The right to an independent judge in the court of justice case law: an evolving principle

O direito a um juiz independente na jurisprudência do tribunal de justiça: um princípio em evolução

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1. Introduction

The right to an independent and impartial judge represents a cornerstone of European Union law. It forms part of the principle of effective judicial protection understood not only in its individual dimension, referring to the protection of the rights of the individual,

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but also in a broader dimension, defined as "constitutional" [2] or "axiological" [3], for the protection of the values of the European Union as described in Article 2 TEU-- the rule of law. In addition to a specific dimension belonging to each Member State, the concept of the rule of law has a distinguishing European Union dimension, in which both Member States and EU institutions are subject to a check of the validity of their acts over the Treaties and the general principles of law. Indeed, in the absence of a full independence of the judiciary, «the state legal system can only provide an illusion of the rule of law»[4].

In the division of powers, the judiciary represents the guardian of the rule of law *par excellence*. It is in the very nature of the judicial function that the judge rules according to the law alone, and Member States and the European Union itself, as well as the parties to a litigation, have to comply with legal norms. This function can only be assured if the judges are not subject to any instruction or pressure in the performance of their duties, either from the parties to the case or from third parties, including political authorities. The consubstantial link between the mission of judging and the requirement of independence explains why the latter represents an essential component of the right to a fair trial[5].

In this framework, the achievement of a "Union based on the rule of law"[6] depends also on the implementation of effective judicial protection, including the right to a judge[7] characterized by this requirement of independence.

For many years it appeared that the values enshrined in the Treaties and the EU Charter of Fundamental Rights, including respect for the rule of law, were "uncontested

2 PRECHAL, Sacha – *Effective judicial protection: some recent developments – moving to the essence*. In *Review of European Administrative Law*, N.º 2, 2020, p. 175; BONELLI, Matteo – *Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature*. In *Review of European Administrative Law*, N.º 2, 2020, p. 35-62.

3 FAVI, Alessandra – *La dimensione "assiologica" della tutela giurisdizionale effettiva nella giurisprudenza della Corte di giustizia in tema di crisi dello Stato di diritto: quali ricadute sulla protezione degli individui?*. In *Il Diritto dell'Unione europea*, 2020, N.º 4, p. 795-822.

4 BIERNAT, Stanisław and FILIPEK, Paweł – *The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM*. In VON BOGDANDY, Armin and others (eds.), *Defending Checks and Balances in EU Member States*, Springer, 2021, p. 405.

5 ADAM, Stanislas and VAN ELSUWEGE, Peter – *L'exigence d'indipénce du judge, paradigm de l'Union européenne comme union de droit*. In *Journal de droit européen*, 2018, p. 335.

6 The expression "union based on the rule of law" – probably even stronger in other linguistic versions like French version "Union de droit", Italian "Unione di diritto" or Spanish "Unión de Derecho" – is quite recently used by the Court of Justice (see CJEU, Grand Chamber, judgment of 25th June 2018, Case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586, para. 49; CJEU, Grand Chamber, judgment of 27th February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses-ASJP*, ECLI:EU:C:2018:117, para. 31) with the same meaning of the well-known expression "community based on the rule of law" (see CJEU, judgement of 23rd April 1986, case 294/83, *Parti écologiste "Les Verts" v. European Parliament*, ECLI:EU:C:1986:166, para. 23; see also CJEU, judgement of the 3rd September 2008, cases C-402/05 e C-415/05, *Kadi e Al Barakaat International Foundation*, ECLI:EU:C:2008:461, para. 81, 281 and 316; CJEU, judgement of the 25th July 2002, Case C-50/00, *Unión de Pequeños Agricultores*, ECLI:EU:C:2002:462, para. 38 and 39).

7 See PICOD, Fabrice – *Droit au juge et voies de droit communautaire. Un mariage de raison*, in *L'Union Européenne: Union de droit, Union des Droits. Mélanges en l'honneur de Philippe Manin*, Pedone, 2010, p. 907-920.

and incontestable", but something has now changed[8]. Therefore, at a time of institutional crisis characterized by the rule of law backsliding, the need to preserve the principle of the independence of judges is, according to Lenaerts, directly related to maintaining the European Union as «a "Union of democracies" a Union of rights" a "Union of justice"» in order to ensure that future generations of Europeans can enjoy their own sphere of individual liberty safe from public interference [9].

The principle of the independence of judges, which, as recalled, is intrinsic to the judicial function itself, involves two aspects of external and internal independence. External independence presupposes that the courts or other judicial bodies exercise their functions in full autonomy, without being subject to any hierarchical or subordinate constraints and without receiving any kind of order or instruction. Those who perform the judicial function must therefore be protected from external pressures that might compromise the independence of their judgment and influence their decisions[10]. As will be discussed below, appropriate guarantees to protect the judges' independence include safeguards against removal from office[11] and an adequate level of remuneration commensurate with the importance of their functions[12]. The internal character of independence, on the other hand, relates to the notion of impartiality and concerns the guarantee of a level playing field for parties to proceedings and their respective interests with regard to the subject matter[13].

The aim of this paper is to relate the evolution of the notion of judicial independence to the context of the retreat of the rule of lawthat has taken place in certain States of the European Union[14]. It does this by studying a trend in the European Union Court of Justice (CJEU) case law. In the sea of studies on the political response to rule of law backsliding, the analysis of the caselaw of the CJEU is particularly relevant because it has been considered as the *last guardian* against the retreat of the guarantees of the rule of law, in particular with regard to the independence of judges, in the lack of an energic

8 VON DANWITZ, Thomas – *Values and the Rule of Law: Foundations of the European Union – An Inside Perpective from the ECJ*. In *Potchefstroomse electonic law journal*, Vol. 21, 2018, p. 1-17.

9 LENAERTS, Koen – *New Horizons for the Rule of Law Within the EU*. In *German Law Journal*, Special Issue 1, 2020, p. 34.

10 To this effect see CJEU, *ASJP*, para. 44.

11 CJEU, Grand Chamber, judgment of 19th September 2006, case C-506/04, *Wilson*, ECLI:EU:C:2006:587, para. 51; CJEU, judgment of 22nd October 1998, joined Cases C-9/97 and C-118/97, *Jokela and Pitkäranta*, ECLI:EU:C:1998:497, para. 20.

12 CJEU, *ASJP*, para. 45.

13 CJEU, *Wilson*, para. 52.

14 Whether this paper takes some points of reflection from the Polish case, the rule of law backsliding also characterizes other states of the Union among which we can include Hungary and Romania. See DONATI, Filippo – *Un nuovo scontro sullo Stato di diritto e sull'indipendenza della magistratura nell'Unione europea*. In I *Post di AISDUE*, N.º 2, 2022, p. 19-27; MÉSZÁROS, Gábor – *Rule without law in Hungary: the decade of abusive permanent state of exception*. In *EUI MWP*, 01/2022.

political response. It raises, however, some doubts about the limits of the EU system and procedures, or at least regarding their effectiveness. The paper is divided into four parts. The first section will briefly illustrate the twofold dimension of the effective judicial protection in a Union based on the rule of law. The following section will analyse the notion of judicial independence in EU law, a multifaceted principle which currently has a triple legal basis in EU primary law. The last two sections will focus on two case studies deriving from the jurisprudence of the Court of Justice, which, for their relevance and peculiarities, have shaped the principle of judicial independence. The first case study concerns the European arrest warrant, in the context of the EU judicial cooperation in criminal matters, while the second deals with some cases related to the constitutional reforms in Poland that raised many doubts about the stability and the independence of the judicial system of that Member State.

2. The twofold dimension of effective judicial protection

The principle of judicial independence in the Court of Justice's caselaw has been mostly developed within the framework of the interpretation of the right to effective judicial protection via the preliminary ruling procedure provided for in Article 267 TFEU[15]. More recently, the principle at stake, as well as the right to effective judicial protection itself, has been defined and consolidated also through the judgments rendered by the Court following the infringement procedures launched by the Commission to stem the retreat of the rule of law, specifically with respect to Poland[16].

15 The preliminary ruling procedure established in Article 267 TFUE is considered by the Court of Justice as the "keystone" of the European Union judicial system, which, by setting up a dialogue between the CJEU and the Member States' courts and tribunals, guarantees the uniform interpretation of EU law, ensure its consistency, its full effect, its autonomy and the nature of the law established by the Treaties. See CJEU, Full Court, Opinion of 18th December 2014, Opinion 2/13, ECLI:EU:C:2014:2454, para. 267; and about the nature of the law established by the Treaties see CJEU, Full Court, Opinion of 8th March 2011, Opinion 1/09, ECLI: EU:C:2011:123, para. 67 and 83.

16 See CJEU, Grand Chamber, judgment of 15th July 2021, Case C-791/19, *Commission v. Poland (Régime disciplinaire des juges)*, ECLI:EU:C:2021:596; CJEU, Grand Chamber, judgment of 5th November 2019, Case C-192/18, *Commission v. Poland (Independence of ordinary courts)*, ECLI:EU:C:2019:924; CJEU, Grand Chamber, judgment of 24th June 2019, Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531. MORI, Paola – *L'uso della procedura d'infrazione a fronte di violazioni dei diritti fondamentali. In Il diritto dell'Unione europea*. In *Il Diritto dell'Unione Europea*, N.º 2, 2018, p. 363-375; ARANCI, Matteo – *La procedura d'infrazione come strumento di tutela dei valori fondamentali dell'Unione europea. Note a margine della sentenza della Corte di giustizia nella causa Commissione/Polonia*. In *Eurojus*, N.º 3, 2019, p. 49-63; CIMADOR, Elisa – *La Corte di giustizia conferma il potenziale della procedura d'infrazione ai fini di tutela della rule of law. Brevi riflessioni a margine della sentenza Commissione/Polonia (organizzazione tribunali ordinari)*. In *Eurojus*, N.º 1, 2020, p. 60-81.

GALILEU · e-ISSN 2184-1845 · Volume XXIV · Issue Fascículo 1-2 · 1st January Janeiro – 31st December Dezembro 2023 · pp. 17-38

Therefore, to study the evolution of the principle of independence of the judiciary, it is essential to first refer to the principle of effective judicial protection and understand its transformation over the years.

Pursuant to a constant and consolidated jurisprudence of the CJEU[17], the effective judicial protection of individuals' rights originally constituted a general principle of EU Law stemming from the constitutional traditions common to the Member States, as well as from Articles 6 and 13 of the ECHR[18]. Through this principle, the Court of Justice can assess the adequacy of the judicial protection provided by the domestic legal systems of the Member States with respect to individual legal positions arising from EU law.

The CJEU's reconstruction of the principle of effective judicial protection can be dated back to the mid-1980s, when in the *Von Colson* judgment – as part of a preliminary reference concerning the implementation of the Council Directive *on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*[19]– the CJEU highlighted the existence of a Member State obligation «to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by discrimination to pursue their claims by judicial process»[20]. However, this obligation was not yet conceived as a principle having a general character, but it was linked to the implementation of secondary law, particularly to the adoption of «measures which are sufficiently effective to achieve the objective of the directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned»[21].

The principle of effective judicial protection, affirmed in a limited way in *Von Colson*, takes on the character of a general and autonomous principle, disengaging itself from its

17 CJEU, judgment of 15th May 1986, Case 222/84, *Johnston*, ECLI:EU:C:1986:206, para. 18 and 19; CJEU, judgment 15th October 1987, Case 222/86, *Heylens and others*, ECLI:EU:C:1987:442, para. 14; CJEU, judgment of 27th November 2001, Case C-424/99, *Commission v. Austria*, ECLI:EU:C:2001:642, para. 45; CJEU, judgment of 25th July 2002, Case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, ECLI:EU:C:2002:462, para. 39; CJEU, judgement of 19th June 2003, Case C-467/01, *Eribrand*, ECLI:EU:C:2003:364, para. 61; CJEU, judgment of 13th March 2007, Case C-432/05, *Unibet*, ECLI:EU:C:2007:163, para. 37; CJEU, judgment of 22nd December 2010, case C-279/09, *DEB*, ECLI:EU:C:2010:811, para. 29-33; CJEU, para. 35.

18 For further information on the independence of judges within the Council of Europe, topic which will not be covered in this paper, see *ex multis* MÜLLER, Lydia F. – *Judicial Independence as a Council of Europe Standard*. In *German Yearbook of International Law*, Vol. 52, 2009, p. 461-486; PACZOLAY, Péter – *The Notion of Judicial Independence: Impartiality and Effectiveness of Judges*. In PINTO DE ALBUQUERQUE, Paulo and WOJTYCZEK, FranceKrzysztof (eds.), *Judicial Power in a Globalized World: Liber Amicorum Vincent De Gaetano*, Springer, 2019, p. 331-343.

19 Council Directive 76/207/EEC of 9th February 1976 *on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*, Official Journal L 39, 14th February 1976, p. 40-42, no longer in force.

20 CJEU, judgment of 10th April 1984, Case 14/83, *von Colson and Kamann v. Land Nordrhein-Westfalen*, ECLI:EU:C:1984:153, para. 18

21 *Ibidem*.

GALILEU · e-ISSN 2184-1845 · Volume XXIV · Issue Fascículo 1-2 · 1st January Janeiro – 31st December Dezembro 2023 · pp. 17-38

express provision in the Union's secondary law, present in the *Johnston* judgment, and finds confirmation the following year in the *Heylens* case, tracing its legal basis in the common constitutional traditions and the provisions of the ECHR. The express recognition of this principle has paved the way for its application as a criterion for interpreting and integrating provisions of Union law[22].

The entry into force of the Lisbon Treaty subsequently affected the definition of this principle in a twofold way: first, through the elevation of the Charter of Fundamental Rights of the European Union to the rank of primary law, reinforcing the principle already contained in Article 47, paragraph 1 of the Charter, according to which «everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal»[23]; on the other hand, the second subparagraph of Article 19 (1) TEU codified the Court's case law by specifying how Member States are required to establish «remedies sufficient to ensure effective legal protection in the fields covered by Union law».

With respect to the principle of effective judicial protection, it is possible to identify a break in which this principle ceases to be built on exclusively on jurisprudence, as one of the manifestations of the principle of loyal cooperation, linked to the effective protection of individual positions attributed by EU Law, and, in addition, takes on a normative dimension linked to the concretization of the rule of law, rising to a systemic element of the European Union's legal system[24]. This moment of caesura, in which the twofold dimension of the principle of effective judicial protection emerges, is believed to be found in the *Associação Sindical dos Juízes Portugueses* judgment, in which the Court clearly states that Article 19 TEU «gives concrete expression to the value of the rule of law stated in Article 2 TEU»[25]. This phrasing also reinforces what the Court reaffirmed regarding the «the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law»[26].

22 FAVI, Alessandra, p. 799.

23 Indeed, the affirmation of the principle of effective judicial protection provided by Article 47 of the Eu Charter as a human right does not replace the general principle, but reaffirms it. See CJEU, judgment of 27th September 2017, Case C-73/16, *Puškár*, ECLI:EU:C:2017:725, para. 59; CJEU, judgments of 15th September 2016, Cases C-439/14 and C-488/14, *Star Storage and Others*, ECLI:EU:C:2016:688, para. 46; CJEU, judgment of 26th July 2017, Case C-348/16, *Sacko*, ECLI:EU:C:2017:591, para. 31.

24 BARTOLONI, M. Eugenia – *La natura poliedrica del principio della tutela giurisdizionale effettiva ai sensi dell'art. 19, par. 1, TUE*. In *Il Diritto dell'Unione europea*, N.º 2, 2019, p. 246.

25 Court of Justice, *ASJP*, para. 32.

26 This expression had already been used by the Court of Justice in its previous jurisprudence. See: CJUE, judgement of 6th October 2015, Case C-362/14, *Schrems*, ECLI:EU:C:2015:650, para 95; CJEU, judgement of 18th December 2014, Case C-562/13, *Abdida*, ECLI:EU:C:2014:2453, para. 45; CJEU, judgment of 28th March 2017, Case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, para. 73.

GALILEU · e-ISSN 2184-1845 · Volume XXIV · Issue Fascículo 1-2 · 1st January Janeiro – 31st December Dezembro 2023 · pp. 17-38

The twofold dimension of the principle of effective judicial protection, ordinary and systematic, thus emerges from what has been called by legal scholarships a "legal syllogism", according to which it is a corollary and consequence of the principle of loyal cooperation[27], currently enshrined in Article 4(3) TEU, conjugated in the procedural sphere and, at the same time, the very premise on which loyal cooperation is based[28]. Two distinct areas of application can be associated with this dual reconstructive dimension, depending on whether it detects a specific and circumscribed obligation or a generalized and transversal obligation[29]. All this results in a different interpretation of the *ratione materiae* scope of the second subparagraph of Article 19(1) TEU, with reference to «the fields covered by Union law», and the provision of Article 51(1) of the Charter[30]. A more restrictive one, in cases where the ordinary dimension of effective judicial protection is relevant[31], and an extensive one where the case has systemic repercussions affecting the overall effectiveness of judicial protection in each Member State.

The application and enforcement of Union law must be guaranteed by the Member States in their respective territories. Therefore, Member States are required to establish the judicial remedies necessary for individuals to be ensured the respect for their right to effective judicial protection in the fields regulated by European Union law. Therefore, each Member State must ensure that the "courts or tribunals" within the meaning of EU law, which in its own legal system may be called upon to hear disputes falling within areas governed by EU law, meet the requirements of effective judicial protection[32]. In that regard, it is pointed out that in order for a body to be considered "courts or tribunals" within the meaning of EU law, the domestic qualification is not sufficient, but it is necessary to make reference to the notion outlined by the Court in its nomophylactic function[33]. According to the CJEU case law in assessing whether a body is a "court or tribunal" there

27 See, *inter alia*, CJEU, judgment of 8th November 2016, Case C-243/15, *Lesoochranárske zoskupenie VLK*, ECLI:EU:C:2016:838, para. 50; CJEU, judgement of 26th July 2017, Case C-348/16, *Sacko*, ECLI:EU:C:2017:591, para. 29.

28 BARTOLONI, M. Eugenia, *La natura poliedrica*, p. 249.

29 *Ivi*, p. 258.

30 On the interpretation of Article 51 of the Charter of Fundamental Rights of the European Union see, *ex multis*, PICOD, Fabrice – *Article 51*, in PICOD, Fabrice, RIZCALLAH, Cécilia and VAN DROOGHENBROECK, Sébastien (eds.) – *Charte des droits fondamentaux de l'Union européenne. Commentaire article par article*, coll. Droit de l'Union européenne, série Textes et commentaires, Bruylant, 2ème éd., 2020, p. 1223-1248 ; TIZZANO, Antonio – *L'application de la Charte de droits fondamentaux dans les États membres à la lumière de son article 51*, paragraphe 1. In *Il diritto dell'Unione Europea*, N.º 3, 2014, p. 429-437.

31 See CJEU, Grand Chamber, judgment of 26th February 2013, Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105.

32 CJEU, *ASJP*, cit., para. 37.

33 On this topic see MITSILEGAS, Valsamis – *Autonomous concepts, diversity management and mutual trust in Europe's area of criminal justice*. In *Common Market Law Review*, N.º 1, 2020, p. 45-78; MITSILEGAS, Valsamis – *Managing Legal Diversity in Europe's Area of Criminal Justice: The Role of Autonomous Concepts*. In R. COLSON Renaud and FIELD, Stewart (eds.) – *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice*, Cambridge University Press, 2016, p. 125-159; AZOULAI, Loic – *The Europeanization of Legal Concepts*. In

are several factors to be taken into account, such as 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, of higher relevance for our analyses, whether it is independent[34].

3. Judicial independence in EU law: a three-dimensional concept

The principle of independence of the judiciary is an essential component of the fundamental right to a fair trial protected by Article 47 of the EU Charter of Fundamental Rights. The Court of Justice elevates it to a cardinal principle, a guarantee of the overall protection of the rights deriving for the individual from the law of the Union and the safeguarding of the values common to the Member States set forth in Article 2 TEU, and in particular of the rule of law.[35]

The notion of the independence of the judiciary can be expressed and studied as a "three-dimensional" concept[36]. Indeed, in European Union Law this notion has a three-pronged legal basis in primary law. As clarified by the CJEU in *Land Hessen*[37], the independence of the judiciary, in the first place, relates to the rule of law, one of the values on which the European Union is founded pursuant to Article 2 TEU, as well as it is a concrete expression of this value under Article 19 TEU which entrusts the domestic courts and tribunals of the Member States with a shared responsibility for ensuring judicial review[38]. Secondly, it refers to Article 47 of the Charter which establishes the right to an independent and impartial judge, which guarantees all the rights conferred to the individuals by EU law[39]. Lastly, the principle of judicial independence is indispensable to the proper working of the judicial cooperation system, by considering that the preliminary ruling mechanism,

NEERGAARD, Ulla B. and NIELSEN, Ruth (eds.) – *European Legal Method in a Multi-Layered Legal Order*, DJOF Publishing, Copenhagen, 2012.

34 See, *inter alia*, CJEU, Grand Chamber, judgments of 17th July 2014, Joined cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088, para. 17; CJEU, Grand Chamber, judgement of 6th October 2015, Case C-203/14, *Consorci Sanitari del Maresme*, ECLI:EU:C:2015:664, para. 17; CJEU, judgement of 16th February 2017, Case C-503/15, *Margarit Panicello*, ECLI:EU:C:2017:126, para. 27; CJEU, *ASJP*, para. 37.

35 CJEU, Grand Chamber, judgement of 25th July 2018, Case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586, para. 48.

36 ROSSI, Lucia Serena – *Fiducia reciproca e mandato d'arresto europeo. Il "salto nel buio" e la rete di protezione*. In *Freedom, Security and Justice: European Legal Studies*, N.º 1, 2021, p. 7.

37 CJEU, judgment of 9th July 2020, Case C-272/19, *Land Hessen*, ECLI:EU:C:2020:535, para. 45.

38 To that effect, see also, CJEU, Opinion 1/09, para. 66; CJEU, Grand Chamber, judgments of 3rd October 2013, Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 90; CJEU, Grand Chamber, judgment of 28 April 2015, Case C-456/13 P, *T & L Sugars and Sidul Açúcares v. Commission*, ECLI:EU:C:2015:284, para. 45; CJEU, *ASJP*, para. 32.

39 See, *inter alia*, CJEU, *Commission v. Poland (Independence of the Supreme Court)*, para. 47 and 48; CJEU, Grand Chamber, judgment of 26th March 2020, Joined cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson v. Council and HG v. Commission*, ECLI:EU:C:2020:232, para. 70 and 71.

GALILEU · e-ISSN 2184-1845 · Volume XXIV · Issue Fascículo 1-2 · 1st January Janeiro – 31st December Dezembro 2023 · pp. 17-38

based on Article 267 TFEU, can only be activated by a judge, responsible for applying EU law, who satisfies the criterion of independence[40].

In its constant jurisprudence, the Court has held that the guarantees of independence and impartiality of the courts and tribunals adjudicating in the fields covered by EU law, require a background of rules relating, in particular, to the composition of the body and the appointment of their members, their length of service, as well as the grounds for abstention, rejection and dismissal[41]. This normative apparatus is the prerequisite for dispelling legitimate doubts that individuals may have about the imperviousness of that body to external factors and pressures, as well as with respect to the guarantee of neutrality towards opposing interests before it[42].

As highlighted above, a key step in protecting the principle of effective judicial protection is the aforementioned judgment *Associação Sindical dos Juízes Portugueses*. Translating a "programmatic" norm, such as Article 2 TEU, into a "prescriptive" and enforceable provision by linking it to Article 19 TEU, this judgment constitutes a crucial moment in the constitutionalization of the EU legal order from the perspective of the judiciary control of the rule of law[43].

The case of the "Portuguese judges" pertaining to a salary reduction had been framed in the Opinion of the Advocate General as a dispute involving budgetary austerity measures in the framework of the European Stability Mechanism (ESM)[44]. Instead, departing from the AG's arguments on the Charter's applicability to ESM-related measures and taking a path that is by no means obvious, the Court traced the case back to a question of protection of the rule of law. Using Article 19 TEU as its legal basis, the Court thus affirmed the existence of a competence to intervene directly in the organization of the national judiciary. This was a momentous turning point, intervening in a field that had hither to been perceived as a prerogative of Member States, deeply rooted in the concept of national sovereignty[45].

40 Too that effect, see in particular: CJEU, ASJP, para. 43; CJEU, Grand Chamber, judgment of 21st January 2020, Case C-274/14, *Banco de Santander,* ECLI:EU:C:2020:17, para. 56.

41 Specifically, to meet the requirement of independence, the Court argues «that dismissals of its members should be determined by express legislative provisions». CJEU, *LM*, para. 66. See also CJEU, judgment of 9th October 2014, Case C-222/13, *TDC*, ECLI:EU:C:2014:2265, para. 32.

42 CJUE, Grand Chamber, judgement of 2nd March 2021, Case C-824/18, *A.B. and others*, ECLI:EU:C:2021:153, para. 117; CJEU, Grand Chamber, judgment of 19th November 2019, Joined cases C-585/18, C-624/18 and C-625/18, *A.K. and others*., ECLI:EU:C:2019:551, para. 123; CJUE, *Commission v. Poland (Independence of the Supreme Court)*, para. 74; CJEU, *LM*, para. 66; CJEU, *Wilson*, para. 53.

43 ADAM, Stanislas and VAN ELSUWEGE, Peter – *L'exigence d'indipénce du judge*, p. 341.

44 Conclusioni dell'Avvocato generale Saugmandsgaard Øe del 18 maggio 2017, causa C-64/16, *Associação Sindical dos Juízes Portugueses*.

45 KRAJEWSKI, Michal – *Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma*. In *European Papers*, N.º 1, 2018, p. 396.

GALILEU · e-ISSN 2184-1845 · Volume XXIV · Issue Fascículo 1-2 · 1st January Janeiro – 31st December Dezembro 2023 · pp. 17-38

Specifically, the Court extended the scope and strengthened the substantive content of the above-mentioned second subparagraph of Article 19(1) TEU under which effective judicial protection must be provided by Member States «in the *fields covered by Union law*»[46] by including in the scope of this provision matters unrelated to any substantive competence of the European Union. The key factor for falling under jurisdiction of the Court of Justice thus falls within a "functional sphere" relating to the exercise of the national courts' jurisdictional power as part of the European judiciary[47]. On the other hand, regarding the "substantive sphere", the Court aligned the provisions of Article 19 TEU with the provisions of Article 47 of the Charter, holding that the latter contains an obligation to guarantee the independence of national judges acting in areas covered by EU law[48].

In *ASJP*, the CJEU thus established certain criteria regarding the level of judicial remuneration, later confirmed in the *Vindel* judgment. In particular, the Court clarified that – considering the socioeconomic background and the average salaries of civil servants[49] – the level of remuneration must be proportionate with the importance of the functions performed by judges[50], and such remuneration must be high enough as a guarantee of independent judgments[51].

This argumentative framework has led to the view that this judgment – while formally dealing with the remuneration of Portuguese judges – was issued with an eye towards the Polish question, with its controversial reforms of the judicial system[52]. In fact, by interpretatively broadening the scope of the principle of judicial independence, this judgment allows for a potential assessment by the CJEU with respect to any provision of

46 Emphasis added.

47 BONELLI, Matteo and Claes, MONICA – *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary*. In *European Constitutional Law Review*, N.º 3, 2018, p. 631.

48 BONELLI, Matteo – *Intermezzo in the Rule of Law Play: The Court of Justice's LM Case*. In VON BOGDANDY, Armin and others (eds.), *Defending Checks and* Balances, p. 464.

49 CJEU, judgment of 7th February 2019, Case C-49/18, *Vindel*, ECLI:EU:C:2019:106, para. 70.

50 *Ivi*, para. 72 and 74.

51 CJEU, *ASJP*, para. 44 and 45; CJEU, *Vindel*, para. 66. In particular, the concept of independence presupposes, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.

52 BONELLI, Matteo and CLAES, Monica – *Judicial Serendipity*, p. 622-643; PECH, Laurent and PLATON, Sébastien – *Judicial Independence Under Threat: The Court of Justice to the Rescue in the ASJP case*. In *Common Market Law Review*, N.º 6, 2018, p. 1827-1854; TABOROWSKI, Maciej – *CJEU Opens the Door for the Commission to Reconsider Charges against Poland*. In *Verfassungsblog*, 2018; OVÁDEK, Michal – *Has the CJEU just Reconfigured the EU Constitutional Order?*. In *Verfassungsblog*, 2018; KRAJEWSKI, Michal – *Associação Sindical dos Juízes Portugueses*, p. 402; BONELLI, Matteo – *Intermezzo in the Rule of Law Play*, p. 464; TORRES PÉREZ, Aida – *From Portugal to Poland: the Court of Justice of the European Union as watchdog of judicial independence*. In *Maastricht Journal of European and Comparative Law*, N.º 1, 2020 p. 105-119.

GALILEU · e-ISSN 2184-1845 · Volume XXIV · Issue Fascículo 1-2 · 1st January Janeiro – 31st December Dezembro 2023 · pp. 17-38

domestic law that could undermine the independence of the judiciary. Thus, the Polish reforms of the judiciary will subsequently be brought within the scope of EU law.

This interpretation was further reinforced in the *Achmea* judgment. *Achmea* clarifies and strengthens the notion of the autonomy of EU law in the legal system of the European Union, *inter alia*, in the rise of a structured network of principles, by affirming that «EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves»[53].

In the resolution of this case, the Court recalled what was set forth in *ASJP* about Article 19(1) TEU and emphasized the role of the principles of mutual trust and loyal cooperation, based on the common values enshrined in Article 2 TEU, in order to ensure in the territories of Member States «the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU»[54].

The role of mutual trust highlighted in the *Achmea* case and its connection to the principle of judicial independence was specified a few weeks later in the *LM* judgment, outlining a new exception to the principle of mutual recognition in EU judicial cooperation in criminal matters.

4. Shaping the principle of independence of the judiciary in preliminary references: the peculiar case of the European arrest warrant

In its jurisprudence on the application of the framework decision on the European arrest warrant[55] and on the principles of mutual recognition and mutual trust, the CJUE clarified

53 CJEU, Grand Chamber, judgment of 6th March 2018, Case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para. 33.

54 CJEU, *Achmea*, para. 34. See also CJEU Opinion 2/13, para. 168 e 173. FANOU, Maria, *The independence and impartiality of the hybrid CETA Investment Court System: Reflections in the aftermath of Opinion 1/17*. In *Europe and the World: A law review*, N.º 1, 2020, p. 11-12. For other comments on the judgment *Achmea* and its impact see *ex plurimis*: SEGOIN, Daniel – *Les accords de protection des investissements conclus entre États membres saisis par le droit de l'Union. Achmea, C-284/16*. In *Revue du droit de l'Union européenne*, N.º 1, 2019, p. 225-238; DASHWOOD, Alan – *Article 26 ECT and intra-EU disputes – the case against an expansive reading of Achmea*. In *European Law Review*, Vol. 46, N.º 4, 2021, p. 415-434; CANDELMO, Claudia – *La sentenza Achmea, un anno dopo: l'impatto sull'ordinamento europeo e il futuro degli intra-EU BITs*. In *Studi sull'integrazione europea*, N.º 2, 2019, p. 447-462; HINDELANG, Steffen –*Conceptualisation and application of the principle of autonomy of EU law: the CJEU's judgment in Achmea put in perspective*. In *European Law Review*, Vol. 44, N.º 3, 2019, p. 383-400.

55 Council Framework Decision of 13 June 2002 *on the European arrest warrant and the surrender procedures between Member States*, 2002/584/JHA, Official Journal L 190, 18th July 2002, p. 1-20

GALILEU · e-ISSN 2184-1845 · Volume XXIV · Issue Fascículo 1-2 · 1st January Janeiro – 31st December Dezembro 2023 · pp. 17-38

the consequence of the failure to defend and preserve the common values enshrined in Article 2 TEU. The main goal of this case law is «to prevent the proliferation of rule of law problems and infringements to the right to fair trial»[56] and not to determine whether a domestic provision is violating the principle of judicial independence.

The leading case, in this domain, is the Grand Chamber's judgement *LM*[57], a preliminary ruling brought by an Irish Court relating to the execution of European arrest warrants issued by Polish courts. In *LM*, The Court of Justice extended the application of the "theory of exceptional circumstances"[58] which takes its cues in *Opinion 2/2013*. The theory represents a rebuttal of the absolute presumption based on mutual trust that Member States are complying with EU law and particularly with the fundamental rights recognised by EU law[59].

This theory of exceptional circumstances acts as a safety valve to protect the European Union's fundamental values and to support the proper development of the area of freedom, security, and justice. Indeed, as Gerard put it, mutual trust is not innate, thus it cannot be just decreed. Nevertheless, its stability depends, *inter alia*, on «a need to preserve a degree of verticality as a safeguard of trust or, put otherwise, as a way to institutionalize distrust»[60].

56 BÁRD, Petra – *In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law*. In *European Law Journal*, Vol. 27, 2021, p. 200.

57 See WENDEL, Mattias – *Indépendance judiciaire et confiance mutuelle: à propos de l'arrêt LM*. In *Cahiers de droit européen*, N.º 1, 2019, p. 189-215; KONSTADINIDES, Theodore – *Judicial independence and the Rule of Law in the context of non-execution of a European Arrest Warrant: LM*. In *Common Market Law Review*, N.º 3, 2019, p. 743-769; ZINONOS, Panagiotis – *Arrêt "L.M." de la Cour de justice: la confiance mutuelle à l'épreuve de la systématique de protection des droits et valeurs fondamentaux en cas de défaillances du système judiciaire d'un État membre*. In *Revue du Droit de l'Union européenne*, N.º 2, 2019, p. 205-222; AMOROSO Daniele and ORZAN Massimo Francesco – *Mandato d'arresto europeo e diritto a un giudice imparziale*. In *Giurisprudenza italiana*, 2018, p. 2075-2077; BÁRD, Petra and VAN BALLEGOOIJ, Wouter – *Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM*. In *New Journal of European Criminal Law*, 2018, p. 353-365; KRAJEWSKI, Michał – *Who is afraid of the European Council? The Court of Justice's cautious approach to the independence of domestic judges*. In *European Constitutional Law Review*, N.º 4, 2018, p. 792-813.

58 This theory was applied for the first time in the area of judicial cooperation in criminal matters, specifically in the context of the European arrest warrant with regard to Article 4 of the EU Charter of Fundamental Rights, in the landmark decision *Aranyosi and Căldăraru*. CJEU, Grand Chamber, judgement of 5th April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198.

59 CJEU, Opinion 2/13, para. 191-192. See DI COMITE, Valeria – *Autonomia o controllo esterno? Il dilemma dell'adesione dell'UE alla CEDU alla luce del parere 2/13*. In *La Comunità internazionale*, N.º 2, 2015, p. 223-243; BENOIT-ROHMER, Florence – *À propos de l'avis 2/13 de la Cour de Justice*. In *Revue trimestrielle de droit européen*, N.º 3, p. 593-611 ; PICOD, Fabrice – *La Cour de justice a dit non à l'adhésion de l'Union européenne à la Convention EDH – Le mieux est l'ennemi du bien, selon les sages du plateau du Kirchberg*. In *La Semaine Juridique – édition générale*, N.º 6, 2015 p. 230-234; VEZZANI, Simone – *L'autonomia dell'ordinamento giuridico dell'Unione Europea. Riflessioni all'indomani del parere 2/13 della Corte di giustizia*. In *Rivista di diritto internazionale*, 2016, p. 68-116; SPAVENTA, Eleanor – *A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13*. In *Maastricht Journal of European and Comparative Law*, N.º 1, 2015, p. 35-56.

60 GERARD, Damien – *Mutual Trust as Constitutionalism*. In BROUWER, Eveline and GERARD, Damien (eds.), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*. In *EUI Working Paper MWP*,

GALILEU · e-ISSN 2184-1845 · Volume XXIV · Issue Fascículo 1-2 · 1st January Janeiro – 31st December Dezembro 2023 · pp. 17-38

For the purpose of this work, the ruling in *LM* is interesting mainly for two reasons. In the first place, the Court develops the reasoning relating to the meaning of the concept of independence of judges, starting precisely from what was stated in the judgment *Associação Sindical dos Juízes Portugueses*. Secondly, the Court of Justice sets a new limit to the execution of the EAW[61], if it is ascertained the existence of a concrete risk of violation of the requested person's right to an independent judge, protected by Article 47(2) of the EU Charter.

Regarding the interpretation of the notion of the independence of the judiciary, one of the most significant aspects of *LM* is that the Court expanded its perspective on the constituents that compose and validate judicial independence beyond the particular case brought by the Irish High Court. Specifically, after reaffirming the elements highlighted in its previous case law concerning personal and institutional guarantees of independence and impartiality[62], the CJEU states that «the requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions»[63]. This attention on disciplinary regime can be considered a consequence of the Polish context, set in continuity with the reasoned proposal made by the European Commission under Article 7(1) TEU[64]. Indeed, in this part of the judgment, the Grand Chamber underlines the need for a system of guarantees to protect the independence of the judiciary, which includes rules that outline disciplinary offenses and their corresponding penalties, involves an impartial body, follows a procedure that protects the rights enshrined in Articles 47 and 48 of the EU Charter (especially the rights of the defence), and allows for legal challenges to the decisions made by disciplinary bodies[65].

Concerning the limitation on the execution of the European arrest warrant set in *LM*, on the other hand, the Court established the possibility of derogating from the obligation to surrender if it is established that there is a real risk of violation of the requested person's right to an independent judge. In reaching this conclusion, the Court based its reasoning on the interpretative connection between the right to a fair trial and the protection of the

N.º 13, 2016, p. 78. To learn more about the topic of mutual trust in the context of judicial cooperation in criminal matters, please refer to MARGUERY, Tony – *Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is 'Exceptional' Enough?*. In *European Papers*, Vol. 1, N.º 3, 2016, p. 943-963.

61 The grounds for mandatory and optional non-execution of the European arrest warrant are listed exhaustively in Articles 3 and 4 of the Framework Decision 2002/584/JHA.

62 CJEU, *LM*, para. 63-66.

63 *LM*, para. 67.

64 BIERNAT, Stanisław and FILIPEK, Paweł – *The Assessment of Judicial Independence*, p. 410.

65 CJEU, *LM*, para. 67.

values enshrined in Article 2 TEU, using the principle of judicial independence as a bridge between the two provisions[66].

In reference for a preliminary ruling, the Irish court raised several interpretative questions about the Framework Decision 2002/584/JHA in relation to the ongoing Article 7 TEU proceedings against the issuing Member State[67], arguing about the inconsistency of the "wide and unchecked powers" of the Polish judicial system with those of a democratic State subject to the rule of law[68]. The referring court held, therefore, that there was «a real risk of the person concerned being subjected to arbitrariness in the course of his trial in the issuing Member State»[69].

It is useful to recall that, as stated in recital 10 of the Framework Decision 2002/584/JHA, the EAW mechanism of surrender may be suspended to a Member State only when the European Council has adopted a decision under Article 7(2) TEU that determines the existence of a serious and persistent breach in the issuing Member State of the common values enshrined in Article 2 TEU. This decision must be followed by an explicit suspension by the Council of the application of Framework Decision 2002/584/JHA, adopted in accordance with the procedure provided for in Article 7(3)[70]. Therefore, in such a circumstance, the executing judicial authority would be obligated to an automatic rejection of any European arrest warrant issued by that Member State.

This differs when, as in the present case, the issuing Member State is the subject of a reasoned proposal under Article 7(1) TEU. According to the Court of Justice the execution of the EAW remains the rule. Such execution may be suspended or refused only in exceptional circumstances, through an analysis of the concrete case that ascertains whether the essential content of the requested person's fundamental right to a fair trial will predictably be violated. This evaluation is to be conducted using the *two-step test*, namely a two-stage control methodology developed in *Aranyosi e Căldăraru*[71], a methodology that in *LM* the Court adapted to the peculiarities of Article 47 of the Charter. Therefore, on this

66 C. DUPRÉ, *The Rule of Law, Fair Trial and Human Dignity: The Protection of EU Values After LM*, in VON BOGDANDY, Armin and others, Defending Checks and Balances, p. 443-454.

67 CJEU, *LM*, para. 25.

68 *Ivi*, para. 22.

69 *Ibidem*.

70 *Ivi*, para. 72.

71 For an analysis of the two-step test developed by the CJUE, allow me to refer to COLAVECCHIO, Giulia – *Il rispetto dei diritti fondamentali nell'esecuzione del mandato d'arresto europeo: l'evoluzione del two-step test e il ruolo degli organismi di prevenzione della tortura*. In *Ordine internazionale e diritti umani*, N.º 5, 2021, p. 1302-1326.

occasion as well, the CJEU merely sets general and abstract interpretative criteria, leaving the burden of applying them in relation to the concrete case to the executing authority [72].

Moving to the operation of this two-step test, as a first stage, the executing judicial authority must determine the extent to which systemic or generalized deficiencies relating to the independence of judges in the issuing Member State may have an impact on the judicial authorities having jurisdiction over the proceedings to which the person in question will be subjected[73]. In the second step, in dialogue with the issuing authority which is required to provide any necessary supplementary information[74], the executing judicial authority will have to ascertain the eventual existence of «*substantial grounds* for believing that he will run a *real risk* of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial» individually.[75] Considering that the right to a fair trial guaranteed by Article 47(2) of the Charter is not an absolute right[76], in carrying out this assessment, the judge is required to balance the rights, interests, and objectives involved, taking into account the personal situation of the requested person, together with the type of crime he is being charged with and the factual context that form the basis of the EAW[77].

The reasoning of the Court in *LM*, especially related to this second part of the test, was widely criticized by scholars[78], since, as noted, «demonstrating individual concern is extremely burdensome for suspects and convicted persons and close to impossible to prove»[79]. However, the *LM test* was corroborated by the Court's Grand Chambre subsequent

72 DE AMICIS, Gaetano – *Stato di diritto, garanzie europee di indipendenza della magistratura e cooperazione giudiziaria penale: quadri di un'esposizione in fieri*. In *Sistema Penale*, 2021, p. 24.

73 CJEU, *LM*, para. 74.

74 *Ivi*, para. 76-77.

75 *Ivi*, para. 75, emphasis added.

76 Differently from the absolute prohibition of torture and inhuman and degrading treatment enshrined in Article 4 of the EU Charter of fundamental rights against which, as seen in the case law branch starting from *Aranyosi and Căldăraru*, for which no balancing is possible.

77 CJEU, *LM*, para. 79.

78 FRĄCKOWIAK-ADAMSKA, Agnieszka – *Drawing Red Lines with No (Significant) Bites: Why an Individual Test Is Not Appropriate in the LM Case*. In VON BOGDANDY, Armin and others (eds.), *Defending Checks and Balances*, p. 443-454; BÁRD, Petra and MORIJN, John – *Luxembourg's Unworkable Test to Protect the Rule of Law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part I)*. In *Verfassungsblog*, 2020.

79 BÁRD, Petra – *In courts we trust*, p. 200. The Author also argued that: «The test developed by the CJEU in these cases is not achievable, and it is highly questionable whether it makes sense for the executing court to engage in a dialogue with the issuing court regarding its own independence, as prescribed by the LMtest».

jurisprudence *L and P*[80] and *X and Y*[81]. Both cases related to the independence of the issuing judicial authority in Poland[82].

In the judgment *L and P*, following the opinion of Advocate General Sánchez-Bordona[83], the Court has decided that even if the executing judicial authority has evidence highlighting systemic or generalized violations concerning the independence of the judiciary, it is not possible to presume a violation of the right to a fair trial by automatically denying the qualification of the issuing judicial authority under Article 6(1) of the Framework Decision 2002/584/JHA[84]. Indeed, as pointed out by the AG, an opposite solution would create a double criticality: on the one hand, it could create a situation of impunity, with a prejudice of crime victims' rights; on the other hand, it would tend to undermine the professional activity of all judges in the Member State at stake, making their participation in sensitive areas such as criminal cooperation mechanisms impossible[85]. The impairment of the professional work of every judge in the concerned Member State would affect the horizontal dialogue between national judges in the EU judicial cooperation, nonetheless, to its extreme consequences. It would also jeopardise the system of preliminary reference established by Article 267 TFEU, which presupposes that the referring judicial authority is qualified as independent.

In *X and Y* the Court reconfirms the application of the *LM two-step test*, through a not easy balancing between protecting the requested person's rights and guarantees of a fair trial with the safeguard of the proper functioning of the instruments of EU judicial cooperation in criminal matters in the current Polish context, in compliance with the

80 CJUE, Grand Chamber, judgment of 17th December 2020, Joined cases C-354/20 PPU and C-412/20 PPU, *L and P*, ECLI:EU:C:2020:1033. For a comment see FRACKOWIAK-ADAMSKA, Agnieszka – *Trust until it is too late! Mutual recognition of judgments and limitations of judicial independence in a Member State: L and P*. In *Common Market Law Review*, Vol. 59, Issue 1, 2022, p. 113-150; ROSANÒ, Alessandro – *The road not taken? Recenti sviluppi sulla nozione di autorità giudiziaria emittente nell'ambito del mae*. In *La legislazione penale*, 2021, p. 1-19; GIACOMETTI, Mona – *Les défaillances systémiques concernant l'indépendance du pouvoir judiciaire polonais: un coup d'arrêt à l'exécution des mandats d'arrêt européens émis par la Pologne?*. In *Revue trimestrielle des droits de l'Homme*, N.º 3, 2021, p. 677-692.

81 CJEU, Grand Chamber, judgment of 22nd February 2022, Joined cases C-562/21 PPU and C-563/21 PPU, *X e Y*, ECLI:EU:C:2022:100.

82 The LM test was confirmed by the Grand Chamber of the Court also in a context very different from the Polish, but equally sensitive related to the Catalan question. See CJUE, Grand Chamber, Judgement of 31 January 2023, Case C-158/21, *Puig Gordi and Others*, ECLI:EU:C:2023:57, para. 97-98.

83 Opinion of Advocate General Sánchez-Bordona delivered on 12th November 2020, Joined cases C-354/20 PPU and C-412/20 PPU, *L and P*, ECLI:EU:C:2020:925, para. 48. According to the Advocate General opinion the individual assessment required by the two-step test cannot be disregarded even in cases of aggravated systemic or generalized deficiencies in the independence of judges in the issuing State.

84 CJUE, *LM*, para. 41-42.

85 Opinion of Advocate General Sánchez-Bordona, *L and P*, para. 52.

GALILEU · e-ISSN 2184-1845 · Volume XXIV · Issue Fascículo 1-2 · 1st January Janeiro – 31st December Dezembro 2023 · pp. 17-38

jurisprudence of the European Court of Human Rights[86]. In this case, the referring court of Amsterdam failed for the second time in its attempt to ask the Court of Justice a broader interpretation of the grounds for refusal of the EAW with regard to the violation of Article 47 of the Charter and the respect for the principles of the rule of law[87]. Therefore, also on this occasion, the two-step test did not turn into a *quick step test*[88] of a more general application.

This ruling, however, is endowed with its own relevance, adding a further element with regard to the interpretation of the right to a fair trial before a judge established by law, which is intimately related to the requirements of independence and impartiality.[89]

According to the referring court of Amsterdam, Polish judicial reforms, particularly with respect to the system of judicial appointments, have significantly undermined the independence of that State's judiciary affecting the right to a fair trial. This court argued that the KRS[90] can no longer be regarded as an independent entity[91], and thus, in the Polish system, the defendant would not have access to any effective legal remedy to contest the validity of the judicial appointment[92].

In this judgment, the CJUE provides a non-exhaustive list of elements that the executing judicial authority should consider in the evaluation of the impartiality and independence of the court's members[93], with the imposition of several and hardly feasible

86 With reference to the rulings of the European Court of Human Rights: ECHR, judgment of 1st December 2020, *Ástráðsson v. Islanda*; ECHR, judgment of 22nd July 2021, *Reczkowicz v. Polonia*; ECHR, judgment of 9th July 2019, *Castaño v. Belgio*; ECHR, judgment of 2nd May 2019, ECHR, *Pasquini v. San Marino*; ECHR, judgment of 8th July 2014, *Biagioli v. San Marino*.

87 WAHL, Thomas – *CJEU: No Carte Blanche to Refuse EAWs from Poland*. In *Eucrime*, Issue 1, 2022, p. 34.

88 VANDAMME, Thomas –*"The two-step can't be the quick step": The CJEU reaffirms its case law on the European Arrest Warrant and the rule of law backsliding*. In *europeanlawblog.eu*, 10 February 2021.

89 CJUE, *X and Y*, para. 55-58 and 69.

90 The KRS (*Krajowa Rada Sądownictwa*) is the Polish National Council of the Judiciary.

91 Indeed, in the present case, it was not possible to rule out the possibility that Polish judges appointed at the request of the KRS, in accordance with the procedure set forth in the Law amending the Law on the National Council of the Judiciary and certain other laws of 8 December 2017 (*ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw*), had participated in the prosecution of one of the requested persons and could participate in the prosecution of the other requested person after their surrender to Poland.

92 CJEU, *X and Y*, para. 28. In addition, note that following the entry into force on 14 February 2020 of the Law amending the Law on the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws of 20 December 2019 (*ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw*), Polish judges cannot challenge the validity of a judge's appointment or the lawfulness of the performance of that judge's judicial functions.

93 According to the Court, during the first phase of the *test*, the executing judicial authority should examine the information contained in the reasoned proposal submitted by the European Commission to the Council under Article 7(1) of the TUE, the relevant case law on the independence of the Polish judiciary and the case law of the European Court of Human Rights. In addition, a relevant factor is encompassed by the constitutional case law of the issuing Member State, which challenges the primacy of EU law, the binding nature of the ECHR and the binding force of judgments of the CJEU and of the European Court of Human Rights. See CJUE, *X and Y*, para. 78-80.

GALILEU · e-ISSN 2184-1845 · Volume XXIV · Issue Fascículo 1-2 · 1st January Janeiro – 31st December Dezembro 2023 · pp. 17-38

duties for the requested person to produce evidence[94] in the second phase of the *LM* test[95]. Such evidence provided by the defence can be, if necessary, supplemented by additional information provided by the issuing authority pursuant to Article 15(2) of the Framework Decision 2002/584[96].

5. Further developments in the interpretation of the principles of judicial independence and impartiality on the basis of the *Polish saga*

The analysis of the jurisprudence of the EU Court of Justice in the area of the European Arrest Warrant shows quite clearly the limits of the preliminary ruling procedure in stemming the rule of law backsliding. A further limit is constituted by the lack of political will, which can be detected both in the institutions of the European Union and in the governments of the Member States, and, even more so, in the Polish government[97]. A clear example of this lack of political will to put into practice the values common to the EU Member States is the adoption by the Polish Parliament of a law intended to ensure that disciplinary measures are taken against judges who question the validity of the appointments of other judges or the legitimacy of a constitutional body[98], the so-called "muzzle law". This law was adopted during the dialogue between the Court of Justice of the European Union and the Chamber of Labour and Social Security of the Polish Supreme Court concerning the independence of the Disciplinary Chamber of the Polish Supreme Court and that of the National Council of the Judiciary, in the framework of the case *A.K.*[99].

Famously, the judgment *A.K.* stated that cases concerning the application of EU law cannot be under the exclusive jurisdiction of a court that is not an independent and impartial tribunal, pursuant to the right to an effective remedy as enshrined in Article 47

94 WAHL, Thomas – *CJEU: No Carte Blanche to Refuse EAWs from Poland*. In *Eucrime*, Issue 1, 2022, p. 34.

95 CJUE, *X and Y*, para. 83.

96 *Ivi*, para. 84.

97 On the topic see MORI, Paola – *La questione del rispetto dello Stato di diritto in Polonia e in Ungheria: recenti sviluppi*. In *Federalismi.it*, N.º 8, 2020, p. 165-210; BOGDANOWICZ, Piotr – *The Court of Justice in Defense of the Independence of the Polish Supreme Court*. In *Quaderni costituzionali*, N.º 4, 2019, p. 920-923; PAULIAT, Hélène – *Abaissement de l'âge de la retraite des magistrats: une atteinte à l'indépendance de la justice reconnue en Pologne*. In *La Semaine Juridique – édition générale*, N.º 29, 2019, p. 1424-1428; BOGDANOWICZ, Piotr and TABOROWSKI, Maciej – *How to save a supreme court in a rule of law crisis: the Polish experience*. In *European Constitutional Law Review*, Vol. 16, Issue 2, 2020, p. 306-327; CAPPUCCIO, Laura – *Stato diritto e difesa dell'indipendenza della magistratura in una recente pronuncia della Corte di giustizia*. In *Quaderni costituzionali*, N.º 2, 2019, p. 470-472; CURTI GIALDINO, Carlo – *La Commissione europea dinanzi alla crisi costituzionale polacca*. In *Federalismi.it*, N.º 12, 2016, p. 1-26.

98 The *Ustawa z dnia 20 grudnia 2019 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw* (Act of 20 December 2019 amending the Act – Law on the Common Courts Organization, the Act on the Supreme Court and certain other acts), entry into force on 14th February 2020.

99 BÁRD, Petra – *In courts we trust*, p. 199.

GALILEU · e-ISSN 2184-1845 · Volume XXIV · Issue Fascículo 1-2 · 1st January Janeiro – 31st December Dezembro 2023 · pp. 17-38

of the EU Charter, and, in the present case, in the framework of the right to equal treatment in employment and occupation enshrined in Article 9(1) of Directive 2000/78/CE[100].

In this ruling, the Court developed an *independence test*, consisting of a list of the elements that the referring court must evaluate in order to determine whether or not the concerned body has the characteristics to be considered a court or tribunal under Union law, and therefore whether it meets the necessary requirements of independence and impartiality. In particular, the elements above are: 1. the objective circumstances in which the concerned body was formed; 2. its peculiar characteristics; 3. the way in which its members have been appointed is likely to generate legitimate doubts; 4. its imperviousness to external factors; including any kind of interference by the executive and legislative powers; 5. the neutrality of the body with respect to the interests before it[101].

With regard to this last element, embodied in the principle of impartiality, the CJEU clarified that what is at stake is the trust that judges must inspire in individuals, and firstly in the parties to the proceedings. This is crucial for the functioning of a democratic society, and in building this trust even appearances may be of a certain importance[102].

The Court's approach to this case has not been exempt from criticism by those who consider it to be at least an incomplete instrument as it does not include, for instance, *an established by law test*[103]. Nevertheless, that approach has the merit of adding another piece to the interpretation of the European Union autonomous concept of independence and impartiality of the judiciary and of possibly avoiding a proliferation of requests for preliminary rulings on the status of various judicial bodies in the Member States.

Although the Court refrained from judging the independence and impartiality of a Polish judicial body on its merits, as previously affirmed, the factual application of the

100 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16-22

101 CJEU, *A.K. and others*, para. 171. For a comment see: LE LOUP, Mathieu – *An uncertain first step in the field of judicial self-government. ECJ 19 November 2019, joined cases C-585/15, C-624/18 and C-625/18, A.K., CP and DO*. In *European Constitutional Law Review*, N.º 1, 2020, p. 145-169; KRAJEWSKI, Michal and ZIÓŁKOWSKI, Michał – *EU judicial independence decentralized: A.K.*. In *Common Market Law Review*, N.º 4, 2020, p. 1107-1138. (ES)

102 See CJUE, *A.K. and others*, para. 128. Outside the Polish context, the Court of Justice in the Wagenknecht judgment had occasion to reaffirm that «there are two aspects to the requirement of impartiality, guaranteed in Article 47 of the Charter. First, the members of the court or tribunal must themselves be subjectively impartial, that is, none of its members may show bias or personal prejudice, there being a presumption of personal impartiality in the absence of evidence to the contrary. Secondly, the court or tribunal must be objectively impartial, that is to say, it must offer guarantees sufficient to exclude any legitimate doubt in this respect». CJEU, judgment of 24th March 2022, Case C-130/21 P, *Wagenknecht v. Commission*, 2022 ECLI:EU:C:2022:226, para. 16. See also CJEU, judgment of 4 December 2019, case C-413/18 P, *H v. Council*, ECLI:EU:C:2019:1044, paragraph 55; CJEU, judgement of 1st July 2008, Joined cases C-341/06 P and C-342/06 P, *Chronopost and La Poste/UFEX*, ECLI:EU:C:2008:375, para. 54.

103 FILIPEK, Paweł – *Only a Court Established by Law Can Be an Independent Court: The ECJ's Independence Test as an Incomplete Tool to Assess the Lawfulness of Domestic Courts*. In *Verfassungsblog*, 2020.

independence test developed in *A.K.* was scuttled when the "muzzle law" entered into force. Indeed, Polish courts were forced to choose between disapplying the national law facing the consequences of a disciplinary procedure or violating EU law[104].

It is worth mentioning that the "muzzle law" is currently under scrutiny by the Court of Justice in an infringement procedure started by the Commission against Poland. Following this procedure, the Advocate General Collins, in his Opinion, proposes, *inter alia*, the Court to rule that the domestic provisions which are the object of the action are liable to affect the competence of the Polish courts to monitor compliance with the requirements concerning an independent and impartial judge, established by law, in violation of the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the EU Charter[105].

Furthermore, the AG suggested that Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU by conferring the jurisdiction to rule on cases directly affecting the status and performance of judges and trainee judges on the Disciplinary Chamber, as the latter does not meet the necessary requirements of independence and impartiality[106].

6. Concluding remarks

Since *ASJP*, the interpretative evolution of the notions of judicial independence and effective judicial protection has raised questions regarding whether the CJEU is operating a reconfiguration of the EU constitutional order[107].

The authority and legitimacy of courts in the division of powers come from two principal sources: their independence and impartiality and the quality of their reasoning. Whether domestic courts have operated, as Lenaerts noted, as the "gatekeepers" of the rule of law within the EU[108], the current retrogression of the guarantees of the rule of law should not be underestimated. Indeed, due to the interconnection of the EU legal system, the weakness of the legal protection in any Member State involves the whole European

104 Questo ha creato una diffusa situazione di incertezza con ampie conseguenze sul sistema giudiziario polacco. See ANGELI, Arianna – *Il principio di indipendenza e imparzialità degli organi del potere giudiziario nelle recenti evoluzioni della giurisprudenza europea e polacca*. In *Federalismi.it*, N.º 4, 2021, particularly p. 10-14.

105 Opinion of Advocate General Collins delivered on 15th December 2022, Case C-204/21, *Commission v. Poland (Indépendance et vie privée des juges)*, ECLI:EU:C:2022:991, para. 147.

106 *Ivi*, para. 213.

107 OVÁDEK, Michal – *Has the CJEU.*

108 LENAERTS, Koen – *New Horizons for the Rule of Law Within the EU*. In *German Law Journal*, Vol. 21, Special Issue 1, 2020, p. 31.

GALILEU · e-ISSN 2184-1845 · Volume XXIV · Issue Fascículo 1-2 · 1st January Janeiro – 31st December Dezembro 2023 · pp. 17-38

Union. Safjan expressed it best when he stated that the «collapse of the rule of law in any Member State is tantamount to a rupture in the legal space of the European Union»[109].

The jurisprudence of the Court of Justice analysed so far has been clearly guided by the common values enshrined in Article 2 TEU, which, as affirmed by the Court in Opinion 2/13, are shared among all Member States and on which mutual trust between them is based[110]. Nevertheless, the jurisprudence of the Court of Justice alone cannot suffice in protecting the rule of law, of which judicial independence is an essential component. The European institutions, such as the Commission, the Council and the European Parliament, must necessarily work in unison using all the political and jurisdictional instruments at their disposal.

With respect to the issues discussed above, it should also be noted that in the area of EU judicial cooperation in criminal matters, with a very (perhaps too much) respectful attitude towards the institutional architecture of the Union, the CJEU's jurisprudence has not credited the hypothesis of a *de facto* suspension of the application of European Arrest Warrant surrender procedures in a background characterized by systemic deficiencies in judiciary independence. The CJEU has therefore decided (at this time) not to try to vicariously lambaste the impasse of the procedures undertaken under Article 7 TEU.

Furthermore, one may wonder whether the efforts undertaken by the Court in order to protect national judges from political scrutiny, including the interim measures taken in the framework of the infringement proceedings opened against Poland[111], can have a positive outcome, in a degenerate situation, such as that in Poland, which can be framed as a *legal black hole*, with respect to which it might be more appropriate to speak of a rule of law *breakdown* instead of a rule of law *backsliding*[112]. A small step forward was taken by Poland with the abolition of the Disciplinary Chamber by amending the law on the Supreme Court, which took effect on 15 July 2022[113]. However, doubts remain about the independence of the Chamber of Professional Responsibility, the body replacing the

109 SAFJAN, Marek – *The Rule of Law and the Future of Europe*. In *Il Diritto dell'Unione europea*, N.º 3, 2019, p. 432.

110 CJUE, Opinion 2/13, para. 168.

111 Order of the Vice-President of the Court, 27 October 2021, case C-204/21, *Commission v. Poland (Indépendance et vie privée des juges)*, ECLI:EU:C:2021:878; Order of the Vice-President of the Court, 6 October 2021, case C-204/21, *Commission v. Poland (Indépendance et vie privée des juges)*, ECLI:EU:C:2021:834; Order of the Vice-President of the Court, 14 July 2021, case C-204/21, *Commission v. Poland (Indépendance et vie privée des juges)*, ECLI:EU:C:2021:593; Order of the Court, Grand Chamber, 8 April 2020, case C-791/19, *Commission v Poland (Régime disciplinaire des juges)*, ECLI:EU:C:2020:277; Order of the Court, Grand Chamber, 17 December 2018, text rectified by order of 2 July 2019, case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2018:1021; Order of the Vice-President of the Court, 19 October 2018, case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI: EU:C:2018:852.

112 PECH, Laurent – *7 Years Later: Poland as a Legal Black Hole*. In *Verfassungsblog*, 2023.

113 As part of the strategy to release the more than 35 billion euros from the recovery fund frozen by the Commission in connection with the failure to meet commitments to protect the rule of law, and also to bring to

GALILEU · e-ISSN 2184-1845 · Volume XXIV · Issue Fascículo 1-2 · 1st January Janeiro – 31st December Dezembro 2023 · pp. 17-38

Disciplinary Chamber. These doubts mainly concern the system of judges' appointment, still under an important political influence; the failure to remove the Chamber's authority power to discipline judges who inquire about the independence of another judge following a request from the parties in a litigation; and the lack of an effective mechanism to reinstate judges who were previously suspended[114].

In conclusion, a profound evolution of the principle of independence of the judiciary emerges in case law, albeit with some limits, through the establishment of new standards and methodologies for their verification in the jurisprudence of the Court of Justice, which are binding to all Member States. This evolutive interpretation was mainly made possible by the previously underused potential of the joint application of Articles 2 TEU, 19(1) TEU and 47 of the EU Charter, which concretized the value of the rule of law by linking it to the operation of the principle of the effective judicial protection and the right to a fair trial, specifically the principle of judicial independence. In addition, these developments have contributed to further improving and defining the very nature of the judicial dialogue between the Court of Justice and the domestic courts, conceived as part of a single and autonomous system of judicial protection, at least when their relationship is not compromised by a specific opposite political will. The jurisdictional development of the principle of independence of the judiciary thus remains deeply anchored to the prerogatives of the European Union, with the Court's interpretive action falling within the limits imposed by the Treaties.

an end the daily penalty payment in an amount of 1 million being ordered by the European Court of Justice with the interim measure with the order of the Vice-President of the Court of 27th October 2021.

114 BLUETT, Kristie, CAMERON, Jasmine D. and CULLINANE, Scott – *Poland's Judicial Reform Falls Short of EU Expectations, Complicating Cooperation Against Russia*. In *Just Security*, 3 October 2022.