‘cannot, in themselves, be sufficient ground for a conclusion that those doubts are well-founded and that that court is not independent’.<sup>48</sup>

According to Beems, the case at issue is interesting in view of Article 267 TFEU. First of all, the CJEU adjudicated that ‘court or tribunal’ under Article 267 TFEU is determined solely by EU law, what derives from its foregoing case law, and in order to do so it referred to relevant factors, *inter alia*, the independence of the body. Moreover, in *VQ vs. Land Hessen* the CJEU clarified, for the first time that the fact that a majority of a committee’s members is appointed

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<sup>41</sup> *Miasto Łowicz vs. Wojewoda Łódzki*, supra n. 40, para 34.

<sup>42</sup> *Miasto Łowicz vs. Wojewoda Łódzki*, supra n. 40, para 36.

<sup>43</sup> *Miasto Łowicz vs. Wojewoda Łódzki*, supra n. 40, para 58.

<sup>44</sup> Coli M. (2020). *On disciplinary chambers, judicial remedies and the rule of law. The Court of Justice’s ruling in Miasto Łowicz and the order for interim measures in Commission v. Poland (C-791/19 R)*, Available at: <https://www.diritticomparati.it/on-disciplinary-chambers-judicial-remedies-and-the-rule-of-law-the-court-of-justices-ruling-in-miasto-lowicz-and-the-order-for-interim-measures-in-commission-v-poland-c-791-19-r/>, [accessed on 23 November 2022].

<sup>45</sup> Beems, B. (2021). *VQ v Land Hessen: From ‘Court of Tribunal’ in the Meaning of Article 267 TFEU to the GDPR’s Concept of a ‘Controller’*, *European Data Protection Law Review*, 7(2), pp. 296-298.

<sup>46</sup> Judgment of 9 July 2020, *VQ vs. Land Hessen*, case C-272/19, ECLI:EU:C:2020:535.

<sup>47</sup> *VQ vs. Land Hessen*, supra n. 45, para 59.

<sup>48</sup> *VQ vs. Land Hessen*, supra n. 45, para 60.

by the legislative power does not result in uncertainty as for the independence of an Appointment Committee.<sup>49</sup>

## 2.8. L. and P. (C-354/20 PPU and C-412/20 PPU)

In *L and P*<sup>50</sup> both preliminary requests were made in proceedings in the Netherlands and involved European arrest warrants which were issued by Poland. The Polish authorities demanded the surrender of two Polish nationals, one for the purpose of prosecution (L) and the other one for the purpose of executing a custodial sentence (P).<sup>51</sup>

On 20 December 2020 the CJEU delivered a ruling in *L and P* as regards two cases in which Poland made a request addressed to the Dutch authorities to surrender two Polish citizens. In this case the issue concerned European extradition by means of the EAW but also addressed Member State compliance with the rule of law and fundamental rights. It is worth mentioning that the balance between the shared values of the EU laid out in Article 2 TEU and the principle of effectiveness of the EU area of freedom, security and justice, namely the principle of mutual recognition and the principle of mutual trust, was the fundament of the line of argument of the CJEU.<sup>52</sup> In its preliminary ruling, the CJEU, *inter alia*, did not resign from the requirement for executing authorities to conduct the second, individualized, step of the two-step test that was introduced in *Aranyosi/Căldăraru*<sup>53</sup> and got confirmed in *LM*. Thus, it is necessary for executing authorities to evaluate whether there is a probability that the fundamental rights of the sought person will be violated since according to the first element of the two-step test, it was established that there are 'systemic or generalized deficiencies'<sup>54</sup> in the issuing Member State in safeguarding that right.<sup>55</sup>

## 2.9. Repubblica vs. Il-Prim Ministru (C-896/19)

The *Repubblica vs. Il-Prim Ministru*<sup>56</sup> case resulted from a reference for a preliminary ruling by the Civil Court, sitting as a Constitutional Court. The referring judge had to adjudicate on an *actio popularis* brought by Repubblica, a Maltese association promoting the rule of law and the protection of justice. The association brought an action as, in its view, the Maltese system appointing judges infringed the principle of judicial independence protected under EU law.

In its judgment the CJEU ingeminated the relevance of judicial independence for the EU legal order in different regards. The principle of judicial independence implies rules that resolve any reasonable doubt as for the judiciary independence from external influences in the minds of individuals, both direct and indirect. The CJEU added that Article 2 TEU guarantees the enjoyment of all rights which derive from the Treaties and that a State is prohibited from

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<sup>49</sup> Beems, B., *supra* n. 45, pp. 299-300.

<sup>50</sup> Judgment of 17 December 2020, *L and P*, Joined Cases C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033.

<sup>51</sup> Ouwerkerk, J. (2021). *Are Alternatives to the European Arrest Warrant Underused? The Case for an Integrative Approach to Judicial Cooperation Mechanisms in the EU Criminal Justice Area*, European Journal of Crime, Criminal Law and Criminal Justice, 29(2), p. 88.

<sup>52</sup> Baude, A. (2021). *Protecting the Union Rule of Law Through National Court Scrutiny? A Comment on Joined Cases C-354/20 PPU and C-412/20 PPU L and P*, Nordic Journal of European Law Issue, 4(1), p. 112.

<sup>53</sup> Judgment of 5 April 2016, *Aranyosi and Căldăraru*, joined cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paras. 91–94.

<sup>54</sup> *L and P*, *supra* n. 50, para. 69.

<sup>55</sup> Ouwerkerk, J., *supra* n. 51, pp. 87-88.

<sup>56</sup> Judgment of 20 April 2021, *Repubblica vs. Il-Prim Ministru*, case C-896/19, ECLI:EU:C:2021:311.

amending its legislation causing a deterioration of protection of the rule of law.<sup>57</sup> It is worth mentioning that by introducing an entirely new ‘nonregression’ rule to EU law relying on the connection between Articles 2 and 49 TEU, the CJEU progressed in dealing with a well-known gap which undermined the EU legal order. The principle in hand is a significant new development in respect of the protection of the EU values. All things considered, the CJEU came to a conclusion that the legislative framework did not infringe the second subparagraph of Article 19(1) TEU.<sup>58</sup>

## **2.10. Romanian Judges Forum (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19)**

In *Asociația ‘Forumul Judecătorilor din România’*<sup>59</sup> the CJEU was asked to evaluate if the reformed civil, criminal and disciplinary liability of magistrates introduced in Romania between 2017 and 2019 could have an impact on the Romanian judiciary’s capacity to rule independently and be in compliance with the EU rule of law values.

This judgment is of great relevance as regards the legal order of the EU since it analyzed for the first time the legal nature and effects of key EU instruments which are used in order to provide the rule of law as well as the accession of new Member States to the EU monitoring, namely the European Commission Reports monitoring Romania’s progress on the rule of law and the Cooperation and Verification Mechanism Decision. The case at issue constituted a crucial contribution to the CJEU’s rule of law approach by, first of all, introducing the principle of progression to achieve EU rule of law standards as laid out in the abovementioned documents. Furthermore, the CJEU established similar judicial independence parameters which would apply to all kinds of judicial liability regimes, apart from the disciplinary one. Also, the judgment shall be remembered as a powerful acknowledgment of the legally binding rule of primacy of EU law for constitutional courts.<sup>60</sup>

## **3. Conclusion**

The case law of the CJEU plays an important role in terms of developing its own standards in the area of judicial protection. It is a common belief<sup>61</sup> that the CJEU has been the most effective EU institution as for protecting judicial independence in the Member States. As it comes from the abovementioned overview of the CJEU’s recent case law on judicial independence, it has been very dynamic since challenges to judicial independence in certain Member States have occurred. Some scholars have described it as ‘truly revolutionary’<sup>62</sup> and, undeniably, of great relevance, *inter alia*, from the viewpoint of the preliminary reference procedure, where only an independent body is regarded as a ‘court or tribunal’ according to Article 267 TFEU.

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<sup>57</sup> *Ibid.*, para. 63.

<sup>58</sup> Dimitrovs, A., Kochenov, D. and Leloup, M. (2021). *Non-Regression: Opening the Door to Solving the ‘Copenhagen Dilemma’? All the Eyes on Case C-896/19 Republika v Il-Prim Ministru*. RECONNECT Working Paper (Leuven) No. 15, pp. 7-11.

<sup>59</sup> Judgment of 18 May 2021, *Asociația ‘Forumul Judecătorilor din România’*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, ECLI:EU:C:2021:393.

<sup>60</sup> Moraru, M. and Bercea, R. (2022). *The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația ‘Forumul Judecătorilor din România, and their follow-up at the national level*. *European Constitutional Law Review*, 18(1), pp. 82-83.

<sup>61</sup> Grabowska-Moroz B., Kochenov, D.V., Scheppele, K.L. (2020). *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, *Yearbook of European Law*, Vol. 39, p. 6-7.

<sup>62</sup> *Ibid.*, p. 6.

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