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CASE LAW

A. Court of Justice

The conflict over the Polish disciplinary regime for judges – an acid test for judicial independence, Union values and the primacy of EU law: *Commission* v. *Poland*

Case C-791/19, *Commission* v. *Poland (Régime disciplinaire des juges)*, Judgment of the Court of Justice (Grand Chamber) of 15 July 2021, EU:C:2021:596; Case C-204/21 R, *Commission* v. *Poland*, Order of the Vice-President of the Court of 14 July 2021, EU:C:2021:593; Case C-204/21 R, *Commission* v. *Poland*, Order of the Vice-President of the Court of 27 October 2021, EU:C:2021:878

1. Introduction

Confronted with the overhaul of the Polish judiciary, the Court of Justice has continuously stepped up its efforts to counter violations of judicial independence, the rule of law and the Union's common values in the Member States. Starting point for this development was the Court's judgment in *Associação Sindical dos Juízes Portugueses* (*ASJP*), which activated the hitherto untapped potential of Article 19(1)(2) and Article 2 TEU. Since then, the case law has evolved at breakneck speed.[1] In this spirit, Marek Safjan noted: "Never before in the history of the ECJ has there been such an intense concentration of case law, in such a short period of time".[2] While this jurisprudential edifice is still growing, the recent case law suggests a twofold shift. On the doctrinal level, the Court seems to have entered a new phase of refinement.[3] After laying the groundwork, it now engages in the legal "nitty gritty" by fleshing out the respective standards and crafting operational tests.

1. A comprehensive mapping of the Court's rule of law-related case law can be found in Kochenov and Pech, *Respect for the Rule of Law in the Case Law of the European Court of Justice* (SIEPS, 2021). Assessing the value-related case law, see Rossi, "La valeur juridique des valeurs", 56 RTDE (2020), 639.
2. Safjan, "Prawo do skutecznej ochrony sądowej", (2020/5) *Palestra*, 5, 25 (author's translation).
3. Bobek, "The second and the third waves of the rule of law cases in the Court of Justice: Looking at the small print", Keynote Speech at the Conference "The rule of law in the EU" (Florence, 10–11 June 2021).

On the level of enforcement, the Polish Government has chosen the path of open confrontation and challenged the ECJ's intervention with all tools at its disposal, including the captured Constitutional Tribunal.

The conflict over the Polish disciplinary regime for judges, the subject of this case note, is at the very heart of these two strands. It involves a multiplicity of actors, whose independence is often hard to discern, and gave rise to a multiplicity of procedures, measures and reactions in Warsaw, Brussels, Luxembourg, and Strasbourg. The following case note attempts to bring some order to this "flurry of judicial activity".[4] It will start by sketching the background of the conflict, and tracing the back and forth between the ECJ and the Polish Government (section 2). It will then focus on the decisions rendered so far in the two infringement proceedings in Case C-791/19 and Case C-204/21 (section 3). These decisions will be analysed from two perspectives. Zooming in, the ECJ seems to have rationalized its proliferating case law on judicial independence, the rule of law and EU values while giving its decisions much more bite (section 4.1). Zooming out, the case note will place these decisions in the wider context of the Union's struggle to uphold its values and safeguard the primacy of EU law (section 4.2). After providing a brief account of the recent challenges to the ECJ's case law by the Polish Constitutional Tribunal, the last section will dispel two myths concerning the judicial enforcement of EU values raised by that captured body. Finally, it will explore how the Commission and the Court could respond to such contestations.

2. Background: The conflict over the Polish disciplinary regime for judges

The new disciplinary regime was established in 2017 and plays a crucial role in shielding the overhaul of the Polish judiciary from internal resistance and external intervention.[5] First, this regime is designed as a repressive tool and intended to exert a chilling effect on the judiciary: suffice to mention the numerous investigations initiated against politically inconvenient judges, including those requesting preliminary rulings from the ECJ to support their

4. For a recent overview, see Editorial Comments, "Clear and present danger: Poland, the rule of law & primacy", 58 CML Rev. (2021), 1635.

5. For some early criticism, see Venice Commission, Opinion No. 904/2017, paras. 35 et seq.; COM(2017)835 final, Reasoned Proposal in Accordance with Art. 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland, paras. 133 et seq. In depth, Sadurski, *Poland's Constitutional Breakdown* (OUP, 2019), pp. 96 et seq.

independence.[6] Second, the newly established Disciplinary Chamber at the Supreme Court has become a central device in the Government's attempt to capture this institution. To recall, the Government forced many Supreme Court judges into early retirement.[7] By restructuring the composition of the National Council of the Judiciary (*Krajowa Rada Sądownictwa*, KRS), which nominates individuals for judicial appointments, it assured that the emerging vacancies would be filled with loyal judges.[8] At the same time, the Disciplinary Chamber has been conferred jurisdiction not only over disciplinary proceedings, but also over matters pertaining to the retirement of Supreme Court judges. As this new chamber has been packed with judges loyal to the Government, effective judicial review of these measures has been effectively precluded. In sum, the Polish Government aimed at creating a *closed system* by hijacking both the appointment processes and judicial remedies.

In two parallel proceedings, this disciplinary regime reached the Court of Justice. The Supreme Court's Labour and Social Insurance Chamber made a first move by asking the ECJ whether the Disciplinary Chamber meets the requirements of judicial independence under Articles 19(1)(2) TEU and 47 of the Charter (Joined Cases C-585, 624 & 625/18, *A.K.*). The Commission followed, and launched an infringement procedure asserting the incompatibility of the disciplinary regime's institutional and substantive facets with these requirements (Case C-791/19, *Commission* v. *Poland*). On 19 November 2019, the ECJ delivered its preliminary ruling in *A.K.*, which developed a set of criteria for determining judicial independence.[9] Though leaving the specific assessment to the referring court, the ECJ raised its concerns regarding the independence of the KRS and thus – by extension – of the nominated judges at the Disciplinary Chamber.[10] In implementing this ruling, the referring court found that neither the KRS nor the Disciplinary Chamber meet the requirements set out in *A.K.*[11] This finding was reiterated

6. See the country chapters on Poland in the Commission's 2021 Rule of Law Report (SWD(2021)722 final, pp. 9 et seq.) and 2020 Rule of Law Report (SWD(2020)320 final, pp. 7 et seq.).

7. The ECJ found these measures to violate EU law in Case C-619/18, *Commission* v. *Poland (Independence of the Supreme Court)*, EU:C:2019:531.

8. Most members formerly appointed by the judiciary are now appointed by legislative and executive authorities. These changes were upheld by the Polish Constitutional Tribunal, see judgment of 25 March 2019, K 12/18.

9. Joined Cases C-585, 624 & 625/18, *A.K. and others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982.

10. Joined Cases C-585, 624 & 625/18, *A.K.*, paras. 138–145.

11. Supreme Court, judgment of 5 Dec. 2019, Ref. No. III PO 7/18, paras. 67–68. See also Orders of 15 Jan. 2020, Ref. Nos. III PO 8/18 and III PO 9/18.

by the Supreme Court's Civil, Criminal and Labour Chambers in a joint resolution.[12]

The Polish Government reacted promptly. Together with the Sejm initiated proceedings against the joint resolution before the captured Constitutional Tribunal. Unsurprisingly, the Tribunal fulfilled the Government's expectations by declaring the said resolution unconstitutional.[13] Further, the Government stepped up the pressure by adopting a new so-called "muzzle law" on 20 December 2019.[14] This law was specifically designed to prevent Polish judges from implementing the judgment in *A.K.* and to shield the Disciplinary Chamber from any kind of contestation. In particular, the new law established the exclusive jurisdiction of the Supreme Court's Extraordinary Review and Public Affairs Chamber to hear cases concerning judicial independence. Moreover, it contained a prohibition for judges to review the independence of their peers and allowed the initiation of disciplinary measures for "acts calling into question" judicial appointments.[15] Very similar provisions were included in the laws relating to ordinary and administrative courts.[16] Again, the Commission initiated infringement proceedings against Poland and eventually referred the case to the ECJ (*Commission* v. *Poland*, Case C-204/21).

3. Cases C-791/19 and C-204/21 before the Court of Justice

In sum, the Polish disciplinary regime has been the subject of three parallel cases before the Court of Justice – one preliminary ruling in *A.K.* and two infringement proceedings.[17] The latter two will be at the heart of the following discussion. Taken together, the Court's decisions leave no room for any further

12. Supreme Court, Resolution of 23 Jan. 2020, Ref. No. BSA I-4110-1/20. In detail, see Krajewski and Ziólkowski, "EU judicial independence decentralized: *A.K.*", 57 CML Rev. (2020), 1107, 1129 et seq.

13. See Polish Constitutional Tribunal, judgment of 20 April 2020, U 2/20 and judgment of 21 April 2020, Kpt. 1/20.

14. For the immediate international criticism, see only Venice Commission, Urgent Joint Opinion, CDL-PI(2020)002-e (16 Jan. 2020); ODHIR, Urgent Interim Opinion, JUD-POL/365/2019 [AlC] (14 Jan. 2020).

15. See Arts. 26, 29 and 72(1) No. 3 of the Law on the Supreme Court. For an unofficial translation, see annex to Venice Commission, Opinion No. 977/2020.

16. Art. 42a(1) and (2) as well as Art. 107(1) Nos. 2 and 3 of the Law relating to the organization of the ordinary courts. For an unofficial translation, see annex to Venice Commission, Opinion No. 977/2020. See also Art. 5(1a) and (1b) as well as Art. 29(1) and Art. 49(1) of the Law relating to the organization of the administrative courts.

17. For an overview of the different steps, see the annex to this annotation.

operation of the current Polish disciplinary regime.[18] The first infringement procedure kicked off with an interim order of 8 April 2020 that instructed Poland to suspend the provisions conferring jurisdiction over disciplinary cases on the Disciplinary Chamber, and to refrain from referring these cases to any other panel that does not meet the EU requirements of judicial independence.[19] As such, this order set the tone for the subsequent Opinion of Advocate General Tanchev and the ECJ's final ruling.

3.1. *Case C-791/19*

3.1.1. *Opinion of Advocate General Tanchev*

In his Opinion of 6 May 2021, the Advocate General found that the disciplinary regime complies neither with the requirements of judicial independence under Article 19(1)(2) TEU nor with the preliminary reference procedure under Article 267 TFEU. Since the ECJ followed Tanchev's assessment of the Polish measures, this contribution will discuss his Opinion only insofar as it goes beyond the Court's reasoning. This concerns especially the complex relationship between the different manifestations of judicial independence in EU law, namely Article 19(1)(2) TEU, Articles 47 and 48 CFR and – as a precondition for a body to be considered a "court of tribunal" – in Article 267 TFEU. Indeed, the Court has tiptoed around this issue since its seminal judgment in *ASJP*.

In previous Opinions, Advocate General Tanchev had developed what might be called the *separation thesis*. Though acknowledging a "constitutional passerelle" and inevitable intersections in terms of sources and content between Articles 19(1)(2) TEU and 47 CFR,[20] he suggested a division of labour. Whereas Article 19(1)(2) TEU addresses a "structural infirmity" in the Member States, Article 47 CFR covers "individual or particularized incidences".[21] This conception was later taken up and refined by Advocate General Bobek. Due to the very different purposes of these provisions, the ECJ should apply different intensities of review.[22] While Articles 2 and 19(1)(2) TEU concern infringements of a systemic nature, which require the

18. It should be added that the ECJ's findings are shared by the ECtHR; see ECtHR, *Reczkowicz* v. *Poland*, Appl. No. 43447/19, judgment of 22 July 2021.

19. Case C-791/19 R, *Commission* v. *Poland*, EU:C:2020:277. For an analysis, see Pech, "Protecting Polish judges from Poland's Disciplinary 'Star Chamber'", 58 CML Rev. (2021), 137.

20. See e.g. his Opinion in Case C-192/18, *Commission* v. *Poland (Independence of ordinary courts)*, EU:C:2019:529, para 97.

21. Ibid., paras. 115–116.

22. A.G. Bobek, Opinion in Joined Cases C-748–754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim*, EU:C:2021:403, paras. 162–166. See also his Opinions in Joined Cases C-83,

Court to go beyond the individual file and consider the broader institutional structure of the national judiciary, Articles 47 and 48 CFR require the violation of a fundamental right and should lead to a much more case-specific assessment. This would exclude reliance upon that provision in circumstances where questions are raised by national judges themselves.[23] Article 267 TFEU, by contrast, serves to identify national bodies that can become interlocutors of the ECJ. Accordingly, the ECJ should assess the independence of these bodies more leniently and concentrate on structural issues at a rather general level.

The ECJ, on the other hand, seems to follow a monolithic conception, which might be referred to as the *equivalence thesis*. It understands these provisions as featuring a corresponding content. Without providing a more detailed justification, the Court has consistently stated that Article 47 CFR "must be duly taken into consideration" when interpreting Article 19(1)(2) TEU and vice versa.[24] The doctrinal problem of such a parallel reading is that Article 19(1)(2) TEU has been interpreted by the Court as featuring a much broader scope of application than the Charter.[25] If the guarantees enshrined in Articles 47 and 48 CFR were read into the standards of judicial independence under Article 19(1)(2) TEU, the latter would become a sort of Trojan horse extending the Charter's relevance far beyond its original confines.[26] Despite these concerns, Advocate General Tanchev has shifted his position and embraced the equivalence thesis.[27] The present case provided a further opportunity to articulate and refine his understanding. Article 19(1)(2) TEU

127, 195, 291, 355 & 397/19, *Asociația "Forumul Judecătorilor din România"*, EU:C:2020:746, paras. 183, 213, 216–217, and Case C-132/20, *Getin Noble Bank*, EU:C:2021:557, paras. 50–51, 58–61.

23. A.G. Bobek, Opinion in Joined Cases C-748-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim*, para 168. One might object that fundamental rights can also unfold an objective dimension detached from the individual rights bearer. E.g., the ECJ can refer to Charter rights as a yardstick for the review of secondary legislation without any individual violation; see e.g. Case C-293/12, *Digital Rights Ireland*, EU:C:2014:238.

24. See e.g. Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586, paras. 35, 41, 53; Case C-619/18, *Commission* v. *Poland*, paras. 49, 54; Case C-896/19, *Repubblika*, EU:C:2021:311, para 45.

25. Case C-64/16, *ASJP*, EU:C:2018:117, para 29.

26. Opinion in Case C-192/18, *Commission* v. *Poland*, paras. 99–101. See also Rasi, "Effetti indiretti della Carta dei diritti fondamentali?", 4 *European Papers* (2019), 615, 622; Badet, "À propos de l'article 19 du Traité sur l'Union européenne, pierre angulaire de l'action de l'Union européenne pour la sauvegarde de l'État de droit", 57 CDE (2020), 57, 77–89; Torres Pérez, "Rights and powers in the European Union: Towards a Charter that is fully applicable to the Member States?", 22 CYELS (2020), 279, 296 et seq.

27. A.G. Tanchev, Opinion in Case C-824/18, *A.B. and others*, EU:C:2020:1053, paras. 90–92. See further Spieker, "'The importance of being earnest': On frank words and missed opportunities in the CJEU's *A.B.* judgment", (2021) *Quaderni Costituzionali*, 435.

should be read as *including* the rights enshrined in Article 47 and 48 CFR.[28] Hence, "Articles 47 and 48 of the Charter apply to national measures concerning disciplinary arrangements for judges that are adopted by a Member State in order to give effect to the second subparagraph of Article 19(1) TEU".[29] This also applies to the notion of judicial independence under Article 267 TFEU, which must be interpreted "in the light" of Article 19(1)(2) TEU.[30]

3.1.2. *Judgment of the Court of Justice*

With its final ruling of 15 July 2021, the ECJ followed the Advocate General's assessment by finding that the disciplinary regime does not comply with the requirements of judicial independence under Article 19(1)(2) TEU (and thus incidentally Art. 2 TEU) and with the preliminary reference procedure under Article 267 TFEU. Though similar in substance, the Court approached the Polish disciplinary regime from a different angle. Importantly, its assessment was conducted within the frame of the newly identified principle of non-regression.

Starting with the first ground, the Court began by recalling the cases concerning Portuguese, Maltese, and Romanian judges. According to these rulings, compliance with the values enshrined in Article 2 TEU is a condition for membership in the Union. A Member State cannot amend its legislation in a manner that leads to a "reduction in the protection of the value of the rule of law, a value which is given concrete expression by, *inter alia*, Article 19 TEU".[31] Since the trailblazing Portuguese Judges case, it is well-established that Article 19(1)(2) TEU requires the Member States to ensure the independence of any court that "*may* rule . . . on questions concerning the application or interpretation of EU law".[32] Considering the breadth of Union law today, this concerns practically every Member State court. To safeguard this independence, disciplinary regimes must provide guarantees preventing them from being used as a "system of political control of the content of judicial decisions".[33] This requires, *substantively*, rules that define the forms of conduct amounting to disciplinary offences, *institutionally*, the involvement of an independent body and, *procedurally*, that such disciplinary

28. A.G. Tanchev, Opinion in Case C-791/19, *Commission* v. *Poland*, EU:C:2021:366, paras. 62, 69, 72.

29. Ibid., para 72.

30. Ibid., para 70.

31. Case C-791/19, *Commission* v. *Poland*, para 51. See also Case C-896/19, *Repubblika*, paras. 63–65; Joined Cases C-83, 127, 195, 291, 355 & 397/19, *Asociația 'Forumul Judecătorilor din România' and others*, EU:C:2021:393, para 162.

32. Case C-64/16, *ASJP*, para 40 (emphasis added).

33. Case C-791/19, *Commission* v. *Poland*, para 61.

proceedings safeguard the rights enshrined in Articles 47 and 48 CFR. Ultimately, the Court concludes that the introduction of the Polish disciplinary regime constitutes "a reduction in the protection of the value of the rule of law".[34]

At the institutional level, the ECJ reviewed the Disciplinary Chamber's independence by rigorously applying the criteria set out in *A.K.* This comprises an assessment of whether the context in which that Chamber was created (1), its characteristics (2), and manner of appointment (3) "are capable of giving rise to reasonable doubts in the minds of individuals as to the imperviousness of that body to external factors, in particular, as to the direct or indirect influence of the legislature and the executive".[35] Starting with the first factor, the ECJ ascertained that this Chamber has been established "in the wider context of major reforms concerning the organization of the judiciary in Poland".[36] Assessed in this light, several of its characteristics are likely to undermine its appearance of independence. As noted previously, the Disciplinary Chamber was established as part of the new Law on the Supreme Court, which forced many Supreme Court judges into early retirement, and it received exclusive jurisdiction to hear these cases.[37] In addition, the new Chamber was packed entirely with new judges. This leads to the issue of their appointment. The Chamber's creation went hand-in-hand with a comprehensive restructuring of the KRS, the body nominating individuals for judicial appointments. According to the ECJ, such a body must itself be sufficiently independent.[38] The KRS, however, falls short of these requirements. After prematurely terminating its members' terms of office, the Polish Government reorganized the KRS's composition in its favour.[39] Importantly, these changes took place in a "context in which it was expected that numerous posts would soon be vacant within the Supreme Court".[40]

At the substantive level, the ECJ had to review the rules that define the conduct amounting to disciplinary offences. In the Court's view, judicial independence cannot justify the total exclusion of any disciplinary liability. Nevertheless, certain safeguards are required to prevent disciplinary regimes from becoming an instrument of political pressure. They must be confined to "very exceptional cases" that concern "serious and totally inexcusable forms

34. Ibid., paras. 112, 157.
35. Ibid., para 86.
36. Ibid., para 88.
37. Ibid., paras. 89 et seq., 94.
38. Ibid., para 100. See already Joined Cases C-585, 624 & 625/18, *A.K.*, para 138; Case C-824/18, *A.B. and others (Nomination des juges à la Cour suprême – Recours)*, EU:C:2021:153, para 125.
39. Case C-791/19, *Commission* v. *Poland*, paras. 104–105. See already Joined Cases C-585, 624 & 625/18, *A.K.*, para 143; Case C-824/18, *A.B.*, paras. 133–139.
40. Case C-791/19, *Commission* v. *Poland*, para 107.

of conduct".[41] Moreover, the relevant provisions that define this conduct must be clear and precise.[42] The Polish legislation, by contrast, is framed in extremely open terms. Disciplinary proceedings can be initiated for any "obvious violation of the law".[43] Even if these offences have been interpreted restrictively in the Supreme Court's previous case law, the ECJ rightly ascertained that this might change with the new Disciplinary Chamber.[44] Its lack of independence further increases the risks of changes that would permit abuses of these provisions.[45]

At the procedural level, Article 19(1)(2) TEU requires that disciplinary proceedings against judges fully guarantee the rights enshrined in Articles 47 and 48 CFR.[46] While the ECJ's yardstick remains Article 19(1)(2) TEU, it nonetheless seems to apply Articles 47 and 48 CFR as well.[47] Unlike the Advocate General, however, the Court glosses over the complex relationship among these provisions. In this context, the ECJ assessed *inter alia* the Chamber President's discretion to designate the disciplinary tribunal adjudicating a case. As this discretion could be used to withdraw cases from certain judges or to put pressure on the designated ones, it is incompatible with the right to be tried by a tribunal established by law under Article 47 CFR.[48] In this context, the ECJ also asserted a violation of the right to be heard within a reasonable time. The Polish disciplinary regime allows the Minister of Justice to re-appoint a disciplinary officer even though the respective case has been closed by a final ruling. Judges could be subject to repeated investigations in the same case and thus "permanently remain under the potential threat of such investigations".[49]

The second ground raised by the Commission pertained to a violation of Article 267(2) and (3) TFEU, as references for preliminary rulings may be subject to disciplinary proceedings. The ECJ recalled that national law cannot prevent a court from referring to the ECJ. This covers any rule "the effect of which" may be that a court refrains from requesting a preliminary ruling.[50] Therefore, a national law that exposes judges to disciplinary proceedings because they exercised their right or obligation to refer cannot be permitted.

41. Ibid., para 137.
42. Ibid., paras. 139–140.
43. See Art. 97(1) of the new Law on the Supreme Court ("obvious violation of the law") and Art. 107(1) of the Law relating to the organization of the ordinary courts ("obvious and gross violations of the law").
44. Case C-791/19, *Commission* v. *Poland*, paras. 143, 145.
45. Ibid., paras. 147–148.
46. Ibid., para 164.
47. Ibid., paras. 192–193.
48. Ibid., para 173.
49. Ibid., para 197.
50. Ibid., paras. 225–226.

The "mere prospect" of being subject to such proceedings is likely to exert a deterrent effect and undermine the effectiveness of this procedure.[51]

3.2. *Case C-204/21*

Despite the judgment in *A.K.*, its implementation by most Supreme Court Chambers, and the Order in Case C-791/19, the Disciplinary Chamber continued – in fact, still continues! – its activity.[52] The Polish Government for its part used all judicial and legislative tools at its disposal to shield it from the ECJ's rulings. First, it started to instrumentalize the captured Constitutional Tribunal to limit the effects of the ECJ's interventions in the Polish legal order (see below section 4.2.1). Second, it adopted the so-called "muzzle law". To recall briefly: this law specifically targets the domestic implementation of the *A.K.* judgment. It seeks to prevent judges from reviewing the independence of other courts and confers exclusive jurisdiction over such cases to the Supreme Court's newly established Extraordinary Control and Public Affairs Chamber. It should be stressed that even this Chamber is prevented from examining the legality of judicial appointments. Moreover, examining the independence of other judges, including their appointment, was qualified as a disciplinary offence.

On 1 April 2021, the Commission brought these measures before the ECJ and immediately requested interim measures. The Court responded with an interim order of 14 July 2021.[53] To start with, the ECJ instructed Poland to suspend those provisions that confer jurisdiction on the Disciplinary Chamber.[54] In particular, it dispelled any doubts pertaining to the scope of its Order in Case C-791/19 by clarifying that the Disciplinary Chamber's *entire* activity must be put on hold. That Order mentioned only a suspension of the Chamber's jurisdiction in "disciplinary cases", which allowed an extremely narrow, abusive implementation. In this spirit, the Disciplinary Chamber had interpreted the Order as not covering proceedings concerning the waiving of judicial immunity, due to their allegedly criminal and not disciplinary nature.[55] The ECJ now unequivocally required Poland to suspend the provisions establishing the Disciplinary Chamber's jurisdiction in cases relating not only to the initiation of criminal procedures against judges but

51. Ibid., paras. 227, 229, 233.

52. For regular updates, see the website of the Polish Judges' Association *Iustitia*, <www.iustitia.pl/en/disciplinary-proceedings> (all websites last visited 21 Feb. 2022). See further the Polish country chapter in the Commission's 2021 Rule of Law Report cited *supra* note 6, pp. 9 et seq.

53. Order of 14 July 2021, Case C-204/21 R, *Commission* v. *Poland.*

54. Ibid., paras. 79–153.

55. In detail, see Pech, op. cit. *supra* note 19, 155 et seq.

also to the status, employment, or social security of Supreme Court judges. Thus, there is no room left for *any* activity of that Chamber.

Secondly, the ECJ ordered Poland to suspend several provisions introduced with the "muzzle law" insofar as they prohibit courts from verifying compliance with EU requirements of judicial independence.[56] The Court noted that EU law contains a twofold obligation for national courts, namely to review doubts concerning their own composition (flowing from *Review Simpson*) and, depending on the procedural context, also the judicial independence of their peers (flowing from *A.K.*).[57] It further added that national courts have a duty to apply directly applicable EU law in full and to disapply contrary national law. Any prohibition on national courts reviewing the EU requirements of judicial independence is therefore in breach of the principle of primacy.[58] It should come as no surprise that this applies – *maiore ad minus* – also to provisions which allow the disciplinary liability of judges to be incurred for examining compliance with those requirements.[59] Finally, Poland must suspend the provisions that establish the exclusive jurisdiction of the Supreme Court's Extraordinary Control and Public Affairs Chamber for complaints alleging a lack of judicial independence.[60] This is an important addition to the existing case law. Yet, the ECJ dedicates merely one short paragraph to the elephant in the room, namely whether this Chamber complies with the EU requirements of judicial independence.[61] It simply articulates its doubts regarding the appointment processes, which involve the KRS – whose lack of independence from the political branches is by now well-established.[62]

Again, the Polish Government did not comply with these orders. The Commission lodged an application requesting the ECJ to order a daily penalty payment. The Court granted that request, imposing a daily penalty payment of EUR 1 million until Poland complies with the former interim order or until the procedure is closed.[63] It justified this unprecedented amount by the serious

56. Order of 14 July 2021, Case C-204/21 R, *Commission* v. *Poland*, paras. 154–192.

57. Ibid., paras. 163–167 and 168–170, citing *Review Simpson* v. *Council* and *HG* v. *Commission* (Joined cases C-542/18 RX-II & C-543/18 RX-II, EU:C:2020:232), and Joined Cases C-585, 624 & 625/18, *A.K.*

58. Ibid., para 174.

59. Ibid., paras. 219–255.

60. Ibid., paras. 193–218.

61. The appointment procedures were subject to the preliminary ruling in *W.Z.*, where the Court indicated their non-compliance with EU law; see Case C-487/19, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, EU:C:2021:798, paras. 138–152. Finding a violation of Art. 6 ECHR, see also ECtHR, *Dolińska-Ficek and Ozimek* v. *Poland*, Appl. Nos. 49868/19 & 57511/19, judgment of 8 Nov. 2021; *Advance Pharma sp. z o.o v. Poland*, Appl. No. 1469/20, judgment of 3 Feb. 2022.

62. Order of 14 July 2021, Case C-204/21 R, *Commission* v. *Poland*, para 210.

63. Order of 27 Oct. 2021, Case C-204/21 R, *Commission* v. *Poland*.

and irreparable harm posed by the Polish disciplinary regime for "the values, set out in Article 2 TEU, on which that Union is founded".[64] The gravity of these threats is emphasized by the determination with which the Court rejected any mitigating circumstances on the part of the Polish Government. Its vague "intention to adopt, within a year, a series of measures intended to reform the Polish judicial system" was considered insufficient to eliminate the current danger for the Union's common values.[65]

4. Comment

The following sections will analyse the judicial conflict over the Polish disciplinary regime on two levels. Zooming in, the respective decisions constitute further pieces in the ECJ's growing jurisprudential edifice on the protection of judicial independence, the rule of law and the Union's common values in the Member States (section 4.1). From a substantive perspective, Case C-791/19 seems to synthesize the proliferating case law into a coherent whole. From a procedural perspective, Case C-204/21 has developed ECJ decisions into an instrument with much bite. Zooming out, the recent challenges to this case law by the Polish Constitutional Tribunal gave rise to fundamental questions concerning the judicial enforcement of Article 2 TEU values and the primacy of EU law (section 4.2). After providing a brief account of these acts of contestation, the second section will debunk some misconceptions that lie at the heart of the Tribunal's decisions and tentatively explore possible responses by the Court of Justice.

4.1. *Zooming in: Developing the Court's case law on judicial independence, the rule of law and EU values*

4.1.1. *Substance: Appearance and regression*

From a substantive perspective, Case C-791/19 is characterized by continuity with the existing case law and demonstrates well how its individual components interlock. The specific criteria for the assessment of judicial independence stem from *A.K.* The respective measures must be "capable of giving rise to reasonable doubts in the minds of individuals" as to a court's independence.[66] In this sense, the ECJ applies an *appearance test*.[67] The broader framework is provided by *Repubblika*, where the Court stressed that a

64. Ibid., para 58.
65. Ibid., para 63.
66. Case C-791/19, *Commission* v. *Poland*, para 86.
67. In detail, see Krajewski and Ziólkowski, op. cit. *supra* note 12, 1123 et seq.

Member State cannot "amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU".[68] Some have read this as laying down a veritable principle of non-regression.[69] At first glance, this suggests a parallel to human rights regimes, which often contain so-called non-regression clauses (e.g. Art. 53 ECHR). While these clauses usually prohibit regressions from standards of other human rights regimes, some have interpreted them as containing a "principle of non-regression" regarding the acquired standard of human rights.[70] Building on these insights, Article 53 CFR has been interpreted in a similar manner.[71] Yet, this view neither prevails in legal scholarship nor is it expressed in the ECJ's case law.[72] Accordingly, the *regression test* applied in Case C-791/19 is an innovation without precedent in the case law.[73]

Both approaches – regression and appearance test – have one central common feature. Instead of attempting a substantive harmonization of the criteria for judicial independence under Article 19(1)(2) TEU and Article 2 TEU, the ECJ merely provides a procedure for identifying violations, which allows different systems to coexist. The appearance test requires an "overall analysis"[74] of the measures under review, which takes into consideration their "wider context".[75] At the same time, the regression test is essentially neutral

68. Case C-896/19, *Repubblika*, para 63. See also Case C-791/19, *Commission* v. *Poland*, para 51.

69. Leloup, Kochenov and Dimitrovs, "Opening the door to solving the 'Copenhagen dilemma'? All eyes on *Repubblika v Il-Prim Ministru*", 46 EL Rev. (2021), 692; Canzian, "Indipendenza dei giudici e divieto di regressione della tutela nella sentenza Repubblika", (2021) *Quaderni Costituzionali*, 715.

70. Dissenting Opinion of Judge Casadevall in ECtHR, *Gorou* v. *Greece No. 2*, Appl. No. 12686/03, judgment of 29 March 2009.

71. See e.g. Lenaerts, "Exploring the limits of the EU Charter of Fundamental Rights", 8 EuConst (2012), 375, 402. See also Van de Heyning, "No place like home" in Popelier, Van de Heyning and Van Nuffel (Eds.), *Human Rights Protection in the European Legal Order* (Intersentia, 2011), pp. 65, 73 et seq.; Martín y Pérez de Nanclares, "Artículo 53" in Mangas Martín (Ed.), *Carta de los Derechos Fundamentales de la Unión Europea* (BBVA, 2008) pp. 852, 856 et seq.

72. See e.g. Lock, "Article 53 CFR" in Kellerbauer, Klamert and Tomkin (Eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP, 2019), para 2. See also Pache, "Art. 53 GRC" in Pechstein, Nowak and Häde (Eds.), *Frankfurter Kommentar zu EUV, GRC und AEUV, Vol. I* (Mohr Siebeck, 2017), para 16; Cariat, "Article 53 – Niveau de protection" in Picod, Rizcallah and Van Drooghenbroeck (Eds.), *Charte des droits fondamentaux de l'Union européenne*, 2nd ed. (Larcier, 2020), pp. 1321, 1328.

73. See also Mader, "Wege aus der Rechtsstaatsmisere: Der neue EU-Verfassungsgrundsatz des Rückschrittsverbots und seine Bedeutung für die Wertedurchsetzung", 32 EuZW (2021), 917, 922.

74. Case C-791/19, *Commission* v. *Poland*, para 110.

75. Ibid., paras. 88, 107.

with regard to substantive standards, such as judicial appointment processes. Instead, it concerns only a significant regression from pre-existing national standards. Following these approaches, the Court avoids providing a full-blown account of the requirements for judicial independence, and eventually the values enshrined in Article 2 TEU. Rather than establishing positive standards on a jurisprudential meta-level,[76] the Court employs a contextualized case-by-case reasoning.[77] This mirrors the ECtHR's case law on judicial independence under Article 6(1) ECHR. Due to the variety of systems for judicial appointments across Europe, the Convention does not impose any "theoretical constitutional concepts" of separation of powers. Instead, "[t]he question is always whether, in a given case, the requirements of the Convention are met".[78] The ECJ already referred to this line of cases in *A.K.*[79]

Certainly, these tests leave many open questions. Even though the judgment in Case C-791/19 seems to render the regression test operational in infringement proceedings, it remains extremely fuzzy. To start with, one may wonder about the *temporal point of reference* for this exercise. Regression from what date? The accession? At least for the founding Member States, this would hardly be feasible. Which date then? The entry into force of the Treaty of Amsterdam, which established the Member States' obligation to adhere to the principles of democracy, fundamental rights and the rule of law in its Article 6(1) TEU? Second, it is unclear whether this test captures – as the case law suggests – "any regression"[80] or only measures that cross a certain threshold of severity. In this context, it should be recalled that the values enshrined in Article 2 TEU constitute the *substantive point of reference* for the regression test. This alone indicates a certain level of severity. Due to their far-reaching scope, the values in Article 2 TEU must be interpreted restrictively.[81] For instance, the value of "respect for human rights" should be

76. On such meta-standards, see Wendel, "Auf dem Weg zum Präjudizienrecht?", 68 *Jahrbuch des öffentlichen Rechts* (2020), 113.

77. Proposing such a contextualized approach, see Waelbroeck and Oliver, "La crise de l'état de droit dans l'Union européenne: Que faire?", 26 CDE (2017), 299, 336; von Bogdandy, "Principles of a systemic deficiencies doctrine", 57 CML Rev. (2020), 705, 734 et seq.

78. ECtHR, *Ástráðsson* v. *Iceland*, Appl. No. 26374/18, judgment of 1 Dec. 2020, paras. 207, 215.

79. Joined Cases C-585, 624 & 625/18, *A.K.*, para 130.

80. Case C-896/19, *Repubblika*, para 64; Case C-791/19, *Commission* v. *Poland*, para 51.

81. In this sense, see Spielmann, "The rule of law principle in the jurisprudence of the Court of Justice of the European Union" in Elósegui, Miron and Motoc (Eds.) *The Rule of Law in Europe* (Springer, 2021), pp. 3, 19.

read as covering only the very essence of a Charter right.[82] As such, the regression test would necessarily be operated in form of a two-stage assessment. First, the ECJ would be required to assess whether an Article 2 TEU value is concerned generally (e.g. are issues concerned that fall in the ambit of a Charter right's essence?). Second, it would review whether there is a regression in this respect.

Similar questions arise regarding the appearance test. What are "reasonable doubts"? Reasonable for whom? Without going into detail, there are several possible points of reference. On the one hand, the ECJ could develop an autonomous EU standard of reasonableness.[83] On the other hand, it could resort to the collective evaluation of several institutions, such as the European Commission, the Council of Europe (i.e. ECtHR and Venice Commission) and national courts, such as the Polish Supreme Court.[84] The more institutions perceive a deficit, the more reasonable the doubts. Finally, one could object that the appearance test remains extremely thin, thus leaving national courts – especially in preliminary rulings – without much guidance. This can prove detrimental considering the domestic pressure these courts are facing.[85] However, this objection concerns less the appearance test as such, but rather the degree of deference applied by the Court. This degree can vary to a considerable extent.[86] Accordingly, it is not excluded that the ECJ decides the question of whether a national body, such as the Disciplinary Chamber, features the necessary appearance of independence. The judgment in Case C-791/19 testifies to that.

Despite these concerns, the Court's approach has three key advantages. On a normative level, it mitigates the effects of the ECJ's case law on the Member States' autonomy and preserves a certain level of constitutional pluralism

82. See e.g. von Bogdandy and Spieker, "Protecting fundamental rights beyond the Charter" in Bobek and Adams-Prassl (Eds.), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020), pp. 525, 532, 541–542.

83. See e.g. Recital 18 of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, O.J. 2005 L 149/22, which refers to an "average consumer, who is reasonably well-informed and reasonably observant and circumspect". Possible guidance might also come from the ECtHR; see Sudre, "Le mystère des 'apparences' dans la jurisprudence de la cour européenne des droits de l'homme", 20 *Revue trimestrielle des droits de l'homme* (2009), 633.

84. On this, see von Bogdandy, op. cit. *supra* note 77, 735–736.

85. In this sense, see Leloup, "An uncertain first step in the field of judicial self-government", 16 EuConst (2020), 145, 157–158.

86. See e.g. Tridimas, "Constitutional review of Member State action: The virtues and vices of an incomplete jurisdiction", 9 *International Journal of Constitutional Law* (2011), 737; Zglinski, *Europe's Passive Virtues* (OUP, 2020), pp. 97 et seq.

across the Union. With its decision in *ASJP*, the Court started to review the Member States' very constitutional structures, such as the organization of their judiciary, against the yardsticks derived from Articles 2 and 19(1)(2) TEU. This controversial step bears the potential of disturbing the Union's federal balance to the detriment of the Member States. As these obligations reach far into domestic territory, the Member States' claims for autonomy exert a particularly strong force. Such claims are not only raised by the Polish Government in ECJ proceedings.[87] Concerns emerged even within the ECJ. Advocate General Bobek observed that Article 19(1)(2) TEU has become limitless, both institutionally – covering all courts that potentially apply EU law – and substantively. To prevent its over-extensive application,[88] he suggests interpreting Article 19(1)(2) TEU as an "extraordinary tool for extraordinary cases".[89] So far, the ECJ has taken a different path. Instead of applying a sort of de minimis rule, it mitigates the far-reaching effects on the Member States' constitutional autonomy by applying the regression and appearance tests. As seen above, this approach allows the Court to refrain from prescribing a specific constitutional model to the Member States.

On a more practical level, the regression and appearance tests relieve the ECJ from the need to find common denominators among the Member States. It seems relatively uncontroversial that the values enshrined in Article 2 TEU and their specific expression should not be interpreted in a legal vacuum but by recourse to the Member States' common constitutional traditions.[90] Andreas Voßkuhle, for instance, described these values as "communicating vessels" with the Member States' constitutional traditions.[91] Very often, however, the diversity among the Member States will render the identification

87. See e.g. Case C-791/19, *Commission* v. *Poland*, para 49.

88. Opinion in Joined Cases C-748-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim*, paras. 131, 135. See also Opinion in Joined Cases C-83, 127, 195, 291, 355 & C-397/19, *Asociaţia "Forumul Judecătorilor din România"*, paras. 207, 208 and Opinion in Joined Cases C-357, 379, 547, 811 & 840/19, *Euro Box Promotion and others*, EU:C:2021:170, para 71.

89. Opinion in Joined Cases C-83, 127, 195, 291, 355/19 & C-397/19, *Asociaţia "Forumul Judecătorilor din România"*, para 223; Opinion in Joined Cases C-748-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim*, paras. 134, 147. See also Spielmann, op. cit. *supra* note 81, p. 19.

90. See e.g. A.G. Cruz Villalón, Opinion in Case C-62/14, *Gauweiler*, EU:C:2015:7, para 61. From the plethora of contributions, see e.g. Levits, "L'Union européenne en tant que communauté des valeurs partagées" in *Liber Amicorum Antonio Tizzano* (Giapichelli, 2018), pp. 509, 518; Lenaerts, "Die Werte der Europäischen Union in der Rechtsprechung des Gerichtshofs der Europäischen Union: Eine Annäherung", 44 EuGRZ (2017), 639, 640; Calliess, "The transnationalization of values by European law", 10 GLJ (2009), 1367, 1377.

91. Voßkuhle, *The Idea of the European Community of Values* (Bittner, 2018), p. 110.

of a common basis difficult if not impossible. This problem is certainly not new. When developing general principles, the Court resolved this issue by employing an evaluative or critical legal comparison.[92] It does not aim at finding an "arithmetical" common denominator, but chooses the solution it deems best suited for the EU legal order.[93] Still, many criticize this approach as offering no reliable criteria.[94] The regression and appearance tests seem to avoid these pitfalls.

From a strategic perspective, such an approach can provide a filter against the abuse of comparative arguments. The Polish Government repeatedly relied on a comparative analysis to justify the overhaul of its judiciary.[95] For instance, it argued that the "composition of the KRS is hardly different from that prevailing in respect of the national councils of the judiciary established in certain other Member States".[96] By pointing to a comparable legal situation in Member States which do not appear to be threatening judicial independence, the Polish Government can accuse the ECJ of applying double standards. The appearance and regression tests allow diverging assessments of – legally – similar systems. In this spirit, the ECJ contends that the mere fact that the members of a body nominating judges are designated by the legislature does not in itself raise doubts in terms of judicial independence. Yet, the "situation may be different where that fact, combined with other relevant factors and the conditions under which those choices were made, leads to such doubts being raised".[97] This might prove useful, if the Polish Minister of Justice delivers on his promise to bring the German system of judicial appointments before the ECJ.[98]

92. See already A.G. Roemer, Opinion in Case 5/71, *Zuckerfabrik Schöppestedt*, EU:C:1971:81, pp. 986, 989.

93. See e.g. A.G. Maduro, Opinion in Joined Cases C-120 & 121/06 P, *FIAMM*, EU:C:2008:98, paras. 55–56; A.G. Lagrange, Opinion in Case 14/61, *Hoogovens* v. High *Authority*, EU:C:1962:19, pp. 277, 283–284. See further Lenaerts and Gutman, "The comparative law method and the Court of Justice of the European Union" in Andenas and Fairgrieve (Eds.), *Courts and Comparative Law* (OUP, 2015), pp. 141, 152–153.

94. See only Mayer, "Constitutional comparativism in action. The example of general principles of EU law and how they are made", 11 I-CON (2013), 1003, 1007.

95. See e.g. White Paper on the Reform of the Polish Judiciary (7 March 2018), available at <archiwum.premier.gov.pl/files/files/white_paper_en_full.pdf>, paras. 168–174, 189, 206–207. On such arguments, see Muszyński, "Comparative legal argument in the Polish discussion on changes in the judiciary", 68 *Jahrbuch des öffentlichen Rechts* (2020), 705.

96. Case C-791/19, *Commission* v. *Poland*, para 69. See also the Order of 14 July 2021 in Case C-204/21 R, *Commission* v. *Poland*, para 110.

97. Case C-791/19, *Commission* v. *Poland*, para 103.

98. Press Release, "The Ministry of Justice calls for an examination of the German model of judicial appointments" (18 Oct. 2021), available at <www.gov.pl/web/justice/the-ministry-of-justice-calls-for-an-examination-of-the-german-model-of-judicial-appointments>.

4.1.2. *Procedure: Acceleration and coercion*

From a procedural perspective, the annotated cases are both disappointing and promising at the same time. On the one hand, it seems clear that the Commission must accelerate its infringement proceedings.[99] In Case C-791/19, the disciplinary regime was already put in place with a law adopted on 8 December 2017. It took the Commission roughly one and a half years to lodge an application before the ECJ and request interim measures. Even if this delay might still be excusable due to the novelty of these challenges, and the guidance provided by the Court in *ASJP*, there is no excuse for the delays in Case C-204/21. The Polish muzzle law entered into force on 14 February 2020. The Commission, however, referred the matter to the ECJ no earlier than 1 April 2021. Though it combined its action directly with an application for interim measures, such a delay is hardly understandable in light of the serious and obvious infringements at issue. The deadline between the letter of formal notice and the Member State's observations as well as between the Commission's reasoned opinion and the Member State's compliance is usually set at two months.[100] Nevertheless, "very short periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach".[101] This might even justify a deadline of one week (!) in both stages of the pre-litigation procedure.[102]

On the other hand, the Court has stepped up the pressure on non-compliant Member States by developing interim orders under Article 279 TFEU into an instrument with actual bite. In what can be considered an audacious step, the ECJ developed a two-stage procedure. In a first step, the Commission can request interim measures under Article 279 TFEU. If the respective Member State does not comply with the interim order, the Court can – and here lies the novelty – order daily penalty payments.[103] This structure mirrors the procedure under Article 260(2) TFEU, which explicitly foresees penalty payments in cases of non-compliance with *final* ECJ judgments. In this sense,

99. This has been repeatedly stressed by Laurent Pech; see e.g. Pech, Wachowiec and Mazur, "Poland's rule of law breakdown: A five-year assessment of EU's (in)action", 13 HJRL (2021), 1, 22–23.

100. See e.g. Schima, "Article 258 TFEU" in Kellerbauer, Klamert and Tomkin, op. cit. *supra* note 72, paras. 21, 23; Karpenstein, "Art. 258 AEUV" in Grabitz, Hilf and Nettesheim (Eds.), *Das Recht der Europäischen Union*, 73rd ed. loose-leaf (Beck, 2021), paras. 34, 45.

101. Case C-293/85, *Commission* v. *Belgium*, EU:C:1988:40, para 14. More recently, see Joined Cases C-715, 718 & 719/17, *Commission* v. *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, EU:C:2020:257, para 92.

102. See Case C-320/03, *Commission* v. *Austria*, EU:C:2005:684, para 33. See also Lenaerts, Maselis and Gutman, *EU Procedural Law* (OUP, 2014), paras. 5.44, 5.50.

103. Order of 20 Nov. 2017, Case C-441/17 R, *Commission* v. *Poland (Białowieża Forest)*, EU:C:2017:877, paras. 97–108.

some have noted that this might exclude penalty payments in other procedures – especially as Article 279 TFEU is ancillary to the *main* action and not the interim order.[104] Still, Article 279 TFEU is framed in an extremely broad manner, allowing the Court to prescribe "in any cases before it . . . any necessary interim measures".

The full potential of such penalty payments was revealed in Case C-204/21. After announcing a daily penalty payment of EUR 100,000 against Poland in the *Białowieża forest* case, and ordering one of EUR 500,000 in the *Turów mine* case,[105] the ECJ broke its record by imposing a daily penalty payment of EUR 1 million until the Polish Government complies with its interim order. It should be added that the ECJ has an extremely broad discretion in determining the amount of these penalty payments. For instance, it is not bound by the amount requested by the applicants.[106] Instead, the penalty payment must be "appropriate to the circumstances".[107] As noted previously, the ECJ's Vice President justifies the unprecedented penalty payment in Case C-204/21 with the serious and irreparable harm to the EU legal order, the rights which individuals derive from EU law, and the values set out in Article 2 TEU.[108] In conclusion, the ECJ seems to have provided the instruments at its disposal with real bite.

At first sight, however, one might argue that hefty penalty payments are well intended, but ultimately useless if Poland refuses to pay. Such doubts are hardly convincing. Indeed, it is well-established that the Commission can offset and thus deduct the respective amount from payments due to Poland.[109] While offsetting was a controversial issue for some time,[110] this possibility is now codified. Under the Financial Regulation, EU institutions are authorized

104. For critical assessments, see Wennerås, "Saving a forest and the rule of law: *Commission* v. *Poland*", 56 CML Rev. (2019), 541, 545–548; Coutron, "La Cour de justice au secours de la forêt de Białowieska", 54 RTDE (2018), 321, 326; Prete, "Infringement procedures and sanctions under Article 260 TFEU" in Montaldo, Costamagna and Miglio (Eds.), *EU Law Enforcement* (Routledge, 2021), pp. 71, 83.

105. Order of 20 Sept. 2021, Case C-121/21 R, *Czech Republic* v. *Poland (Turów Mine)*, EU:C:2021:752.

106. Order of 27 Oct. 2021, Case 204/21 R, *Commission* v. *Poland*, para 21.

107. Ibid., para 22.

108. Ibid., para 58.

109. In detail, see Pohjankoski, "Rule of law with leverage: Policing structural obligations in EU law with the infringement procedure, fines, and set-off", 58 CML Rev. (2021), 1341, 1358 et seq.

110. On this discussion, see Tesauro, "La sanction des infractions au droit communautaire", (1992) *Rivista di diritto europeo*, 477, 488; Wägenbaur, "Zur Nichtbefolgung von Urteilen des EuGH durch die Mitgliedstaaten" in Due, Lutter and Schwarze (Eds.), *Festschrift für Ulrich Everling,* Vol. 2 (Nomos, 1995), pp. 1611, 1621–1622.

to recover amounts receivable from debtors through offsetting.[111] With regard to lump sums and penalty payments ordered by the ECJ, this has been put in practice by a Commission decision.[112] Its current wording seems to apply equally to daily penalty payments ordered for non-compliance with interim measures under Article 279 TFEU.

This leads to the question of whether this financial pressure will have any deterrent effect on the Polish Government. Here we leave the terrain of legal scholarship and venture into the realm of politics, sociology, and psychology. Some might argue that there is a risk that Member States such as Poland will use penalty payments to "purchase" continued non-compliance.[113] For several reasons, the current situation might be different. First, the conflict between the Polish Government and the EU is not about some technical regulation, but at the very centre of public attention. For that reason, non-compliance with an ECJ judgment as well as the imposition of fines go hand in hand with a considerable reputational damage. Moreover, unprecedented fines would be difficult to communicate to Polish voters – especially if a majority perceives the current ECJ interventions as legitimate.[114] Second, the ECJ has demonstrated its willingness to elevate the penalty payments with each step of further non-compliance. Thus, the final bill for Poland might be higher than the current setting suggests. The Commission has already announced that it will start recouping the penalty payments due by Poland.[115] In response, the Polish Minister of Justice proposed taking the conflict to the next level of escalation by suspending the Polish contributions to the EU budget.[116] Yet, such threats can hardly exert any credible pressure. As Poland is by far the

111. Arts. 101 and 102 of Regulation 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, O.J. 2018, L 193/1.

112. Arts. 29(2) and 31 of Commission Decision of 3 Aug. 2018 on the internal procedure provisions for the recovery of amounts receivable arising from direct management and the recovery of fines, lump sums and penalty payments under the Treaties, C(2018)5119 final. See also Schima, "Article 260 TFEU" in Kellerbauer, Klamert and Tomkin, op. cit. *supra* note 72, para 17; Karpenstein, "Art. 260 AEUV" in Grabitz, Hilf and Nettesheim, op. cit. *supra* note 100, para 76.

113. On this strategy Jack, "Article 260(2) TFEU: An Effective judicial procedure for the enforcement of judgements?", 19 ELJ (2013), 404, 421.

114. For opinion polls, see Pacewicz, "Poles agree: EU Court of Justice has the right to stop illegal judiciary reform", *OKO.press* (29 Aug. 2018) and more recently Wójcik, "Większość uważa, że TSUE ma prawo cofnąć zmiany w polskim sądownictwie", *OKO.press* (7 Oct. 2021). Another poll finds that 73% of Poles back the idea of linking rule of law to the budget; see "Poll: How many Poles support tying EU funds to the rule of law criterion?", *Rzeczpospolita* (21 Nov. 2020).

115. "Commission asks Warsaw to pay fines imposed by EU Court of Justice", *Bulletin Quotidien Europe* 12873 (21 Jan. 2022).

116. Shotter, "Poland justice minister threatens EU veto over rule of law 'blackmail'", *Financial Times* (12 Dec. 2021).

biggest net recipient of the Union's budget,[117] the Commission could easily recover the respective amounts through offsetting.[118]

4.2. *Zooming out: The struggle over values and primacy*

4.2.1. *Contestations by the captured Polish Constitutional Tribunal*

As previously indicated, the captured Constitutional Tribunal was quickly pitted against the interventions from the ECJ. One day after the ECJ's first interim order in Case C-791/19, the Disciplinary Chamber requested the Tribunal to assess whether the Order was ultra vires.[119] Specifically, the Tribunal was asked whether Articles 4(3) TEU and 279 TFEU were unconstitutional insofar as they contain an obligation for the Member States to implement interim measures relating to the organization of Polish courts. On 14 July 2021, the Constitutional Tribunal followed this request and declared that the ECJ's Order constituted an ultra vires act.[120] Before providing a brief account of this decision, two disclaimers seem required.

To start with, it cannot be stressed enough that the Polish Constitutional Tribunal is a captured body. Current members were appointed in manifest breach of Polish law. As far as they include unlawfully appointed judges, its panels cannot be considered a "tribunal established by law".[121] Its adjudicatory practice, moreover, confirms that the Tribunal has degenerated into a tool for rubberstamping the Government's agenda.[122] Against this backdrop, one could stop here and reject any doctrinal analysis of its decisions. Some might even argue that a doctrinal engagement is not only futile, but potentially dangerous, as it can legitimize the Tribunal's actions.[123] Still, the very capture of the Tribunal indicates how important it is for the Polish Government to maintain a façade of legality.[124] The more cracks

117. For an instructive chart, see e.g. Buchholz, "Which countries are EU contributors and beneficiaries?", *Statista* (13 Jan. 2020), available at <www.statista.com/chart/18794/net-contributors-to-eu-budget/>.

118. With regard to the Turów mine case, see "European Commission to withhold EU funds allocated to Poland over Turów mine case", *Bulletin Quotidien Europe* 12886 (9 Feb. 2022).

119. Supreme Court (Disciplinary Chamber), Order of 9 April 2020, Ref. No. I DO 16/20.

120. Polish Constitutional Tribunal, judgment of 14 July 2021, P 7/20.

121. ECtHR, *Xero Flor* v. *Poland*, Appl. No. 4907/18, judgment of 7 May 2021, paras. 252 et seq.

122. In detail Sadurski, "Polish Constitutional Tribunal under PiS: From an activist court, to a paralysed tribunal, to a governmental enabler", 11 HJRL (2018), 63.

123. In this sense, see e.g. Jakab, "Bringing a hammer to the chess board: Why doctrinal-conceptual legal thinking is futile in dealing with autocratizing regimes", *Verfassungsblog* (25 June 2020).

124. See e.g. Scheppele, "Autocratic legalism", 85 *University of Chicago Law Review* (2018), 545.

emerge in this façade, the less useful such a captured institution becomes to cloak the Government's actions with a mantle of legality. While it is certainly important to underline the Tribunal's lack of independence, demonstrating substantive abuses of the law can further undermine its credibility.

Second, it should be noted that the Tribunal, already before its capture, never accepted the primacy of EU law over the Polish Constitution.[125] In its judgment on the Accession Treaty, the Tribunal stated that pursuant to Article 8(1), the Constitution remains the "supreme law of the Republic of Poland" and prevails in conflicts with EU law.[126] Such conflicts can only be remedied either by changing the Constitution, changing EU law, or withdrawing from the Union.[127] The Tribunal also stressed that Article 90(1) of the Polish Constitution allows only a transfer of competences "in certain matters". This precludes the delegation of all competences in a given field or transfers that affect the Polish constitutional identity.[128] The Tribunal repeatedly affirmed its mandate to review not only whether transfers respect these limitations, but also the constitutionality of EU law,[129] including acts of EU institutions based on Treaty provisions.[130] Unlike the German Constitutional Court, however, the Tribunal refrained from developing a fully fleshed ultra vires or identity review doctrine. Instead, it consistently emphasized the "full axiological compatibility" between the Polish Constitution and EU law and underlined the need for restraint.[131]

Although the Tribunal's judgment of 14 July 2021 shows some continuity with the earlier case law, it breaks with its spirit of restraint and cooperation. The Tribunal starts by construing an ultra vires review, which seems to be derived from the principle of legality enshrined in Article 7 of the Polish Constitution ("[t]he organs of public authority shall function on the basis of,

125. For a concise overview, see Śledzińska-Simon and Ziółkowski, "Constitutional identity in Poland" in Calliess and van der Schyff (Eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press, 2019), pp. 243, 245. See e.g. Kowalik-Bańczyk, "Should we polish it up? The Polish Constitutional Tribunal and the idea of supremacy of EU law", 6 GLJ (2005), 1355.

126. Polish Constitutional Tribunal, judgment of 11 May 2005, K 18/04, *Treaty of Accession*, paras. III.2.1, 4.2, 4.5; judgment of 24 Nov. 2010, K 32/09, *Lisbon*, para III.2.5.

127. Polish Constitutional Tribunal, judgment of 11 May 2005, K 18/04, *Treaty of Accession*, para III.6.4.

128. Polish Constitutional Tribunal, judgment of 24 Nov. 2010, K 32/09, *Lisbon*, para III.2.1.

129. Polish Constitutional Tribunal, judgment of 11 May 2005, K 18/04, *Treaty of Accession*, para III.9.1; Judgment of 16 Nov. 2011, SK 45/09, *Brussels I*, para III.2.4–2.5.

130. In this sense, see Dudzik and Półtorak, "The Court of the last word: Competences of the Polish Constitutional Tribunal in the review of European Union law", 15 *Yearbook of Polish European Studies* (2012), 225, 250–251.

131. Polish Constitutional Tribunal, judgment of 24 Nov. 2010, K 32/09, *Lisbon*, para III.2.2 and judgment of 16 Nov. 2011, SK 45/09, *Brussels I*, para III.2.4, 2.6, 2.7.

and within the limits of, the law").[132] Any EU act, including judgments of the ECJ, must respect the principle of conferral in Articles 4(1) and 5 TEU and the Member State's national identity under Article 4(2) TEU. With regard to the Disciplinary Chamber's request, the Tribunal asserts that Article 19(1)(2) TEU does not confer a competence on the ECJ to review the organization of the Polish judiciary. What is more, it considers the organization of the judiciary to form part of the "constitutional core" that cannot be transferred to the EU. As such, the Tribunal declares the orders imposed by the ECJ to constitute ultra vires acts. Insofar as Articles 4(3) TEU and 279 TFEU cover such interim measures, they are incompatible with the Constitution and thus not applicable in the Polish legal order.[133]

An even bigger blow to the ECJ's activation of Articles 19(1)(2) and 2 TEU was the Tribunal's decision of 7 October 2021.[134] These procedures were initiated by the Polish Prime Minister and specifically aimed at instrumentalizing the captured Tribunal as a shield against the ECJ. Again, the Tribunal fulfilled the Government's expectations. In particular, it declared that Articles 19(1)(2) and 2 TEU – in their current interpretation by the ECJ – are incompatible with the Constitution insofar as they allow Polish courts to review the legality of judicial appointments and the independence of their peers. While the decision will certainly become subject to extensive academic scrutiny, two points made in the accompanying press release already seem noteworthy. First, the Tribunal repeatedly stated that Article 19(1)(2) TEU does not confer any competence on the ECJ to review the organization of the Polish judiciary.[135] Second, it stressed that the values mentioned in Article 2 TEU "are merely of axiological significance" and do not constitute legal principles.[136]

4.2.2. *The judicial enforcement of EU values: Debunking the value and competence myths*

These two decisions do not only challenge the Order in Case C-791/19, but the ECJ's entire case law based on Articles 19(1)(2) and 2 TEU.[137] This includes the rulings and orders annotated here. In particular, the Tribunal aims at spreading two "myths" about the judicial enforcement of EU values in the

132. Polish Constitutional Tribunal, judgment of 14 July 2021, P 7/20, paras. III.6.1 and 6.10.

133. Ibid., para III.7.

134. Polish Constitutional Tribunal, judgment of 7 Oct. 2021, K 3/21.

135. The Court has briefly explained its reasoning in a Press Release accompanying the judgment of 7 Oct. 2021, K3/21, para 11.

136. Ibid., para 19.

137. It should be noted that the Tribunal also contested the constitutionality of Art. 6 ECHR as interpreted by the ECtHR in its judgment of 24 Nov. 2021, K 6/21. A similar case is pending as K 7/21.

Member States. On the one hand, it asserts that Article 2 TEU contains moral values instead of legal principles. On the other hand, the Tribunal repeatedly claimed that Article 19(1)(2) TEU, "from which the CJEU derives its competence to adjudicate on the organizational structure of Polish courts, constitutes an obligation of EU Member States and that obligation is not tantamount to the conferral of competences (even negative ones) on . . . the CJEU."[138] These statements could easily be pushed aside by pointing to the Tribunal's obvious political bias. Unfortunately, however, these value and competence myths have been fuelled by EU institutions themselves. Therefore, it seems important to set them straight.

Starting with the *value myth*, the shift from the former principles in Article 6(1) TEU (Amsterdam/Nice versions) to the values enshrined in the first sentence of Article 2 TEU introduced an ambiguous notion into EU primary law that casts doubt over the provision's legal normativity. The Commission's uncertainty in this respect became tangible in its first reasoned proposal: "The Commission, *beyond* its task to ensure the respect of EU law, is also responsible . . . for guaranteeing the common values of the Union."[139] Even the reporting judge in *ASJP* advocated caution.[140] While the ECJ's recent activity has incited a shift from a "general agreement" on the limited legal effects of Article 2 TEU to an "overwhelming agreement" on its justiciability,[141] many scholars remain sceptical.[142] Such scepticism is hardly convincing.[143]

Departing from the *wording*, the value semantics might indeed suggest that Article 2 TEU contains moral values, not legal principles.[144] Yet, many have

138. Ibid., para 18.

139. European Commission, Reasoned Proposal cited *supra* note 5, para 1 (emphasis added).

140. Levits, op. cit. *supra* note 90, p. 521.

141. Contrast Closa and Kochenov, "Reinforcement of the rule of law oversight in the European Union" in Schröder (Ed.), *Strengthening the Rule of Law in Europe* (Hart, 2015), pp. 173, 183, with Scheppele, Kochenov and Grabowska-Moroz, "EU values are law, after all", 38 YEL (2020), 3, 67.

142. See e.g. Bonelli, "Infringement actions 2.0: How to protect EU values before the Court of Justice", EuConst (2022) (forthcoming). See also Nettesheim, "Kompetenzkonflikte zwischen EuGH und Mitgliedstaaten", 54 *Zeitschrift für Rechtspolitik* (2021), 222; Möllers, *The European Union as a Democratic Federation* (Bittner, 2018), pp. 124, 127; Müller, "Protection of democracy and the rule of law", 21 ELJ (2015), 141, 146.

143. In detail, see Spieker, *EU Values before the Court* (Frankfurt University, PhD thesis, 2022), pp. 32 et seq.

144. For a distinction between values of *moral* normativity and principles of *legal* normativity, see Habermas, *Between Facts and Norms* (Polity, 1996), pp. 255 et seq. This contribution understands legal principles as rules of higher generality in content and impact; see Jakab, *European Constitutional Language* (Cambridge University Press, 2016), pp. 368 et seq.

already pointed to the inconsistent and misleading nature of the terminology employed by the Treaties.[145] For instance, the preamble employs the notion of values and principles interchangeably. In this sense, the wording is a rather weak argument in this respect. *Systematically*, the values of Article 2 TEU are laid down in the operative part of a legal text – the TEU. They are applied in legally determined procedures by public institutions (see Arts. 7, 13(1) or 49(1) TEU) and their disregard leads to sanctions, which are of a legal nature.[146] Also *historically*, there are strong arguments for the legal normativity of Article 2 TEU values. Its predecessor, Article 6(1) TEU (Amsterdam/Nice versions) referred to them as principles. The *travaux* to the European Convention, which introduced the value semantics, clearly indicate that the drafters did not intend to weaken the provision's legal force. In this spirit, Convention President Valery Giscard d'Éstaing emphasized that "on ne peut mettre dans cet article 2 que des valeurs qui sont définies juridiquement de façon suffisamment solide . . . On ne peut donc pas mettre des valeurs indicatives ou respectables mais de caractère plus émotif que juridique".[147] The prevalent understanding at the time was that the values enshrined in Article 2 TEU were an "héritier direct" of the former principles of Article 6(1) (Amsterdam/Nice versions).[148] In conclusion, there is a strong case for the legal normativity of Article 2 TEU.[149]

More problematic is its justiciability. Admittedly, the values of Article 2 TEU are extremely indeterminate. As such, they fall short of the criteria for direct effect, which require a provision of EU law to be clear, precise, and unconditional. For that reason, important voices from within the ECJ doubt

145. Kochenov, "The acquis and its principles" in Jakab and Kochenov (Eds.), *The Enforcement of EU Law and Values* (OUP, 2017), pp. 9, 10; Streinz, "Principles and values in the European Union" in Hatje and Tichý (Eds.), *Liability of Member States for the Violation of Fundamental Values* (Nomos, 2018), pp. 9, 10.

146. von Bogdandy, op. cit. *supra* note 77, 716–717.

147. European Convention, Plenary Session of 27 Feb. 2003, 4-006 – Giscard d'Estaing, available at <www.europarl.europa.eu/Europe2004/textes/verbatim_030227.htm>. See also Praesidium, Draft of Articles 1 to 16 of the Constitutional Treaty, CONV 528/03, p. 11. From within the Convention secretariat, see Pilette and de Poncins, "Valeurs, objectives et nature de l'Union" in Amato et al. (Eds.), *Genèse et destinée de la constitution européenne* (Bruylant, 2007), pp. 287, 300–301.

148. See e.g. Benoît-Rohmer, "Valeurs et droits fondamentaux dans la Constitution", 41 RTDE (2005), 261, 262; Tridimas, *The General Principles of EU Law*, 2nd ed. (OUP, 2007), p. 15.

149. From the bench, see Rossi, op. cit. *supra* note 1; Safjan, "Domestic infringements of the rule of law as a European Union problem", (2019) *Osteuropa Recht*, 552, 553; Martín y Pérez de Nanclares, "La Unión Europea como comunidad de valores", 43 *Teoría y Realidad Constitucional* (2019), 121, 135.

that Article 2 TEU could be applied as a freestanding provision.[150] According to Advocate General Pikamäe, the value of the rule of law "cannot be relied upon on its own".[151] Similarly, Advocate General Tanchev argued that Article 2 TEU does not constitute a standalone yardstick for the assessment of national law.[152] So far, the Court has avoided such a contentious step. Instead, it chose to operationalize these values through more specific Treaty provisions. Starting with *ASJP*, the Court has repeatedly emphasized that "Article 19 TEU . . . gives concrete expression to the value of the rule of law stated in Article 2".[153]

Through this nexus, Article 2 TEU seems to leave the realm of lofty values and become subject to judicial application.[154] This formula has been reiterated in Case C-791/19[155] and in the actions brought by Poland and Hungary against the rule of law conditionality regulation. The Court stressed that "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which . . . are given concrete expression in principles containing legally binding obligations for the Member States".[156] Moreover, it provided further possible connections between Article 2 TEU and other Treaty provisions. In this sense, it noted that Articles 6, 10 to 13, 15, 16, 20, 21, and 23 CFR define the scope of the values of human dignity, freedom, equality, and respect for human rights, while Articles 8, 10, 19(1), 153(1), and 157(1) TFEU substantiate the values of equality, non-discrimination, and equality between women and men.[157]

The judgment in Case C-791/19 – and before that the Maltese and Romanian judges cases – indicates a further development in this respect. While still employing Article 2 TEU and Article 19(1)(2) TEU as cumulative yardsticks,[158] the ECJ seems to have placed Article 2 TEU at the centre. It

150. But see Rossi, op. cit. *supra* note 1, 657; Safjan, "On symmetry: In search of an appropriate response to the crisis of the democratic State", (2020) *Il Diritto dell'Unione Europea*, 673, 696.

151. A.G. Pikamäe, Opinion in Case C-457/18, *Slovenia* v. *Croatia*, EU:C: 2019:1067, paras. 132–133.

152. Opinion in Case C-824/18, *A.B.*, para 35.

153. Case C-64/16, *ASJP*, para 32. From the plethora of cases, see Joined Cases C-585, 624 & 625/18, *A.K.*, para 167; Case C-896/19, *Repubblika*, para 63; Joined Cases C-83, 127, 195, 291, 355 & 397/19, *Asociația 'Forumul Judecătorilor din România'*, paras. 162, 188.

154. In detail, see Spieker, "Breathing life into the Union's common values", 20 GLJ (2019), 1182, 1204 et seq., and Spieker, "Defending Union values in judicial proceedings" in von Bogdandy et al. (Eds.), *Defending Checks and Balances in EU Member States* (Springer, 2021), p. 237.

155. Case C-791/19, *Commission* v. *Poland*, para 51.

156. Case C-126/21, *Hungary v. Parliament and Council*, EU:C:2021:974, para 232.

157. Ibid., paras. 157 et seq.

158. See e.g. Joined Cases C-748-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim*, EU:C:2021:931, para 90; Case C-824/18, *A.B.*, para 108 et seq.

stressed that Member States are precluded from adopting measures that lead to "a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, *inter alia*, Article 19 TEU".[159] Similarly, the Commission started to rethink its approach in the infringement proceedings against the Hungarian and Polish violations of LGBTIQ rights. These proceedings are not only based on market freedoms and Charter rights: "Because of the gravity of these violations, the contested provisions also violate the values laid down in Article 2 TEU."[160] It remains to be seen whether the Court will seize this opportunity.

The *competence myth* has taken two forms, conceiving EU competences either as a *limit for the primacy* of EU law or, on a narrower level, as a *limit for its enforcement* by EU institutions. The former claim was raised by the Polish Constitutional Tribunal in its decision of 7 October 2021. In particular, it ascertained that EU law takes precedence "only within the scope of the conferred competences".[161] The Hungarian Government quickly supported this claim in a resolution asserting that "Union law can take precedence only in areas where the European Union has competence."[162] As was already noted by first commentators,[163] such a reasoning flies in the face of the very assumptions on which the EU legal order is built. Primacy flows from the applicability of a provision of EU law in a certain case, which, in turn, depends on the provision's *scope* and *direct effect*.[164] In contrast, the lack of an EU competence to take action in a certain field (e.g. to adopt secondary legislation) does not affect the primacy of EU law. Similarly problematic is the second claim, namely that the ECJ can enforce obligations under EU law, including those under Articles 2 and 19(1)(2) TEU, only when the EU has a competence in the respective field. Astonishingly, similar claims were raised

159. See the cases cited *supra* note 31. Case C-791/19, *Commission* v. *Poland*, para 51.

160. European Commission, Press Release, "EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people" (15 July 2021), IP/21/3668.

161. Press Release cited *supra* note 135, para 11.

162. Government decision No. 1712/2021 (of 9 Oct. 2021) on the Hungarian position to be taken in connection with the decision of the Constitutional Court of the Republic of Poland on the relationship between national law and European Union law, para 2 b).

163. Krappitz and Kirst, "The primacy of EU law does not depend on the existence of a legislative competence", *EU Law Live* (20 Oct. 2021). See also Pohjankoski, op. cit. *supra* note 109, 1347.

164. The latter is not a requirement for the duty of national courts to interpret national law consistently with EU law, but for its disapplication in case of conflicts; see Case C-573/17, *Popławski*, EU:C:2019:530, paras. 72 et seq. See further Miasik and Szwarc, "Primacy and direct effect – still together: *Poplawski II*", 58 CML Rev. (2021), 571, 578 et seq.

by the Council Legal Service. In an opinion on the Commission's Rule of Law Framework, it noted that violations of EU values "may be invoked against a Member State only when it acts in a subject matter for which the Union has competence". Only Article 7 TEU "provides for a Union competence to supervise the application of the rule of law . . . in a context that is not related to a specific material competence".[165] By implication, the ECJ's jurisdiction would be excluded beyond the competences of the EU.

The competence myth, in both its facets, would require the ECJ to conduct a two-step assessment each time it reviews whether a Member State complies with EU law. Only after confirming that the Union has a general competence in the subject area under Articles 3, 4 or 6 TFEU, could the Court proceed to an assessment of whether the Member State complies with its obligations under EU law. Such a significant caveat, however, cannot be derived from the Treaty text. Instead, the Court has a general jurisdiction under Article 19(1)(1) TEU to ensure that "the law is observed" without any qualification. Further, Article 258 TFEU unequivocally states that the Court shall assess whether a Member State has failed to fulfil *any* "obligation under the Treaties". This has been confirmed by the Court in Case C-791/19. Although the organization of the national judiciary falls within the competence of the Member States, "the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU".[166] This position is not limited to the organization of the judiciary, but has been applied consistently to practically all areas of salient Member State competences.[167] This includes sensitive matters such as nationality,[168] criminal law,[169] direct

165. Council, Opinion of the Legal Service: Commission's Communication on a New EU Framework to Strengthen the Rule of Law: Compatibility with the Treaties, 10296/14, paras. 16–17.

166. Case C-791/19, *Commission* v. *Poland*, para 56. See also Case C-619/18, *Commission* v. *Poland*, para 52; Case C-896/19, *Repubblika*, para 48; Case C-487/19, *W.Ż.*, paras. 74, 88.

167. Azoulai, "The 'retained powers' formula in the case law of the European Court of Justice", 4 *European Journal of Legal Studies* (2011), 192. See also Lenaerts, "L'encadrement par le droit de l'Union européenne des compétences des États membres" in *Mélanges en l'honneur de Jean Paul Jacqué* (Dalloz, 2010), p. 421; Boucon, "EU law and retained powers of Member States" in Azoulai (Ed.), *The Question of Competence in the European Union* (OUP, 2014), p. 168.

168. Case C-221/17, *Tjebbes*, EU:C:2019:189, para 32; Case C-135/08, *Rottmann*, EU:C:2010:104, para 41.

169. Joined Cases C-202 & 238/18, *Rimšēvičs*, EU:C:2019:139, para 57; Case C-203/80, *Casati*, EU:C:1981:261, para 27.

taxation,[170] surnames,[171] social security,[172] civil status[173] or the organization of education systems.[174] Against this backdrop, the primacy of EU law and its enforcement by the ECJ is indifferent to the attribution of competences.[175]

4.2.3. *The judicial enforcement of primacy: Unravelling primacy's substantive core*

The decisions taken by the Polish Constitutional Tribunal do not only challenge the judicial enforcement of EU values in the Member States, but also the primacy of EU law on a more fundamental level. In this sense, the Tribunal jumped into the slipstream of the German Constitutional Court's *PSPP* judgment and a growing trend of contestation. Hiding in Karlsruhe's mighty shadow, the courts in Poland, but also in Romania and Hungary, have developed doctrines that serve very different purposes – namely to shield the respective government's agenda against external intervention.[176] Despite their comparative references,[177] these instances of contestation are – institutionally, procedurally and substantively – miles away from their alleged role model.

This applies especially to the Polish Constitutional Tribunal.[178] Institutionally, Karlsruhe and Warsaw can hardly be compared in terms of independence. Procedurally, the former established a doctrine of

170. Case C-35/19, *Belgian State*, EU:C:2019:894, para 31; Case C-279/93, *Schumacker*, EU:C:1995:31, para 21.

171. Case C-541/15, *Freitag*, EU:C:2017:432, para 33; Case C-353/06, *Grunkin and Paul*, EU:C:2008:559, para 16.

172. Case C-179/18, *Rohart*, EU:C:2019:111, para 14; Case C-158/96, *Kohll*, EU:C:1998:171, paras. 18, 19.

173. Case C-673/16, *Coman*, EU:C:2018:385, paras. 37–38; Case C-267/06, *Maruko*, EU:C:2008:179, para 59.

174. Case C-73/08, *Bressol*, EU:C:2010:181, para 28; Case C-318/05, *Commission* v. *Germany*, EU:C:2007:495, para 86.

175. See also De Witte, "Exclusive Member State competences – is there such a thing?" in Garben and Govaere (Eds.), *The Division of Competences between the EU and the Member States* (Hart, 2017), pp. 59, 62.

176. Thus, many speak of an abuse of the *ultra vires* and identity doctrines. See Halmai, "Abuse of constitutional identity", 43 *Review of Central and East European Law* (2018), 23; Kelemen and Pech, "The uses and abuses of constitutional pluralism", 21 CYELS (2019), 59; Martinico and Pollicino, "Use and abuse of a promising concept", 39 YEL (2020), 228.

177. See e.g. Polish Constitutional Tribunal, judgment of 14 July 2021, P 7/20, para III.6.4; Romanian Constitutional Court, Decision of 8 June 2021, No. 390, para 81; Hungarian Constitutional Court, Decision of 30 Nov. 2016, 22/2016 (XII.5.) AB, *Joint Exercise of Competences with the EU*, paras. 34–44, 49.

178. See e.g. Voßkuhle, "Applaus von der falschen Seite" in Voßkuhle, *Europa, Demokratie, Verfassungsgerichte* (Suhrkamp, 2021), p. 334; Biernat, "How far is it from Warsaw to Luxembourg and Karlsruhe", 21 GLJ (2020), 1104.

"Europarechtsfreundlichkeit" that requires utmost restraint and dialogue.[179] The Tribunal, by contrast, does not even remotely adhere to such standards.[180] Also substantively, *PSPP* is hardly comparable to the judgment in K 3/21. While the former concerned the isolated act of an EU institution, the latter declared the ECJ's interpretation of central Treaty provisions to be unconstitutional. The BVerfG generally accepts the primacy of EU law over the *Grundgesetz* and intervenes only with regard to a narrowly defined part, whereas the Tribunal asserts the primacy of the entire Constitution over EU law.[181] In addition, *PSPP* is – even though highly questionable – the outcome of nearly 30 years of judicial development.[182] The Tribunal's reasoning, by contrast, is largely unsubstantiated and incoherent.[183]

This leads to the question of how the Commission and the ECJ should respond to such contestations. This is not the place to reopen the long-standing and tiresome debate on whether contestations to the primacy of EU law or the ECJ's doctrine of unconditional primacy are legitimate. In any case, neither the Member States' constitutional courts nor the ECJ are likely to change their position.[184] A taste for the ECJ's solid stance was provided by an order of 6 October 2021 in Case C-204/21, which constitutes a rather odd sidenote in this conflict. After the Tribunal's decision of 14 July 2021, the Polish Government had requested the ECJ to cancel its interim order of 14 July 2021, based on a "change of circumstances" (Art. 163 of the Rules of Procedure). The ECJ, for its part, rejected this odd request by simply recalling that "a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law".[185]

179. Certainly, one may wonder whether the BVerfG observed these standards in *PSPP*; see e.g. Weiler, "Why Weiss?", 19 I-CON (2021), 179.

180. For such an empty rhetoric, see Polish Constitutional Tribunal, judgment of 14 July 2021, P 7/20, paras. III.6.5 and III.8. In its Press Release accompanying Case K 3/21, cited *supra* note 135, the Tribunal changed its tone, openly questioning the ECJ's independence (para 5) and threatening an "elimination" of ECJ judgments from the Polish legal order if Luxembourg does not refrain from its "progressive activism" (para 22).

181. Still, both doctrines are extremely prone to conflict; see Spieker, "Framing and managing constitutional identity conflicts", 57 CML Rev. (2020), 361, 374–375.

182. See e.g. Grimm, "A long time coming", 21 GLJ (2020), 944.

183. See e.g. the extremely short paragraph on the Polish constitutional identity in judgment of 14 July 2021, P 7/20, para III.6.7.

184. Contrast e.g. Grabenwarter, Huber, Knez and Ziemele, "The role of the Constitutional Courts in the European Judicial Network", 27 EPL (2021), 43, with Lenaerts, Gutiérrez-Fons and Adam, "Exploring the autonomy of the European legal order", 81 ZaöRV (2021), 47, 70.

185. Order of 6 Oct. 2021, Case C-204/21 R-RAP, *Commission* v. *Poland*, EU:C:2021:834, paras. 18, 24.

On that basis, the Commission initiated an infringement procedure against Poland for disregarding the primacy of EU law.[186] Roughly around the same time, however, it decided to close its proceedings against Germany for the ruling in *PSPP*.[187] This differentiation seems to require some justification. Politically, such differentiations among individual Member States can render the Commission vulnerable to accusations of ideological bias and could raise allegations of double standards. Legally, the Commission might even be under a duty to give reasons. Despite its wide discretionary powers,[188] the Commission exercises public authority when initiating infringement procedures. Accordingly, its decisions should not be arbitrary. Further, the Commission should observe the equality of the Member States enshrined in Article 4(2) TEU.[189] In this spirit, Advocate General Colomer argued that different sanctions should not be applied to Member State infringements "unless the Commission can give *sound reasons* for such differentiation".[190]

How then could the Commission and subsequently the ECJ justify differentiations between the German and the Polish case? First, the Commission could refer to the position of the respective Member State government. Concerning the closure of proceedings against Germany, the Commission hinted towards such an approach. It noted that the German Government explicitly recognizes the authority of the ECJ and committed to take an "active role" and "use all means at its disposal" to avoid a repetition of an ultra vires finding.[191] Conversely, the Polish Government is actively provoking such ultra vires decisions by bringing a whole series of cases before the captured Constitutional Tribunal. Yet, one may wonder whether such commitments could lead to an undue political influence on the judiciary and undermine the Union's efforts to protect judicial independence.

Second, the Commission and the ECJ could rely on the growing body of scholarship that developed criteria for constructive and destructive forms of contestation[192] or for the abuse of ultra vires or identity arguments.[193] Some

186. Commission Press Release, "Rule of law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal" (22 Dec. 2021), IP/21/7070.

187. Commission, "December infringements package: Key decisions" (2 Dec. 2021), INF/21/6201.

188. Case C-575/18 P, *Czech Republic* v. *Commission*, para 78. See already Case 416/85, *Commission* v. *United Kingdom*, EU:C:1988:321, para 9.

189. Várnay, "Discretion in the Articles 258 and 260(2) TFEU procedures", 22 MJ (2015), 836, 848. See also Karpenstein, op. cit. *supra* note 100, para 14; Prete, *Infringement Proceedings in EU Law* (Kluwer, 2017), pp. 347–350.

190. A.G. Colomer, Opinion in Case C-387/97, *Commission* v. *Greece*, EU:C:1999:455, para 97 (emphasis added).

191. See infringements package cited *supra* note 187.

192. See e.g. Bobić, "Constructive versus destructive conflict", 22 CYELS (2020), 60.

even proposed a sort of "legitimacy test" by which one could assess whether certain instances of judicial opposition constitute a loyal and principled form of disagreement or abusive resistance.[194] These approaches, however, have one thing in common: they depart from a pluralist conception and thus from the assumption that in some instances contestation and defiance is legitimate. Applying these differentiations would therefore require the ECJ to depart from its current doctrine of unconditional primacy. Due to the low likelihood of such a fundamental change, these distinctions are of little value for the ECJ's judicial practice.

A third, more promising approach could consist of applying a *substantive understanding of primacy*. Due to the limited scope of the present contribution, this proposal can only be explored tentatively, rather inciting further research than providing a fully developed argument. Currently, the substantive aims, which the principle of primacy seeks to fulfil, remain astonishingly unsubstantiated in the ECJ's case law. In its order of 6 October 2021 in Case C-204/21, the ECJ simply noted that primacy aims at preventing national law from undermining the "unity and effectiveness of EU law".[195] Still, the Court does not explain the reason behind the need for assuring the full effectiveness of EU law. Effectiveness for its own sake? More recent attempts have tried to fill this void. Koen Lenaerts, for instance, argued forcefully that primacy is essential to guarantee the equality among the Member States under Article 4(2) TEU.[196] This conception found its way into the Court's Press Release following *PSPP*[197] and the judgments in *Euro Box Promotion* and *RS*.[198] Others have gone even further, by suggesting that primacy is not only based on the equality among Member States but ultimately on the equality among individuals in the Union.[199] This rationale was already prevalent in *Costa* v. *ENEL*. In that judgment, the Court justified the primacy of EU law with the argument that "Community law cannot vary from one

193. See e.g. Scholtes, "Abusing constitutional identity", 22 GLJ (2021), 534, 550 et seq.

194. Flynn, "Constitutional pluralism and loyal opposition", 19 I-CON (2021), 241, 245.

195. Order of 6 Oct. 2021, Case C-204/21 R-RAP, *Commission* v. *Poland*, paras. 18, 24.

196. Lenaerts, "L'égalité des États membres devant les traités", (2021) *Revue du droit de l'Union européenne*, 7. See also Fabbrini, "After the *OMT* case: The supremacy of EU law as the guarantee of the equality of the Member States", 16 GLJ (2015), 1003. See, critically Lindeboom, "Is the primacy of EU law based on the equality of the Member States?", 21 GLJ (2020), 1032, 1037 et seq.

197. ECJ, Press Release following the judgment of the German Constitutional Court of 5 May 2020, No. 58/2020.

198. Joined Cases C-357, 379, 547, 811 & 840/19, *Euro Box Promotion and others*, EU:C:2021:1034, para 249; Case C-430/21, *RS (Effet des arrêts d'une cour constitutionnelle)*, EU:C:2022:99, para 55.

199. Klamert, "Rationalizing supremacy: Supremacy, effectiveness, and two standards of equality in EU law", *Verfassungsblog* (18 Oct. 2021).

State to another in deference to subsequent domestic laws, without . . . giving rise to the discrimination prohibited by Article 7".[200] In this sense, primacy was never just a functional tool, but justified by substantive considerations – the equality among individuals.

If the ECJ were to apply such a substantive understanding, it could disregard the merely doctrinal implications of an ultra vires judgment. Instead, it could concentrate on whether such a decision has any impact on the ground that gives rise to an inequality among Union citizens. This is only the case if there is no other way to accommodate the conflict between EU law and the national judgment. In the case of *PSPP*, the conflict was resolved by a simple request of the German Central Bank to the ECB for additional proportionality considerations.[201] In sum, the effect of *PSPP* was marginal. Importantly, the judgment did not give rise to any inequalities between individuals within the Union. The same assessment might lead to a very different conclusion in the Polish case. If national courts disregard the EU requirements for judicial independence on the basis of the Constitutional Tribunal's ultra vires decisions, Union citizens would have no equal access to independent courts and importantly no equal access to the ECJ (i.e. through the preliminary reference procedure). As such, the Tribunal's decisions would give rise to an inequality among Union citizens on the ground. Following such a substantive understanding, the Polish case would constitute a violation of the principle of primacy, whereas the German one would not.

5. Conclusion

The annotated decisions constitute an unequivocal, albeit preliminary end-point in the conflict over the Polish disciplinary regime for judges. After the clear judgment in Case C-791/19 and the orders in Case C-204/21, there is no room left for its further operation. While these decisions might be applauded as a legal victory for the Union's common values, the struggle will now shift to the level of enforcement. Beyond the specific case, the Court's decisions will have a twofold impact. Substantively, the judgment in Case C-791/19 consolidated the proliferating case law on judicial independence,

200. Case C-6/64, *Costa* v. *ENEL*, EU:C:1964:66. More recently, Joined Cases C-357, 379, 547, 811 & 840/19, *Euro Box Promotion*, para 246; Case C-430/21, *RS*, para 48. See further Pernice, "*Costa v ENEL* and *Simmenthal*: Primacy of European law" in Maduro and Azoulai (Eds.), *The Past and Future of EU Law* (Hart, 2010), pp. 47, 49.

201. See Deutscher Bundestag, Drucksache 19/20621. See also <www.bundestag.de/dokumente/textarchiv/2020/kw27-de-anleihekaeufe-703660>. The BVerfG accepted this as implementation of its judgment; see BVerfG, Order of 29 April 2021, 2 BvR 1651/15, paras. 96 et seq.

the rule of law and EU values into a coherent whole. In particular, the appearance and regression test have been rendered operational. In this respect, the ECJ seems to have left the stage of doctrinal innovation and entered the stage of consolidation and refinement. Procedurally, the orders in Case C-204/21 have given much more bite to ECJ proceedings. The Court clearly indicates that it will not shy away from direct confrontation. Instead, it seems ready to elevate the conflict to the next level and, if necessary, attempt to force Poland into compliance through financial penalties. Though the EU certainly lacks a national guard or instruments of "Bundeszwang", the latest order in Case C-204/21 considerably strengthened the Union's coercive force.

If we assess the ECJ's performance in the rule of law crisis so far, we cannot but acknowledge the Court's readiness to develop the necessary doctrinal innovations and engage in the conflict. Under the pressure of the illiberal developments in Poland, it started turning the values enshrined in Article 2 TEU into operational yardsticks. Today, there should be no doubt that the Union's common values are in fact legal obligations. Looking ahead, however, the challenges have not decreased. Rather than changing its course, the Polish Government continues to escalate the conflict and instrumentalize its captured constitutional judiciary. In this spirit, the Minister of Justice has submitted a new motion to review the daily penalty payments imposed by the ECJ in Case C-204/21 before the Constitutional Tribunal.[202] If this development continues, Polish judges will be increasingly confronted with diverging rulings from the ECJ and their constitutional court. This puts them in a difficult spot. In this respect, the recent judgments in *Euro Box Promotion* and *RS* have considerably strengthened their position. The ECJ stated that Articles 2 and 19(1)(2) TEU do not generally preclude the bindingness of constitutional court decisions for the national judiciary. Yet, this comes with an important caveat: the independence of the respective constitutional court must be guaranteed.[203] This constitutes an important support and should spark hope among those Polish judges who still resist the overhaul of their judiciary. They do not stand alone, but find a reliable and persistent partner in Luxembourg.

Luke Dimitrios Spieker[*]

202. The case is now pending as K 8/21.

203. Joined Cases C-357, 379, 547, 811 & 840/19, *Euro Box Promotion*, para 230; Case C-430/21, *RS*, para 44.

* Research fellow at the Max-Planck Institute for Comparative Public Law and International Law, Heidelberg, and legal trainee at the Berlin Higher Regional Court. I am very grateful to Maciej Taborowksi, Paweł Filipek as well as László Detre, Michał Krajewski, Mathieu Leloup, Cecilia Rizcallah, Julian Scholtes and the anonymous reviewers for feedback, insights and inspiration.

1. Annex: Timeline of the "saga" of the Polish disciplinary regime