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Anna Arampatzoglou

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Συγγραφέας:	Anna Arampatzoglou
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by: Anna Arampatzoglou
Supervisor: Prof. Michail Chrysomallis

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INTRODUCTION

The Treaty on European Union (TEU), as amended by the Lisbon Treaty, recognizes the rule of law as a value common to the European Union's Member States and one on which the European Union (EU) is said to be founded. As such, the value of the rule of law provide the foundation for an independent and effective judiciary and justify the subjection of public power to formal and substantive legal constraints by guaranteeing the primacy of the individual and its protection against the arbitrary or unlawful use of public power. In that regard, the Court of Justice of the European Union considered in its case-law that the rule of law includes the individual fundamental right to judicial protection and provides the foundation for judicial review.

Until recently, the Court of Justice of the European Union did not view the rule of law as a rule of law actionable before a court. It was 'the rule of law crisis' in certain EU Member States, during the last decade, the watershed moment for the Court to provide an answer as to the justiciability of the rule of law, independently to the enforcement of other political procedures. In its recent case-law the Court placed judicial independence at the core of the EU constitutional order, thus it became something more of a general principle, competent to shape Member States' discretion as to the organization of their judiciaries. Moreover, the Court emphasized the importance of judicial independence as a part of the right to a fair trial and the rule of law, by verifying that a risk of a breach of the fundamental right to an independent court can justify a limitation of the mutual trust between the EU Member States. In addition, deficiencies of judicial independence in one Member State entail problems for the courts in other Member States, as the latter are obliged by EU law to recognize and enforce judicial decisions coming from other EU Member States, in accordance with the principle of mutual recognition.

In that context, this paper aims, in the first part, to present the rule of law and the principle of judicial independence in the recent case-law of the Court, their foundation and justiciability, as the Court's reaction to 'the rule of law backsliding' in certain EU Member States. The second part introduces the principles of mutual trust and mutual recognition in the EU's legal order and the Court's recent case-law regarding those principles, particularly in the Area of freedom security and justice.

PART A

CHAPTER I: THE RULE OF LAW AND THE PRINCIPLE OF JUDICIAL INDEPENDENCE IN THE EUROPEAN UNION'S LEGAL ORDER

A. The rule of law as a value common to the EU Member States and as a value upon the EU is founded.

In the landmark judgment *Les Verts*,[1] the Court of Justice of the European Union (hereinafter referred as 'the Court'), described the European Union (ex European Community) as a 'Community based on the rule of law'. In paragraph 23 of its judgment the Court considered that "It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty. Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling."

As is apparent from the foregoing, the Court considered that the rule of law includes the individual fundamental right to judicial protection and provides the foundation for judicial review by implying the existence of comprehensive and complementary judicial review processes. These processes enable the judiciary to ensure compliance with two principles inherent in any genuine legal system: the principle of legality, that is essentially the requirement that public authorities enact measures in conformity with the legal system's hierarchy of norms and the principle of judicial protection, which in particular implies the right to obtain an effective remedy before a competent court for any person whose rights or interests guaranteed by law are violated by public authorities. In other words, judicial review ensures that public authorities respect legally protected 'individual' rights and interests, and also guarantees that these authorities enact measures in compliance with all relevant

1 Court of Justice, judgment of 23 April 1986, Case 294/83, *Les Verts*. The issue in that case concerned the question whether the European Parliament could act as a respondent in annulments proceedings initiated by a private party, a non-profit-making French association known as Parti écologiste 'Les Verts'.

superior legal principles.[2] However, the key to the concept of the rule of law is the judicial review of decisions of public authorities by independent courts.[3]

Following the end of the cold war, European countries agreed to commit themselves to promoting human rights, democracy and the rule of law as the three fundamental principles on which the 'new Europe' must be founded.[4]

Accordingly, the Treaty on European Union (TEU), as amended by the Lisbon Treaty, refers to the rule of law as a value (Article 2): "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." Therefore, the rule of law is identified both as a value common to the EU Member States and one on which the EU is said to be founded. Nonetheless, all the values referred to in Article 2 TEU are interdependent and must be construed in light of each other. The EU is founded on all of them simultaneously and violation of any of them should necessarily mean that the others cannot be satisfactorily complied with.[5]

Moreover, the rule of law is recognized as a principle in the Preamble of the Charter of Fundamental Rights of the European Union (hereinafter referred as 'the Charter'): "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law."

According to influential authors,[6] the rule of law requires the protection of the right to a fair trial as well as access to courts while an independent judiciary should be granted the power to review that, on the one hand, laws are prospective, adequately publicized, clear, relatively stable and, on the other hand, lawmaking is guided by open, stable, clear and general rules and also that the discretionary powers of the police and prosecuting authorities are limited.

The rule of law is a common value to the EU Member States and is unanimously recognized as one of the foundational principles in all European constitutional systems, a posited legal principle of constitutional value, although never precisely defined either by national constitutions or by courts but always left to scholars and judges to interpret. As such, the rule of law provide the foundation for an independent and effective judiciary and essentially describe and justify the subjection of public power to formal and substantive legal constraints by guaranteeing the primacy of the individual and its protection against the arbitrary or unlawful use of public power.[7] In addition, the formal and procedural components of the rule of law as proportionality, non-retroactivity, access to courts, fundamental rights protection, are

2 Pech L. (2009), *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09, NYU School of Law, pp. 15-16.

3 Jacobs F. (2007), The European Union and the rule of law. In *The Sovereignty of law: The European Way* (The Hamlyn Lectures, pp. 35-66), Cambridge: Cambridge University Press, doi:10.1017/CB09780511493706.007.

4 See Charter of Paris for a new Europe adopted by the Heads of State or Government of the participating States of the Conference on Security and Co-operation in Europe on the 21st of November 1990.

5 Pech L., cit., p. 52.

6 Raz J. (1979), The Rule of Law and its Virtue. In *The Authority of Law: Essays on Law and Morality*, Clarendon Press, Published to Oxford Scholarship Online: March 2012, Part III, Chapter 11.

7 See Carpano E. (2005), *État de droit et droits européens: L'évolution du modèle de l'État de droit dans le cadre de l'européanisation des systèmes juridiques*, L'Harmattan, p. 23, para 11, as cited in Pech L., cit., p. 44.

supposed to serve the substantive values human dignity, individual autonomy, social justice, upon which societies are founded. Thus, by crystallizing a broad set of legal standards and of moral values, the rule of law fulfils multiple and valuable functions.[8] Most importantly, courts may rely on the rule of law both as a principle in order to interpret all legal norms and a basis from which a set of legal principles can be derived to help the judiciary in their day-to-day mission to interpret and scrutinize the validity of public authorities' measures.[9]

Furthermore, the EU rule of law, is an 'umbrella' legal principle with a broader scope of application than the one it normally has at the national level and has been reasonably relied on by the Court of Justice as an interpretative guide and as a source from which additional more specific legal standards may be derived. That is, after all, the most significant aspect of the Court's case-law post *Les Verts*: the broader interpretation of the rule of law, as an 'umbrella' principle[10] with formal and substantive components or sub-principles.[11] A few years after *Les Verts* the Court described the 'Community based on the rule of law' as a principle.[12]

In *Les Verts,* the Court initially focused on guaranteeing procedural principles, as the principle of judicial review and the right to an effective remedy, the principle of legal certainty, the principle of legitimate expectations and the principle of proportionality. Accordingly, the Court referred to fundamental rights clarifying that the EU rule of law demands judicial remedies and processes to protect procedural as well as substantive fundamental rights.[13]

Nevertheless it would be difficult to deny that the Court of Justice did not view, until recently,[14] the rule of law as a rule of law actionable before a court. For instance, parties in legal proceedings cannot directly rely on the rule of law to seek annulment of the acts of EU institutions.[15] The reason is that the rule of law is not one of the principles of judicial review but rather provides the constitutional foundation for judicial review at EU level. This explains the relatively minor number of instances where the rule of law has played a direct role with respect to the outcome of the cases before the EU courts, even where the Court has been invited to do so by the private parties' counsels or by the Advocates General.[16]

As stated above, the rule of law is the foundation for an independent and effective judiciary with the power of judicial review and a fundamental value to which courts may refer to in order to guide their interpretation of the law or use as a source from which they can derive justiciable principles.

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8 Pech L., cit., pp. 42-44.

9 Ibid., pp. 46-47.

10 See Marshall G. (1993), "The Rule of Law. Its Meaning, Scope and Problems", *24 Cahiers de philosophie politique et juridique 43*, p. 43: Both the rule of law and the separation of powers "are umbrella terms or labels for a range of institutional provisions whose various elements have to be assembled in the shape of numerous more detailed rules", as cited in Pech L., cit., p. 53.

11 Simon D. (1991), "Y a-t-il des principes généraux du droit communautaire", *Droits, Revue Française de Théorie Juridique, 14*, p. 73. Simon divides by categorizing these sub-principles around two main ideas, "the right to rights" and "the right to a judge", as cited in Pech L., cit., p. 53.

12 Court of Justice, order of 13 July 1990, Case C-2/88, *Zwartveld*.

13 Court of Justice, judgment of 25 July 2002, Case C-50/00 P, *Unión de Pequeños Agricultores*, para. 38.

14 This issue will be analyzed later on, see *infra* CHAPTER II, sections B and C.

15 As is well known, in annulment proceedings (ex Article 230 EC) applicants may rely on one or more of these four grounds: lack of power; misuse of powers; infringement of an essential procedural requirement; infringement of the TEU or any rule of law relating to its application. This last ground notably includes the general principles of law.

16 Pech L., cit., p. 58.

As a constitutional value of the EU, the rule of law has had a positive impact on the development of the European legal order. Additionally, in the EU constitutional framework, the rule of law - along with liberty, democracy and respect for fundamental rights - is also used as a benchmark to assess and eventually sanction the actions of its current and prospective members.[17]

In this context, according to Article 7(1) TEU the Council may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Moreover, according to Article 7(2) TEU the European Council may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2. In that case, the Council may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.[18] Therefore, on the one hand, the Council may determine that there is a clear risk of a serious breach by a Member State, and, on the other hand, the European Council may determine the existence of a serious and persistent breach by a Member State, of the values referred to in Article 2. Moreover, with respect to candidate States, Article 49 TEU provides, respectively, that "any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union."

It is worth noting that, the fact that there must be a clear risk or that the actual breach must be simultaneously serious and persistent, indicate that the requirements for activating Article 7 TEU are hard to satisfy, in case of a breach of the values referred to in Article 2 TEU, including the rule of law. Any implementation of this provision is further circumscribed by demanding voting and the Council's discretionary power to sanction the relevant Member State. In that regard, the 'umbrella' nature of these values and the lack of any explicit Treaty definition call for a political judgment, rather than a legal one, to establish whether a current member or a candidate country is in breach of these principles. Also, the question of sanctioning a Member State or agreeing to the adhesion of a new *c*ountry is governed by broad political and geopolitical concerns which preclude any strict reading of Articles 7 and 49 TEU. As a result, no Member State or candidate country is likely of being formally found in breach of the principles of liberty, democracy, respect for fundamental rights and the rule of law. Also, the fact that the Court of Justice was given no direct role to play indicates that the Member States understand these mechanisms as political ones and whose value is essentially if not exclusively symbolic.[19] However, despite their limitations and defects, Articles 7 and 49 TEU serve a useful purpose since national governments of Member States or candidate countries must always be ready to defend the legitimacy of their actions in light of principles they cannot individually set aside.[20]

17 Ibid., pp. 62-63.

18 Article 7 (3) TEU provides: "3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State."

19 Pech L., cit., pp. 64-65.

20 Ibid., p. 67.

B. The rule of law backsliding in EU Member States

It is in this intersection that, a group of national governments of certain Member States as Hungary, Romania and Poland have essentially breached the foundational values on which the Union is based, in particular, the rule of law, thus embodying the notion of 'the rule of law backsliding'.[21]

In that regard, the most striking case is Poland. The Polish government has taken extensive measures that have undermined the independence of the Constitutional Tribunal and has strengthened its influence on the National Council of the Judiciary, which selects the judges. By lowering the retirement age and applying it to current Supreme Court judges, the law of the polish government terminates the mandate and potentially retires a significant number of current Supreme Court judges: 31 of the 83 (37%).[22] Moreover, it has raised the overall number of Supreme Court judges, thereby creating the need for up to 70 new nominations and has established a new disciplinary chamber as well as an extraordinary appeals procedure before the Supreme Court, which has the potential to bow independent-minded judges.[23]

By surprising many who consider the rule of law value of Article 2 TEU a vague political statement, the guardians of the Treaties have developed it in a way that allows for a juridical assessment of Member States' activities. In other words, the institutions have linked the value of the rule of law to well-established principles.[24]

More specifically, the Commission compiles relevant principles into a sensible whole, in particular in its Rule of Law Framework,[25] by relying on many sources: the Court's rulings, but also decisions and opinions of other institutions, in particular the European Court of Human Rights (ECtHR) and the European Commission for Democracy through Law (the Venice Commission). The Commission's Rule of Law Framework is an important step with regard not only for the interpretation but also, possibly, for the normativity of the rule of law. Indeed, the Commission has reiterated the Framework's interpretation in its Reasoned Proposal under Article 7(1) TEU regarding the Rule of Law in Poland[26] and referred to the rule of law value in its 2018 Justice Scoreboard for 'monitoring of justice reforms at EU level' as well as in its last Country Report on Poland under the European Semester.[27] The Commission's recent

21 A definition for the notion of 'the rule of law backsliding' is provided by Kim Lane Scheppele and Laurent Pech as: "the process through which elected public authorities deliberately implement government blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.", "What is rule of law backsliding?", verfassungsblog.de/what is rule of law backsliding/, 2 March 2018.

22 COM (2017) 835 final, "European Commission, Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland: Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law", p. 21, para. 116.

23 Act on the Supreme Court of 8 December 2017, Journal of Laws (2018), item no. 5, Venice commission, available at http://www.venice.coe.int/webforms/documents.

24 Von Bogdandy Armin, Bogdanowicz Piotr et al., "A Constitutional moment for the European Rule of Law – Upcoming landmark decisions concerning the Polish Judiciary", *MPIL Research Paper Series No. 2018-10*, p. 3.

25 COM (2014) 158 final/2, "European Commission, Communication from the Commission to the European Parliament and the Council: A new EU framework to strengthen the rule of law" p. 4, and Annex I.

26 COM (2017) 835 final, cit., p.1, para 1.

27 SWD (2018) 219 final, "Commission Staff Working Document, Country Report Poland 2018 accompanying the document Communication from the Commission to the European Parliament, the Council, the European Central Bank and the Eurogroup: 2018 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011 {COM (2018) 120 final}", p. 3.

regulation proposal regarding 'generalized deficiencies as regards the rule of law'[28] even provides a definition for 'generalized deficiency as regards the rule of law'.[29]

However, despite the above mentioned instruments adopted by the Commission, the Polish authorities did not undertake any remedial action, therefore, on 20 December 2017, the Commission launched the procedure under Article 7(1) TEU for the first time ever. Thus, the Commission finds that there is a clear risk of a serious breach of the rule of law in Poland and indicates precisely which steps need to be taken.

CHAPTER II: THE PRINCIPLE OF JUDICIAL INDEPENDENCE IN THE CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

A. Before the landmark judgment in *Associação Sindical dos Juízes Portugueses* case.

The Court of Justice reacted to 'the rule of law crisis' or 'the rule of law backsliding' by delivering its crucial judgment in *Associação Sindical dos Juízes Portugueses* case.[30] In that judgment, the Court's interpretation of Article 19 TEU covers the institutional dimension of domestic judicial independence and the European rule of law becomes justiciable vis-à-vis the Member States.[31]

Interestingly enough, ever since the judgment in *Les Verts* case and up to the judgment in *Associação Sindical dos Juízes Portugueses* case, the case-law of the Court had provided all the necessary instruments. In that regard, it is worth mentioning a few of the judgments concerning the issue at hand, that is to say, the rule of law value, the principle of effective judicial protection and the principle of judicial independence.

More specifically, in the judgment in case C-506/04 *Wilson,* the Court considered first of all that "in order to ensure effective judicial protection of the rights (...) the body called upon to hear appeals against decisions (…), must be a court or tribunal as defined by Community law. That definition has been laid down in the case-law of the Court relating to the definition of a national court or tribunal (...), setting out a certain number of criteria that must be satisfied by the body concerned, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and its independence and impartiality."[32]

Accordingly, the Court ruled that "the concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision. The concept has two other aspects. The first aspect, which is external, presumes that the body is protected against external intervention or pressure liable to jeopardize the independent judgment of its members as regards proceedings before them. That essential freedom

28 COM (2018) 324 final, "European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States", at Article 2(b).

29 Von Bogdandy Armin et al., cit., pp. 3-4.

30 Court of Justice, judgment of 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses,* analyzed *infra* in section B1.

31 Von Bogdandy Armin et al., cit., p. 3.

32 Court of Justice, judgment of 19 September 2006, Case C-506/04, *Wilson,* paras 47-48 and the case-law cited.

from such external factors requires certain guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office. The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it."[33]

Later on, the judgment in case C-432/05 *Unibet,* provided that "the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union (...)."[34]

Similarly, in the judgment in case C-279/09 *DEB,* the Court ruled that "The question (...) concerns the right of a legal person to effective access to justice and, accordingly, in the context of EU law, it concerns the principle of effective judicial protection. That principle is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (...). As regards fundamental rights, it is important, since the entry into force of the Lisbon Treaty, to take account of the Charter, which has 'the same legal value as the Treaties' pursuant to the first subparagraph of Article 6(1) TEU. Article 51(1) of the Charter states that the provisions thereof are addressed to the Member States when they are implementing EU law. In that connection, the first paragraph of Article 47 of the Charter provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. Under the second paragraph of Article 47, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone is to have the possibility of being advised, defended and represented. The third paragraph of Article 47 of the Charter provides specifically that legal aid is to be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. According to the explanations relating to that article, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter, the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR (…)."[35]

Furthermore, in case C-614/10 *Commission v Austria*, the Court held that "the fact that the (Austrian authority) has functional independence in so far as, (...) its members are 'independent and [are not] bound by instructions of any kind in the

33 Ibid., paras 49-53 and the case-law cited.

34 Court of Justice, judgment of 13 March 2007, Case C-432/05, *Unibet*, para. 37 and the case-law cited.

35 Court of Justice, judgment of 22 December 2010, Case C-279/09, *DEB*, paras 29-33 and the case-law cited.

performance of their duties' is, admittedly, an essential condition in order for that authority to satisfy the criterion of independence (...) However, (...) such functional independence is not by itself sufficient to protect that supervisory authority from all external influence. The independence required (...) is intended to preclude not only direct influence, in the form of instructions, but also, (...) any indirect influence which is liable to have an effect on the authority's decisions."[36]

In case C-175/11 *D. and A.*, the Court considered that "(...) under (...) Act 2000, applicants for asylum may also question the validity of recommendations (…) and decisions of the Refugee Appeals Tribunal before the High Court, the decisions of which may be appealed to the Supreme Court. The existence of these means of obtaining redress appear, in themselves, to be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention or pressure liable to jeopardize the independence of its members. In those circumstances, it must be concluded that the criterion of independence is satisfied by the Irish system for granting and withdrawing refugee status and that that system must therefore be regarded as respecting the right to an effective remedy."[37]

Moreover, in case C-583/11 P, *Inuit Tapiriit Kanatami and others v. Parliament and Council***,** the Court ruled that "First, it must be recalled that judicial review of compliance with the European Union legal order is ensured, as can be seen from Article 19(1) TEU, by the Court of Justice and the courts and tribunals of the Member States (see, to that effect, Opinion of the Court 1/09 [2011] ECR I-1137, paragraph 66). Further, the European Union is a union based on the rule of law in which the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, the general principles of law and fundamental rights.[38] In that context, it must be emphasized that, in proceedings before the national courts, individual parties have the right to challenge before the courts the legality of any decision or other national measure relative to the application to them of a European Union act of general application, by pleading the invalidity of such an act.[39] As regards the role of the national courts and tribunals, (…) it must be recalled that the national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed (Opinion of the Court 1/09, paragraph 69). It is therefore for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection. That obligation on the Member States was reaffirmed by the second subparagraph of Article 19(1) TEU, which states that Member States 'shall provide remedies sufficient to ensure effective judicial protection in the fields covered by European Union law'."[40]

In case C-288/12, *Commission v Hungary*, the Court provided that "(...) it is necessary to examine whether (…) the requirement, (...) to ensure that each supervisory authority is able to carry out the tasks entrusted to it in complete independence entails an obligation for the Member State concerned to allow that authority to serve its full term of office. (...) The supervisory authorities responsible

36 Court of Justice, judgment of 16 October 2012, Case C-614/10, *Commission v Austria*, paras 42-43.

37 Court of Justice, judgment of 31 January 2013, Case C-175/11, *D. and A.*, paras 103-104.

38 Court of Justice, judgment of 3 October 2013, Case C-583/11 P, *Inuit Tapiriit Kanatami and others v. Parliament and Council*, paras 90-91 and the case-law cited.

39 Ibid., para. 94 and the case-law cited.

40 Ibid., paras 99-101 and the case-law cited.

for supervising the processing of personal data must enjoy an independence allowing them to perform their duties free from external influence. That independence precludes inter alia any directions or any other external influence in whatever form, whether direct or indirect, which may have an effect on their decisions and which could call into question the performance by those authorities of their task of striking a fair balance between the protection of the right to private life and the free movement of personal data."[41]

Accordingly, in case C-456/13 P, *T & L Sugars and Sidul Açúcares v Commission*, the Court held, once more, that "Judicial review of compliance with the European Union legal order is ensured, as can be seen from Article 19(1) TEU, not only by the Court of Justice but also by the courts and tribunals of the Member States. The FEU Treaty has, by Articles 263 TFEU and 277 TFEU, on the one hand, and Article 267 TFEU, on the other, established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the European Union judicature."[42]

In addition, in case C-72/15 *Rosneft*, the Court ruled that "As is apparent from both Article 2 TEU, which is included in the common provisions of the EU Treaty, and Article 21 TEU, concerning the European Union's external action, (…) one of the European Union's founding values is the rule of law. It may be added that Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection, requires, in its first paragraph, that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. It must be recalled that the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law."[43]

Besides, in case C-503/15, *Margarit Panicello*, the Court held that "In that regard, it must be recalled that, according to settled case-law, in order to determine whether a body making a reference is a 'court or tribunal' for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.[44] It should be recalled that the requirement for a body making a reference to be independent is comprised of two aspects. The first, external, aspect presumes that the court exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and is thus protected against external interventions or pressure liable to jeopardize the independent judgment of its members as regards proceedings before them."[45]

In case C-685/15 *Online Games and Others*, the Court considered that "According to settled case-law, under the principle of sincere cooperation laid down in Article 4(3) TEU, it is for the courts of the Member States to ensure judicial

41 Court of Justice, judgment of 8 April 2014, Case C-288/12 P, *Commission v Hungary*, paras 50-51 and the case-law cited.

42 Court of Justice, judgment of 28 April 2015, Case C-456/13 P, *T & L Sugars and Sidul Açúcares v Commission*, para. 45 and the case-law cited.

43 Court of Justice, judgment of 28 March 2017, Case C-72/15 *Rosneft*, paras 72-73 and the case-law cited.

44 Court of Justice, judgment of 16 February 2017, Case C-503/15, *Margarit Panicello*, para. 27 and the case-law cited.

45 Ibid., para. 37 and the case-law cited.

protection of a person's rights under EU law. In addition, Article 19(1) TEU requires Member States to provide remedies sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law. The scope of Article 47 of the Charter, in so far as the action of the Member States is concerned, is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States when they are implementing EU law. That provision confirms the Court's settled case-law, which states that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations.(...) Where a Member State enacts a measure that derogates from a fundamental freedom guaranteed by the FEU Treaty, such as the freedom of establishment or the freedom to provide services, that measure falls within the scope of EU law. The first paragraph of Article 47 of the Charter provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. It is also common ground that, in the context of the cases in the main proceedings, the applicants claim that the rights of freedom to provide services and of freedom of establishment deriving from Articles 56 and 49 TFEU respectively have been infringed by the confiscation measures and the sanctions which they ask to be annulled, on that ground, before the national court. Article 47 of the Charter is therefore applicable to the present case. Although the obligations on national courts, as regards examining the justification for legislation which restricts a fundamental freedom of the Union, have accordingly been defined by the case-law of the Court, it is for the domestic legal system of each Member State to regulate the procedural rules governing actions for the protection of the rights which individuals derive from EU law. In the absence of EU legislation, the Member States have the responsibility for ensuring that those rights are effectively protected in each case and, in particular, for ensuring compliance with the right to an effective remedy and to a fair hearing enshrined in Article 47 of the Charter. As regards the right to an independent and impartial tribunal set out in the second paragraph of Article 47 of the Charter, the concept of 'independence', which is inherent in the court's task, has two aspects. The first aspect, which is external, entails that the body is protected against external intervention or pressure liable to jeopardize the independent judgment of its members as regards proceedings before them. The second aspect, which is internal, is linked to 'impartiality' and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect, which the referring court fears is not complied with in the present case, requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Those guarantees of independence and impartiality require rules, particularly statutory and procedural rules, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it."[46]

In case C-403/16 *El Hassani*, the Court ruled that "Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection, requires, in its first paragraph, that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal

46 Court of Justice, judgment of 14 June 2017, Case C-685/15 *Online Games and Others*, paras 54-62 and the case-law cited.

in compliance with the conditions laid down in that article. Furthermore, the second paragraph of Article 47 of the Charter provides that everyone is entitled to a hearing by an independent and impartial tribunal. Compliance with that right assumes that a decision of an administrative authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body that must, in particular, have jurisdiction to consider all the relevant issues. The concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision."[47]

In this context, the Court has also delivered its *Opinion 1/09*, in which it provided that "It is apparent from the Court's settled case-law that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the European Union legal order thus constituted are in particular its primacy over the laws of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (see Opinion 1/91 [1991] ECR I-6079, paragraph 21). As is evident from Article 19(1) TEU, the guardians of that legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States. Moreover, it is for the Court to ensure respect for the autonomy of the European Union legal order thus created by the Treaties (see Opinion 1/91, paragraph 35). It should also be observed that the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for European Union law. Further, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law. The national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed. The judicial system of the European Union is moreover a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions."[48]

B. In the aftermath of the judgment *Associação Sindical dos Juízes Portugueses* case.

1. Case C- 64/16: *Associação Sindical dos Juízes Portugueses*.

47 Court of Justice, judgment of 13 December 2017, Case C-403/16 *El Hassani*, paras 38-40 and the case-law cited.

48 Court of Justice, opinion 1/09 of 8 March 2011, paras 65-70 and the case-law cited.

As stated above, the Court's judgment in *Associação Sindical dos Juízes Portugueses* case[49] is of crucial importance as far as the value of the rule of law and the principle of judicial independence is concerned.

More specifically, the request for a preliminary ruling in that case concerned the interpretation of the second subparagraph of Article 19(1) TEU[50] and Article 47 of the Charter. The request has been made in proceedings between the Associação Sindical dos Juízes Portugueses (Trade Union of Portuguese Judges, 'the ASJP') and the Tribunal de Contas (Court of Auditors, Portugal) concerning the temporary reduction in the amount of remuneration paid to that court's members, in the context of the Portuguese State's budgetary policy guidelines.

In its judgment the Court, first of all, pointed out that the material scope of the second subparagraph of Article 19(1) TEU, relates to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter. Furthermore, the Court provided that, according to Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU[51]. Therefore the European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act. Accordingly, the Court held that Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals.[52] As a consequence, the Court considered that national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed.[53]

The Member States are therefore obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law[54]. Thus, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields.[55]

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49 See *supra* note 30.

50 Article 19(1) and (2) TEU provides: '1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. 2. ... The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt ...'

51 Court of Justice, opinion 2/13 of 18 December 2014, para. 168.

52 See *supra* note 30, paras 29-32 and the case-law cited.

53 Court of Justice, Opinion 1/09 of 8 March 2011, para. 69.

54 Ibid., para. 68.

55 See *supra* note 30, paras 33-34 and the case-law cited.

As far as the principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU is concerned, the Court ruled that it is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and which is now reaffirmed by Article 47 of the Charter. Most importantly, the Court stated that "The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law".[56]

Subsequently, the Court provided that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection. The factors to be taken into account in assessing whether a body is a 'court or tribunal' include, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.[57]

Concerning the specific circumstances of the case, the Court accepted that to the extent that the Tribunal de Contas (Court of Auditors) may rule, as a 'court or tribunal', as referred above, on questions concerning the application or interpretation of EU law, the Member State must ensure that that court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU. Consequently, in order to ensure that protection, maintaining such a court or tribunal's independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy.[58]

Furthermore, as far as the prerequisite of independence is concerned, the Court emphasized that the guarantee of independence, which is inherent in the task of adjudication, is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Article 19(2) TEU, but also at the level of the Member States as regards national courts. Additionally, the independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, as that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence. The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.[59]

In view of the foregoing, a few important observations ought to be made, concerning the above analyzed crucial judgment. First of all, the Court considered that the scope of application of Article 19(1) TEU, which refers "the fields covered by

56 Ibid., paras 35-36 and the case-law cited.
57 Ibid., paras 37-38 and the case-law cited.
58 Ibid., paras 40-41.
59 Ibid., paras 42-44.

Union law" is broader than the scope of Article 51(1) of the Charter, which refers to "implementing Union law". In fact, the Court provides that there are certain obligations flowing directly from Article 19(1) TEU thus reaching further into national territory. Second, by holding that Article 19(1) gives "concrete expression to the value of the rule of law stated in Article 2 TEU" the Court operationalizes the values of Article 2 TEU and reinforces it with a reference to Article 4(3) TEU on the principle of sincere cooperation. Thus, the Court provides an answer as to the justiciability of the values, independently to the enforcement of Article 7 TEU, which is more a political procedure with its already mentioned limitations and defects.[60] Third, the Court, after reaffirming that the principle of effective judicial protection is a general principle of EU law, alters the scope of application of Article 19(1) TEU and infuses it both with the principle of effective judicial protection enshrined therein with the principle of judicial independence, based inter alia on Article 47 of the Charter and the case-law on Article 267 TFEU. Fourth, the Court within its judgment has reconfigured the EU constitutional order by emphasizing the essential importance and mutual reinforcement of the rule of law, effective judicial protection, judicial independence, mutual trust, sincere cooperation and the decentralized enforcement of EU law by national courts.[61]

Finally, according to a recent study (Chrysomallis, 2019), what makes that judgment significant is the fact that the Court preferred to consider that the obligation of the Member States to respect judicial independence is based exclusively on Article 19(1) TEU, by emphasizing earlier that Article 19(1) TEU could be implemented in national level irrespective of whether the Member Sates are implementing Union law, within the meaning of Article 51(1) of the Charter. By circumventing Article 47 of the Charter, without providing any explanation whatsoever, the Court broadened the material scope of the principle of effective judicial protection inherent in the principle of judicial independence. As a matter of fact, the Court created a 'presumption', according to which, the Member States should ensure independence of their national courts irrespective of whether they implement Union law in specific cases. The fact that national courts are 'potentially' competent to rule on 'the fields covered by Union law' is sufficient.

Another interesting judgment following *Associação Sindical dos Juízes Portugueses*, is in case C-284/16, *Achmea*,[62] according to which, EU law is characterized by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other. EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognized, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of

60 See *supra* Chapter IA at the end.

61 Ovadek Michal (2018), "Has the CJEU Just Reconfigured the EU Constitutional Order?", verfassungsblog, 28 February, pp. 4-5.

62 Court of Justice, judgment of 6 March 2018, Case C-284/16, *Achmea*, paras 33-37.

Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU. In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties.[63]

2. Case C-216/18 PPU, *Minister for Justice and Equality*, *LM*

In case C-216/18 PPU, *Minister for Justice and Equality*, *LM*, in which the request for a preliminary ruling concerned the interpretation of Article 1(3) of the Framework Decision[64] on the European arrest warrant and the surrender procedures between Member States and has been made in connection with the execution, in Ireland, of European arrest warrants issued by Polish courts against LM, the Court recalled, in the beginning, that EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognized, and therefore that the EU law that implements them will be respected.[65]

As the issue in the specific case was whether, like a real risk of breach of Article 4 of the Charter, a real risk of breach of the fundamental right of the individual concerned to an independent tribunal and, therefore, of his fundamental right to a fair trial as laid down in the second paragraph of Article 47 of the Charter is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to a European arrest warrant, on the basis of Article 1(3) of Framework Decision, the Court pointed out that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded. The European Union is a union based on the rule of law in which individuals have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act. Furthermore, in accordance with

63 See Court of Justice, opinion 2/13 of 18 December 2014, paras 165-168, 173-176 and the case-law cited.

64 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) 'the Framework Decision'.

65 Court of Justice, judgment of 25 July 2018, Case C-216/18 PPU, *Minister for Justice and Equality*, *LM*, para. 35 and the case-law cited.

Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and judicial protection of the rights of individuals under that law. The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.[66]

As a consequence, every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection. In order for that protection to be ensured, maintaining the independence of those bodies is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy. The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the Court's settled case-law, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence. Since, the Framework Decision is intended to establish a simplified system of direct surrender between 'judicial authorities' for the purpose of ensuring in the area of freedom, security and justice the free movement of judicial decisions in criminal matters, maintaining the independence of such authorities is also essential in the context of the European arrest warrant mechanism.[67]

Furthermore, in criminal procedures for the purpose of prosecution, or of enforcement of a custodial sentence or detention order, the Member States are still obliged to observe fundamental rights enshrined in the ECHR or laid down by their national law, including the right to a fair trial and the guarantees deriving from it. The high level of trust between Member States on which the European arrest warrant mechanism is based is thus founded on the premiss that the criminal courts of the other Member States meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts. Regarding this case, in particular, the Court held that the existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that European arrest warrant. Thus, where the person in respect of whom a European arrest warrant has been issued, pleads, in order to oppose his surrender to the issuing judicial authority, that there are systemic deficiencies, or, at all events, generalized deficiencies, which, according to him, are liable to affect the independence of the judiciary in the issuing Member State and thus to compromise the essence of his fundamental right to a fair trial, the executing judicial authority is required to assess whether there is a real risk that the individual concerned will suffer a breach of that fundamental right, when it is called upon to decide on his surrender to the authorities of the issuing Member State.[68]

Accordingly, the Court ruled that the executing judicial authority must, as a first step, assess, on the basis of material that is objective, reliable, specific and

66 Ibid., paras 47-51 and the case-law cited.
67 Ibid., paras 52-55 and the case-law cited.
68 Ibid., paras 57-60 and the case-law cited.

properly updated concerning the operation of the system of justice in the issuing Member State, applying by analogy the 'Aranyosi test',[69] whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalized deficiencies there, of the fundamental right to a fair trial being breached. As regards the requirement that courts be independent which forms part of the essence of that right, the Court pointed out that that requirement is inherent in the task of adjudication and has two aspects. The first aspect, which is external in nature, presupposes that the court concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. That essential freedom from such external factors requires certain guarantees appropriate for protecting the person of those who have the task of adjudicating in a dispute. Furthermore, the second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.[70]

In addition, the requirement of independence means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary. As a consequence, if the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalized deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts, that authority must, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk. That specific assessment is also necessary where (i) the issuing Member State has been the subject of a reasoned proposal adopted by the Commission pursuant to Article 7(1) TEU in order for the Council to determine that there is a clear risk of a serious breach by that Member State of the values referred to in Article 2 TEU, such as that of the rule of law, on account, in particular, of actions impairing the independence of the national courts, and (ii) the executing judicial authority considers

69 Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru,* analyzed *infra* PART B, CHAPTER IIA.

70 See *supra* note 65, paras 61-66 and the case-law cited.

that it possesses, on the basis, in particular, of such a proposal, material showing that there are systemic deficiencies, in the light of those values, at the level of that Member State's judiciary.[71]

Moreover, the Court considered that, as is apparent from recital 10 of the Framework Decision, implementation of the European arrest warrant mechanism may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, determined by the European Council pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU. It thus follows that it is for the European Council to determine a breach in the issuing Member State of the principles set out in Article 2 TEU, including the principle of the rule of law, with a view to application of the European arrest warrant mechanism being suspended in respect of that Member State. Therefore, it is only if the European Council were to adopt a decision determining, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend the Framework Decision in respect of that Member State that the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected.[72]

By contrast, as long as a decision, pursuant to Article 7(1) TEU, has not been adopted by the European Council, the executing judicial authority may refrain, to give effect to a European arrest warrant issued by a Member State which is the subject of a reasoned proposal only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, that there are substantial grounds for believing that the person in respect of whom that European arrest warrant has been issued will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial.[73]

It follows from the foregoing, that the judgment in *LM* case is significant, regarding the rule of law and the principle of judicial independence as a limit to the presumption of mutual trust and the application of mutual recognition of judicial decisions between Member States. More specifically, the *LM* case, deals with a comprehensive violation of the value of the rule of law since a Member State (Poland) is suffering from a systemic deficiency in upholding the rule of law because it undermined the independence of the judiciary. That could have the broadest implications and could possibly affect the fundamental principle of mutual trust on which the entire judicial cooperation in the European legal space rests. Indeed, the autonomy of judges is a 'key matter' for the functioning of the preliminary ruling procedure, since a systemic rule of law problem with judicial independence affects the effectiveness of the entire EU legal system. Thus, the Court evaluated the impact legislative changes in Poland have on judicial independence, building on its judgment in *Associação Sindical dos Juízes Portugueses* and its case-law regarding the principle of effective judicial protection.[74] At the same time, the judgment can be seen as an important development of the case-law related to the protection of fundamental

71 Ibid., paras 67-69 and the case-law cited.
72 Ibid., paras 70-72.
73 Ibid., para. 73.
74 Von Bogdandy Armin et al., cit., pp. 9-10.

rights in the field of mutual recognition. A detailed analysis is provided on the issue whether the infringement of the right to a fair trial, which is always at risk when the judicial independence is limited, can justify refraining from the execution of a European arrest warrant.

Furthermore, as far as the principle of judicial independence is concerned, the Court approached the issue only from the perspective of an individual, as a part of the right to a fair trial, protected by Article 47 of the Charter. It did not determine any systemic consequences of limiting the judicial independence to judicial cooperation.[75]

Moreover, the Court emphasizes the importance of judicial independence as a part of the right to a fair trial and the rule of law by verifying that a risk of a breach of the fundamental right to an independent court can justify a limitation of the mutual trust.

According to a recent working paper (Tzortzi, 2019): "An important issue to which the Court answers in its LM judgment is whether the finding of the erosion of the foundations of mutual trust lies with the European Council or the courts, when the article 7 procedure has already begun. Further, if it is ultimately held that it is up to the courts to which ones, the Court of Justice or the national courts responsible for the execution of the European Arrest Warrant? The Court in LM case (...) while respecting its role in the preliminary ruling procedure, it refuses to circumvent the powers of both the national judge and the European Council (...) According to the judgment, national courts and not the Court itself are ultimately responsible for assessing that the rule of law is being violated in the issuing member state of the European Arrest Warrant. This gives rise to uncertainty for national judges, in particular as to the extent of the supplementary information they have to provide to the judicial authority of the issuing member state. Moreover, one can only recognize the potential risks of allowing national courts to carry out such an assessment and, thus, erode the principle of mutual trust, ultimately questioning the primacy, unity and effectiveness of EU law."

Finally, according to the judgment, national courts should apply both steps of the 'Aranyosi test'[76] when judicial independence in the issuing Member State is endangered. In that case, if the executing court possesses evidence of systemic or generalized deficiences as a first step, it should proceed to the second step of individual case assessment. Similarly, the second step of individual case assessment is also necessary if a procedure pursuant to Article 7 TEU has started against the issuing Member State.

More specifically, the Court provides instructions to national courts on how to proceed and implement, by analogy, the 'Aranyosi test', if the person in respect of whom a European arrest warrant has been issued pleads that there are systemic or generalized deficiencies concerning the independence of courts in the issuing Member State. The assessment consists of two steps, a systemic and a specific one. As a first step the executing judicial authority must assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State, according to the criteria of judicial independence provided by the judgment. If this assessment implies the conclusion that there is a real risk, connected with a lack of independence of the courts of the issuing

75 Dr hab Frackowiak-Adamska Agnieszka, "Mutual trust and independence of the judiciary after the CJEU judgment in LM – new era or business as usual?", eulawanalysis.blogspot.com/2018/08, p. 3.

76 See *infra* Part B, Chapter II A.

Member State, the court is obliged to the second step, the specific assessment. In this second step, the court must assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the surrender to the issuing Member State, the requested person will run a real risk of a breach of the fundamental right to a fair trial. The executing judicial authority must examine to what extent the systemic or generalized deficiencies, as regards the independence of the issuing Member State's courts, are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject. If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant.[77]

C. Judgment in Case C-619/18 *European Commission v. Republic of Poland*

According to the European Commission's website,[78] on 29 July 2017, the Commission launched an infringement procedure on the Polish Law on Ordinary Courts, on the grounds of its retirement provisions and their impact on the independence of the judiciary. On 12 September 2017, the Commission moved to the next stage of the infringement procedure by sending for the first time in history a Reasoned Opinion to Poland activating the Article 7 TEU mechanism. The Commission referred the case to the European Court of Justice on 20 December 2017. The first legal concern of the Commission related to the discrimination on the basis of gender due to the introduction of a different retirement age for female judges (60 years) and male judges (65 years). According to the Commission, this is contrary to Article 157 of the TFEU and Directive 2006/54 on gender equality in employment. The second legal concern of the Commission was that the independence of Polish courts has been undermined by the fact that the Minister of Justice has been given a discretionary power to prolong the mandate of ordinary court judges who have reached the retirement age.[79] According to the Commission, this is contrary to Article 19(1) TEU read in connection with Article 47 of the Charter.

On 2 October 2018, the European Commission launched an action under Article 258 TFEU against the Republic of Poland for failure to fulfil obligations. By its application, the European Commission requested that the Court declare that, first, by lowering the retirement age of the judges appointed to the Sąd Najwyższy (Supreme Court, Poland) and by applying that measure to the judges in post appointed to that court before 3 April 2018 and, secondly, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, the Republic of Poland has failed to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

77 See *supra* note 65, paras 74-75.

78 http://www.ec.europa.eu.

79 In this regard, see also *supra* in Chapter I B.

On 24 June 2019, the Court delivered its long awaited judgment in case C-619/18, *European Commission v. Republic of Poland*[80] and ruled that the Polish 'Law on the Supreme Court', lowering the retirement age of judges of the Supreme Court, is contrary to EU law and breaches the principle of the irremovability of judges and thus that of judicial independence. In fact, it is the first time that the Court declared the incompatibility of a national provision on the ground that it breached Article 19 TEU. However, the Court had already prepared the foundations in its recent case-law, *Associação Sindical dos Juízes Portugueses* and *LM*,[81] where Article 19 TEU was linked to the protection of the rule of law.

More specifically, in its judgment the Court considered that as is apparent from Article 49 TEU, which provides the possibility for any European State to apply to become a member of the European Union, the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them, EU law being based on the fundamental premiss that each Member State shares with all the other Member States, and recognizes that those Member States share with it, those same values. That premiss both entails and justifies the existence of mutual trust between the Member States and, in particular, their courts that those values upon which the European Union is founded, including the rule of law, will be recognized, and therefore that the EU law that implements those values will be respected. In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law which has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing that consistency and that uniformity in the interpretation of EU law, thereby serving to ensure its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties. Furthermore, the Court recalled that the European Union is a union based on the rule of law in which individuals have the right to challenge before the courts the legality of any decision or other national measure concerning the application to them of an EU act.[82]

In that context, Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice. As provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields. Accordingly, the Court considered, once more, that the principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which is now reaffirmed by Article 47 of the Charter. Moreover, the Court held that the second subparagraph of Article 19(1) TEU refers to 'the fields covered by Union law',

80 Court of Justice, judgment of 24 June 2019, Case C-619/18, *European Commission v. Republic of Poland*.

81 See *supra* in Chapter II B 1 and 2, respectively.

82 See *supra* note 80, paras 42-46 and the case-law cited.

irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter.[83]

Most importantly, the Court ruled that, although the organization of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU. By requiring the Member States thus to comply with those obligations, the European Union is not in any way claiming to exercise that competence itself nor is it, therefore, arrogating that competence.[84]

Consequently, the Court provided that the second subparagraph of Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law, more specifically, every Member State must, under the second subparagraph of Article 19(1) TEU, ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection.[85]

As far as the specific case is concerned, the Court ruled that as the Sąd Najwyższy (Supreme Court) may be called upon to rule on questions concerning the application or interpretation of EU law and that, as a 'court or tribunal', within the meaning of EU law, it comes within the Polish judicial system in the 'fields covered by Union law' within the meaning of the second subparagraph of Article 19(1) TEU, so that that court must meet the requirements of effective judicial protection. To ensure that a body such as the Sąd Najwyższy (Supreme Court) is in a position to offer such protection, maintaining its independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy. That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.[86]

Accordingly, the Court held that, the requirement that courts be independent, which the Member States must, under the second subparagraph of Article 19(1) of the TEU, ensure is observed in respect of national courts which, like the Sąd Najwyższy (Supreme Court), are called upon to rule on issues linked to the interpretation and application of EU law, has two aspects to it. The first aspect, which is external in nature, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The second aspect, which is internal in nature, is for its part linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective

83 Ibid., paras 47-50 and the case-law cited.
84 Ibid., para. 52 and the case-law cited.
85 Ibid., paras 54-55 and the case-law cited.
86 Ibid., paras 56-58 and the case-law cited.

interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. In particular, that freedom of the judges from all external intervention or pressure, which is essential, requires certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office. The principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed. In that latter respect, it is apparent from the Court's case-law that the requirement of independence means that the rules governing the disciplinary regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. Thus, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary.[87]

In the specific circumstances of the case, the reform being challenged, which provides that the measure lowering the retirement age of judges of the Sąd Najwyższy (Supreme Court) is to apply to judges already serving on that court, results in those judges prematurely ceasing to carry out their judicial office and is therefore such as to raise reasonable concerns as regards compliance with the principle of the irremovability of judges. Having regard to the cardinal importance of that principle, such an application is acceptable only if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it.[88]

As a consequence to all the foregoing, the Court concluded that the Commission's first complaint, alleging breach of the second subparagraph of Article 19(1) TEU, must be upheld, since the application of the measure lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court) to the judges in post within that court is not justified by a legitimate objective, and subsequently, that

87 Ibid., paras 71-77 and the case-law cited.

88 Ibid., paras 78-79.

application undermines the principle of the irremovability of judges, which is essential to their independence.[89]

Since the guarantees of the independence and impartiality of the courts require that the body concerned exercise its functions wholly autonomously, being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions, with due regard for objectivity and in the absence of any interest in the outcome of proceedings, the rules seeking to guarantee that independence and impartiality must be such that they enable any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it to be precluded.[90]

Furthermore, although it is for the Member States alone to decide whether or not they will authorize an extension to the period of judicial activity beyond normal retirement age, the fact remains that, where those Member States choose such a mechanism, they are required to ensure that the conditions and the procedure to which such an extension is subject are not such as to undermine the principle of judicial independence. In that connection, the fact that an organ of the State such as the President of the Republic is entrusted with the power to decide whether or not to grant any such extension is admittedly not sufficient in itself to conclude that that principle has been undermined. It is important to ensure that the substantive conditions and detailed procedural rules governing the adoption of such decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them. To that end, it is necessary, in particular, that those conditions and procedural rules are designed in such a way that those judges are protected from potential temptations to give in to external intervention or pressure that is liable to jeopardize their independence. Such procedural rules must thus, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned.[91] In that respect, the discretion held by the President of the Republic of Poland for the purposes of authorizing, twice and each time for a 3-year term, between the ages of 65 and 71, a judge of a national supreme court such as the Sąd Najwyższy (Supreme Court) to continue to carry out his or her duties is such as to give rise to reasonable doubts, inter alia in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests before them.[92]

The Court also answered to the Republic of Poland's argument as to an alleged similarity between the national provisions thus challenged and the procedures applicable in other Member States or applicable at the time of any renewal of the mandate of a judge of the Court of Justice of the European Union that it cannot succeed by considering that the conditions set under the Treaties cannot modify the scope of the obligations imposed on the Member States pursuant to the second subparagraph of Article 19(1) TEU,[93] hence confirming that renewable fixed term mandates are in line with European requirements for judicial independence.

89 Ibid., paras 96-97.
90 Ibid., para. 108.
91 Ibid., paras 110-112 and the case-law cited.
92 Ibid., para. 118.
93 Ibid., paras 119 and 122.

Finally, the Court concluded that, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article19(1) TEU, first, by providing that the measure consisting in lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court) is to apply to judges in post who were appointed to that court before 3 April 2018 and, secondly, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age.[94]

Interesting findings derive from the above mentioned judgment. First of all, the Court clarifies the assessing restrictions of judicial independence pursuant to Article 19 TEU and affirms that the legitimacy of judicial independence restriction is always subject to a proportionality test. Additionally, restrictions on the different guarantees of judicial independence, e.g. irremovability, adequate remuneration and judicial immunity, even if they are justified and proportionate, should not raise doubts as to the 'imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it'. Therefore, judicial independence is considered a principle that can be restricted only if it does not harm the value to which is instrumental, namely the appearance of impartiality of the judge.

Secondly, the Court, after confirming that effective judicial protection is a general principle of EU law and that its content is not determined with reference to Article 47 of the Charter, which only reaffirmed it, provided that Article 19 TEU, is not granting a subjective right on individuals, but only impose on Member States a positive obligation to provide sufficient remedies in the fields covered by EU law. In that respect, a violation of the right to effective judicial protection in concrete cases can only be assessed with reference to Article 47 of the Charter pursuant to Article 51(1) of the Charter. Nonetheless, Article 19 TEU may be invoked by private parties in order to assess the compatibility with EU law of the guarantees provided by national law for judicial independence, during judicial review. As is apparent, the Court's intention is to place judicial independence at the core of the EU constitutional order. By reading the requirements of effective judicial protection enshrined at Article 47 of the Charter into Article 19 TEU, the principle of effective judicial protection and in particular judicial independence, becomes something more of a general principle, competent to shape Member States' discretionality as to the organization of their judiciaries.[95]

In the aftermath of the above analyzed judgment, the Court once more repeated its findings in its judgment in joined cases 624/28 and 625/18, *CP and DO*. The requests for a preliminary ruling concerned the interpretation of Article 2 and of the second subparagraph of Article 19(1) TEU, of the third paragraph of Article 267 TFEU, of Article 47 of the Charter and of Article 9(1) of Council Directive 2000/78/EC[96] and have been made in proceedings between, CP and DO, Judges of the Sąd Najwyższy (Supreme Court, Poland), and that court concerning their early retirement due to the entry into force of new national legislation.

In that context, the Court ruled that "Article 47 of the Charter and Article 9(1) of Directive 2000/78 must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which

94 Ibid., para. 124.

95 Simonelli Marco Antonio, "Thickening up judicial independence: the ECJ ruling in Commission v. Poland (C-619/18)", europeanlawblog.eu/2019/07/08.

96 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

is not an independent and impartial tribunal, within the meaning of the former provision. That is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court). If that is the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the above mentioned chamber, so that those cases may be examined by a court which meets the above mentioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field."[97]

It is clear from the foregoing that the Polish reforms are problematic for the EU, because national courts are to ensure "the full application of European Union law (...) and (...) judicial protection of an individual's rights under that law"[98]. EU Member States and their legal orders differ as to the substance and procedures, ways and level of protection of fundamental rights, court organization and the expediency of proceedings. These differences are treated as diversity and have not prevented the EU from establishing the European area of justice based on mutual trust and mutual recognition of judgments. However, deficiencies of judicial independence in one Member State entail problems for the courts in other Member States, as the latter are obliged by EU law to recognize and enforce judicial decisions coming from other EU Member States.[99]

97 Court of Justice, judgment of 19 November 2019, joined cases C-585/18, 624/28 and 625/18, *A.K., CP and DO,* para 171.

98 Court of Justice, Opinion 1/09 of 8 March 2011, para. 68.

99 Dr hab Frackowiak-Adamska Agnieszka, *supra* note 75, p. 1.

PART B

CHAPTER I: THE PRINCIPLES OF MUTUAL TRUST AND MUTUAL RECOGNITION IN THE EUROPEAN UNION'S LEGAL ORDER

A. Definition and Foundation

The principles of mutual trust and mutual recognition are of crucial importance for the European Union's legal order. Nonetheless, surprisingly enough, there is no mention of the principle of mutual trust in the EU Treaties, although there are references to the principle of mutual recognition.[100] However, the principle of mutual trust was developed by the Court of Justice of the European Union and later on was taken over by the EU legislator.

Indeed, it was the Court of Justice which explicitly introduced 'mutual trust' as a concept of EU law. It first appeared in the Court's case-law in the late 1970s,[101] but it is only in recent years that it has been regularly mentioned by the Court. A simple search of the Court's case-law shows that the concept was mentioned in less than 10 Court judgments issued before 2003. By contrast, from 2003 on wards, the Court pronounces virtually every year at least one judgment containing a reference.[102] At the same time, the principle was also referred to in three Opinions of the Court.[103]

It was in Opinion 2/13 of 18 December 2014 on the Accession of the EU to the European Convention on Human Rights (ECHR), that the Court of Justice emphasized that "this legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognized and, therefore, that the law of the EU that implements them will be respected"[104] and that "the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained".[105]

Before the above mentioned Opinion, the Court had already indicated the way in judgment *NS* where it held that "At issue here is the raison d' être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights"[106] thus indicating the large field of application of the principle of mutual trust.

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100 E.g. Art. 81, paras 1 and 2, Art. 82 paras 1 and 2 TFEU for Judicial Cooperation in Civil and Criminal Matters, respectively. Also, Art. 67, paras 3 and 4 TFEU.

101 See Court of Justice, judgment of 25 January1977, Case 46-76, *Bauhuis*, para. 38.

102 Cambien Nathan (2017): "Mutual Recognition and Mutual Trust in the internal market", EUROPEAN PAPERS, VOL.2, No 1, p. 95.

103 Court of Justice, opinion 1/75 of 11 November 1975; Court of Justice, opinion 1/03 of 7 February 2006 and Court of Justice, opinion 2/13 of 18 December 2014.

104 Court of Justice, opinion 2/13 of 18 December 2014, para 168.

105 Ibid., para 191.

106 Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *NS and others*, para. 83.

As is apparent, the Court of Justice has elevated the principle of mutual trust to the status of a constitutional principle of EU law. In that regard, the principle of mutual trust is essential to the structure and development of the Union. As such, it can be compared to the principle of loyal cooperation, another principle of constitutional nature. Loyal cooperation relates to matters taking place within a Member State or to relations between Member States and the Union, but also to relations between Member States and between the national authorities of different Member States. In this perspective, loyal cooperation becomes mutual cooperation, and mutual cooperation could not function without mutual trust and mutual respect which the principle of mutual trust entails. [107]

Moreover, the Court of Justice provided a definition of the principle of mutual trust in Opinion 2/13 as follows: "That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law (…)[108] Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU. "[109]

Consequently, two negative obligations derive from that definition for the Member States. First of all, they may not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law. Secondly, they may not check, save in exceptional cases, whether another Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU. Whilst the first obligation allows no room for exceptions, the second one does,[110] as it will be analyzed later on.

It is admitted that the principle of mutual recognition has been developed mainly in the area of freedom, security and is called the cornerstone of judicial cooperation in civil and criminal matters, ever since the European Council of Tampere, in 1999.[111] Furthermore, mutual recognition, whereby a decision of one Member State is more or less automatically accepted in another Member State and obtains legal force, presumes, in turn, trust in the sense that the rules of the first Member State are adequate, that they offer equal or equivalent protection and that they are applied correctly. In this way mutual recognition is based on mutual confidence.[112] This has been confirmed many times in the case-law[113] and also mutual

107 Prechal Sacha (2017): "Mutual Trust before the Court of Justice of the European Union", EUROPEAN PAPERS, VOL.2, No 1, p. 92 and the case-law cited.

108 Court of Justice, opinion 2/13 of 18 December 2014, para 191.

109 Ibid., para 192.

110 Lenaerts K., "La vie après l' avis: Exploring the principal of mutual (yet not blind) trust" Article, *Common Market Law Review*, VOL. 14, No 3, June 2017, pp. 813-814.

111 Tampere European Council Conclusions of 15-16 October 1999. See also the definition for mutual recognition provided by the Commission's Communication to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters, (COM/2000/0495).

112 Prechal Sacha, cit., p. 76.

113 E.g. Court of Justice, judgment of 23 December 2009, case C-403/09, *Detiček*, para. 45 and judgment of 30 May 2013, case C-168/13 PPU, *Jeremy F.* , para. 50.

trust is emphasized in the preamble of various instruments concerning judicial cooperation in civil and criminal matters.[114]

B. Shared and Distinctive Features

Mutual trust has a more fundamental role than mutual recognition. Indeed, the duty imposed on a Member State to place trust in the legal system of another Member State is more far-reaching than a duty to recognize certain rules or acts produced by that legal system.[115] In fact, mutual trust is a prerequisite for a system based on mutual recognition to operate properly. By contrast, the absence or decrease of mutual trust among Member States, undermines the areas of EU law, where the principle of mutual recognition prevails.

Accordingly, the principle of mutual recognition, where trust is a prerequisite as mentioned, has long been prevalent within the Internal Market with the free movement of goods, services, capital and people.[116] It has gradually been broadened to also apply to the EU' s judicial cooperation in criminal matters. The presumption of trust has constituted a way to broaden the competence of the EU when the EU has not had legislative power. The reason is simple: before the Lisbon Treaty came into effect, the EU had very limited competence to adopt legislation in the area of JHA (Justice and Home Affairs pillar). Therefore, it was the Court of Justice that introduced the concept of mutual trust in its case-law. [117]

C. Application and Limits

Since the principle of mutual trust was elevated to a constitutional principle of EU law, the Court of Justice case-law does not exclude the possibility to apply the principle in a larger field than the area of freedom, security and justice or the internal market, where the case-law was linked with the provisions on the four Treaty freedoms. Indeed, the Court of Justice ruled that "It should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice".[118]

114 E.g. recitals 16 and 17 of Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation); recital 21 of Regulation (EC) 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II a Regulation), repealing Regulation (EC) 1347/2000 (Brussels II Regulation); recital 10 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (EAW Framework Decision); recital 5 of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

115 Cambien Nathan, cit., p. 99.

116 Peers S. (2015), *EU justice and home affairs*, Vol. 1, 2, Oxford, Oxford University Press, as cited in Herlin-Karnell Ester (2019), The Question of Trust in EU Criminal Law Cooperation: A Constitutional Perspective, in Bakardjieva Engelbrekt Antonina et al., *Trust in the European Union in challenging times*, Interdisciplinary European Studies, p. 147.

117 Mitsilegas M. (2009), *EU criminal law*, Oxford, Hart Publishing, as cited in Herlin-Karnell Ester, cit., p. 148.

118 Opinion 2/13, cit., para 191.

More specifically, the principle of mutual trust is mainly related to the creation and maintenance of an area without internal borders, an area of freedom, security and justice, given that it guarantees that the exercise of free movement does not undermine the effectiveness of the decisions adopted by the competent Member State.

Provided that the authors of the Treaties considered that national courts were best placed to protect the fundamental rights of individuals as they are insulated from political considerations and are, in cooperation with the Court of Justice, entrusted with the task of upholding the rule of law within the EU, the establishment of such an area is, first and foremost, to be achieved through the mutual recognition of national judicial decisions.[119] In that regard, the Court of Justice held that "… the principle of mutual recognition…, is founded on the premiss that a judicial authority has intervened prior to the execution of the European arrest warrant for the purposes of exercising its review. However, the issue of an arrest warrant by a non-judicial authority, such as a police service, does not provide the executing judicial authority with an assurance that the issue of that European arrest warrant has undergone such judicial approval and cannot, therefore, suffice to justify the high level of confidence between the Member States, … which forms the very basis of the Framework decision."[120]

Nevertheless, there are limitations to the principles, although exceptional. There are also national public policy and European public policy exceptions to the mutual recognition of judgments.

Since the principle of mutual recognition means that judicial decisions issued by the competent court must be recognized and enforced in all Member States, it is clear that the implementation of the principle contributes to the effective exercise of public power by the Member States, regardless of whether that exercise of public power serves to protect public or private interests.

Indeed, in favouring the effectiveness of national judicial decisions in civil or criminal matters that may involve the application of coercive measures in another national legal order, that principle inevitably has a negative impact or restriction on the exercise of fundamental rights. For example, the competent court under the Brussels IIa Regulation may order a parent who has removed a child from his or her Member State of habitual residence to return the child to that Member State, thus placing a constraint on that parent's right to a family life.[121] Similarly, a person who is the subject of an European arrest warrant may be surrendered to the Member State that issued the warrant against his or her will, thus limiting that person's freedom.[122]

As a consequence, it is crucial that the application of the principle of mutual recognition in civil and criminal matters, in other words in the area of freedom, security and justice, must be limited and subjected to strict conditions. In this respect, only the EU legislator may give concrete expression to the principle of mutual recognition since any limitation on the exercise of the rights and freedoms (fundamental rights) 'must be provided for by law'.[123]

119 Lenaerts K., cit. p. 809.

120 Court of Justice, judgment of 10 November 2016, case C-452/16 PPU, *Poltorak*, para. 44-45. See also in this context, Court of Justice, judgment of 10 November 2016, case C-477/16 PPU, *Kovalkovas*, paras 43-44.

121 See Council Regulation (EC) No. 2201/2003 (Brussels II a Regulation), *supra* note 114.

122 Lenaerts K., cit. p. 810.

123 Charter of Fundamental Rights of the European Union (2016/C 202/02), Art. 52 (1).

Accordingly, in this area secondary Union law includes various conditions of application, grounds for refusal or criteria which guide an assessment that are closely related to the protection of fundamental rights, such as the right to a fair trial and rights of defence, the application of the ne bis in idem principle, the rights of the child and the protection of family life.[124]

Also, in the field of judicial cooperation in civil matters, the Brussels I and II Regulations contain a public-policy clause which may be used to deny recognition and enforcement of a foreign judgment. This clause can, in turn, be used as a vehicle for the protection of fundamental rights.[125]

In this respect, the Court of Justice emphasized in its case-law that "Recourse to the public-policy clause in Article 34 (1) of Regulation No 44/2001 can be envisaged only where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order."[126]

Furthermore, in the absence of a public-policy clause that could be applied, the Court accepted a limit to the principle of mutual trust in the important case *Aranyosi and Căldăraru*,[127] by providing that "as is stated in Article 1(3) thereof, the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights as enshrined in, inter alia, the Charter"[128], interpreting in fact Article 1(3) of the Framework Decision.[129] More recently, the Court accepted judicial independence as a limit to mutual trust and mutual recognition, in case *LM*.[130]

As is apparent from the foregoing, the crucial role of the Court of Justice is to interpret the EU legislative acts that shape the principle of mutual recognition and to make sure that the balance that the EU legislative institutions have struck between the principle of mutual trust and the protection of fundamental rights complies with primary EU law, and in particular with the Charter. Consequently, where EU legislation complies with the Charter, limitations on the principle of mutual trust must remain exceptional and should operate in such a way as to restore mutual trust, thus solidifying all at once the protection of fundamental rights and mutual trust as the cornerstone of the Area of freedom, security and justice. [131]

CHAPTER II: FROM THE INTERNAL MARKET … TO THE AREA OF FREEDOM SECURITY AND JUSTICE

124 E.g. Art. 6, 8, 9, 10, 11 and 27 of the Dublin III Regulation; Art. 26, 34, para. 2, 43 of the Brussels I Regulation; Art. 15 of the Brussels II Regulation; Art. 3, para. 2, 11, 14, 15, 18 and 19 of the EAW Framework Decision, as well as Art. 4a, inserted by Council Framework Decision 2009/299/JHA of 26 February 2009, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

125 Prechal Sacha, cit., p. 86.

126 Court of Justice, judgment of 6 September 2012, case C-619/10, *Travel Agency*, para. 51 and the case – law cited.

127 See *supra* note 69.

128 Ibid., para. 83.

129 See *supra* note 64.

130 See the analysis of the judgment *supra* PART A, Chapter II, B2.

131 Lenaerts K., cit. p. 840.

As is well-known, it was the judgment in the *Cassis de Dijon* case[132] which introduced the principle of mutual recognition into Union's legal order. Initiated from the free movement of goods, mutual recognition was later on extended to the other freedoms (free movement of services, persons and capital).

According to that judgment, when goods produced legally in one Member State are released in the Internal Market, they shall be allowed to be commercialized freely without cross-border obstacles, even if they don't fulfil all the technical provisions in the other States. However, the free movement is not unconditional. National conditions can be maintained if reasons of general interest, strictly defined, do exist.[133]

Consequently, Member States are obliged to recognize each other's national rules regarding product requirements as binding, also diplomas or professional qualifications obtained in another Member State. That said, it is obvious that the principle of mutual recognition makes an essential contribution to the establishment and functioning of the internal market,[134] as it frees economic operators from the burden of having to comply with various national standards.[135]

In this context and as far as the principle of mutual trust in the area of internal market is concerned, the Court of Justice has referred to in a rather small number of cases, some of the very first concerning animals trade. For instance, in case C-5/94, *Hedley Lomas*, the Court held that "the Member States must rely on trust in each other to carry out inspections relating to animal welfare on their respective territories*"*.[136]

By contrast, European Union's legislation in the area of the internal market includes many references to mutual trust, for instance relating to transport[137] or to mutual recognition relating to higher education.[138] Furthermore, the Commission emphasized in its White Paper 'Completing the Internal Market', in 1985, that the principle of mutual trust between the Member States was one of the main elements in a system of mutual recognition.[139] In addition, the Commission recently confirmed the above in its working document on 'A Single Market Strategy for Europe', as follows: "Outside the area of harmonized goods, Member States still have national (and often very different) rules on products. While these national rules may conflict on paper, in practice mutual trust among Member States should apply: if a product is compliant in

132 Court of Justice, judgment of 20 February 1979, case C-120/78, *Cassis de Dijon.*

133 Ibid., para. 8: "Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."

134 Cambien Nathan, cit., p. 98.

135 E.g. Court of Justice, judgment of 30 April 2014, case C-365/13, *Ordre des architects v. État belge* (Belgium may not oblige an architect from another Member States to undertake a traineeship, or to prove that he possesses equivalent professional experience, in order to be authorized to practise the profession of architect).

136 Court of Justice, judgment of 23 May 1996, case C-5/94, *Hedley Lomas*, para.19, see also *Bauhuis*, cit., para. 22.

137 COM (1984) 541 final of 8 October 1984 Report from the Commission to the Council on the establishment of a system for observing the transport markets.

138 COM (1981) 186 final of 29 April 1981 Communication from the Commission to the Council, Academic Recognition of Diplomas and of Periods of Study.

139 COM (1985) 310 final, Commission, White Paper on Completing the Internal Market, para. 93.

one Member State, it should be allowed to be marketed in all Member States by applying the principle of mutual recognition".[140]

Also, in recent European Union's legislation in the area of the internal market, in particular in the preambles of legislative acts, references to mutual trust appear.[141] More importantly, some internal market legislation provides for the adoption of effective enforcement mechanisms or mechanisms to increase transparency in order to build mutual trust among Member States[142] that the provisions of the legislation concerned will effectively be complied with.[143]

Similar to mutual recognition, mutual trust is not unconditional, in the area of the internal market. In fact, mutual recognition in the internal market has never been unconditional. Restrictions to protect important national rights and values have always been present in the Treaties and also introduced in the case-law, though only insofar as a limitation has to be proportionate,[144] hence such refusal must not go further than necessary in order to achieve the legitimate aim pursued. As a consequence, in implementing mutual recognition, a fine-tuned balance must be struck between recognition and the constraints that must be attached to it.

As stated before, the principle of mutual trust does not impose unlimited trust, while, in exceptional circumstances, a Member State is not obliged under Union's law to place trust in the outcome of the legal system of another Member State. After all, mutual trust must not be confused with 'blind trust'.[145]

In this context, in the judgment in case C-486/14, *Kossowski*, the Court of Justice underlined that "that mutual trust can prosper only if the second Contracting State is in a position to satisfy itself, on the basis of the documents provided by the first Contracting State, that the decision of the competent authorities of that first State State does indeed constitute a final decision including a determination as to the merits of the case."[146] In other words, the principle of mutual trust obliges the competent authorities of a Member State to check whether certain conditions are properly satisfied.

As already mentioned above, mutual trust is a prerequisite for mutual recognition. However, the principle of mutual recognition although initiating from the free movement of goods and later on extending to the other freedoms of services,

140 SWD (2015) 202 final of 28 October 2015, Commission Staff Working Document, A Single Market Strategy for Europe - Analysis and Evidence Accompanying the document Upgrading the Single Market: more opportunities for people and business, p. 91.

141 E.g. recital 33 of Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community; preamble of Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons (mutual confidence).

142 Cambien Nathan, cit., p. 109.

143 E.g. recital 38 of Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community; recital 13 of Regulation (EC) 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) 339/93; recital 46 of Directive 1993/38/EEC of the Council of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

144 Storskrubb E. (2019), Mutual Trust in Civil Justice Cooperation in the EU, in Bakardjieva Engelbrekt Antonina et al., *Trust in the European Union in challenging times*, Interdisciplinary European Studies, p. 163.

145 Lenaerts K., "The principle of mutual recognition in the Area of Freedom, Security and Justice", Lecture, 30 January 2015, All Souls College, University of Oxford, p. 29.

146 Court of Justice, judgment of 29 June 2016, case C-486/14, *Kossowski*, para. 52.

persons and capital, thus concluding the field of internal market, plays also an important role in the area of freedom, security and justice.

More specifically, as far as the Area of Freedom, Security and Justice is concerned, it is submitted to be the most common area of law in which the judgments of the Court of Justice make a reference to the principle of mutual trust, for example, in the context of the Schengen Agreement[147] or in the context of the application of Regulation 604/2013 (Dublin III Regulation),[148] where the Court famously ruled that mutual trust is also subject to certain limitations, for instance in cases of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in a given Member State.[149] In the same way, the principle of mutual trust often appears in judgments concerning the European Arrest Warrant.[150]

As is apparent from the case-law, both principles are necessary for the creation of the area of freedom, security and justice. In *Aranyosi and Căldăraru* the Court of Justice held that "Both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained".[151] Yet, mutual recognition, in the context of the area of freedom, security and justice, as stated above, presupposes mutual trust. Accordingly, in *Bob-Dogi*, the Court stressed that "The principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognized at EU level, particularly in the Charter of Fundamental Rights of the European Union".[152]

It was, with the entry into force of the Lisbon Treaty that the idea of creating an area of freedom, security and justice, and extending cooperation in criminal law, became a central issue for the European Union. Nevertheless, it is only by taking the rule of law and the principle of legality into consideration, that the necessary condition for the creation of area of freedom, security and justice, is fulfiled. Hence, the rule of law can be regarded as the foundation on which the area of freedom, security and justice must be built.[153]

On the other hand, it is submitted that there are significant differences in the way mutual recognition operates in both contexts (the internal market and the area of freedom, security and justice), therefore affecting the functioning of the principle of mutual trust.

First of all, as far as the object of mutual recognition is concerned, in the context of the internal market, Union's law requires the mutual recognition of product

147 E.g. ibid., para. 50, also Court of Justice, judgment of 11 December 2008, case C-297/07, *Bourquain* , para. 37 and the case-law cited.

148 The Dublin III Regulation, Regulation No 604/2013, which entered into force on 19 July 2013, replaced Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) ('the Dublin II Regulation') with effect from 1 January 2014.

149 See e.g. *supra* note 106, *NS*.

150 See e.g. *supra* note 69 *Aranyosi and Căldăraru.*

151 Ibid., para. 78.

152 Court of Justice, judgment of 1 June 2016, case C-241/15, *Bob-Dogi*, para. 33.

153 Herlin-Karnell Ester (2019), The Question of Trust in EU Criminal Law Cooperation: A Constitutional Perspective, in Bakardjieva Engelbrekt Antonina et al., *Trust in the European Union in challenging times*, Interdisciplinary European Studies, p. 145.

requirements, technical regulations and diplomas and professional qualifications, while in the Area of Freedom, Security and Justice, Union's law requires the mutual recognition of judicial decisions taken by judicial authorities from another Member State. Secondly, in the field of the internal market, the principle of mutual recognition furthers the freedom of market operators, who may rely on it, for instance, to import goods into or have their professional qualifications recognized by another Member State. By contrast, in the Area of Freedom, Security and Justice, the principle contributes to the effective exercise of public power by the Member States rather than the freedom of economic operators. In fact, the freedom of individuals is limited by the extraterritorial enforcement of judicial decisions, and this limitation may result in a violation of one or more of their fundamental rights.[154]

However, mutual trust is by no means less of an issue in the context of the internal market, as it is not only just about harmless or uncontroversial product requirements, it is also about more fundamental aspects. For instance, some product requirements may have a significant impact on the safety, health and well-being of a Member State's inhabitants, and, therefore, placing trust in the equivalence of another Member State's regulations is not a natural or uncontroversial act, as is obvious from a high number of court proceedings. Also, as far as the free movement of persons is concerned, it is not obvious for a Member State to allow doctors or lawyers qualified in another Member State to practice on its territory. Given the fundamental consequences this may have, it requires a deep level of mutual trust. Last but not least, fundamental rights violations are an issue not just in the context of the area of freedom, security and justice, but also in the context of the internal market, as is apparent from a number of cases dealing with the free movement of goods[155] or with the free movement of persons and services[156] or European Union's citizenship.[157]

In the light of the foregoing, an important question has been raised whether mutual recognition and mutual trust (that is considered necessary to mutual recognition) is the most appropriate regulatory strategy for the area of freedom, security and justice.[158] In this context, it has been asked whether an integration method originally adopted for goods and services is suitable for judgments and justice systems.[159]

A. Recent case-law of the Court of Justice of the European Union on the European Arrest Warrant

With regard to the European Arrest Warrant, a large number of judgments of the European Court of Justice can be mentioned, concerning the application of the principles of mutual trust and mutual recognition in the area of freedom, security and justice.

154 Cambien Nathan, cit., p. 110.

155 E.g. Court of Justice, judgment of 14 October 2004, case C-36/02, *Omega Spielhallen*.

156 See e.g., concerning the free movement to provide services, Court of justice, judgment of 11 July 2002, case C-60/00, *Carpenter*.

157 Cambien Nathan, cit., p. 111.

158 Storskrubb E., cit., p. 164.

159 Schmidt S. K. (2007), "Mutual recognition as a new mode of governance", *Journal of European Public Policy*, 14(5), p. 667-681. Also Storskrubb E. (2016a), Mutual recognition as a governance strategy for civil justice? In B. Hess, M. Bergstrom & E. Storskrubb (Eds.), *EU civil justice: Current issues and future outlook*, Oxford, Hart Publishing, as cited in Storskrubb E., cit., p. 164.

In *Melloni* case, the issue raised by the Spanish Constitutional Court was whether a Member State may refuse to execute a European arrest warrant on the basis of Article 53 of the Charter of Fundamental Rights of the European Union ('the Charter') on grounds of infringement of the fundamental rights of the person concerned guaranteed by the national constitution. The request for a preliminary ruling had been made in proceedings between Mr Melloni and the Ministerio Fiscal concerning the execution of a European arrest warrant issued by the Italian authorities for the execution of a prison sentence handed down by judgment *in absentia* against Mr Melloni. The request also concerned the interpretation and, if necessary, the validity of Article 4a(1) of the Framework Decision.[160]

In its judgment the Court of Justice recalled first of all that as is apparent in particular from Article 1(1) and (2) of the Framework Decision and from recitals 5 and 7 in the preamble thereto, the purpose of that decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of conducting prosecutions, that system of surrender being based on the principle of mutual recognition.[161] The Framework Decision thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States.[162]

Furthermore, the Court stated that it is apparent from recitals 2 to 4 and also Article 1 of the amended Framework Decision that the European Union, in adopting that decision, intended to facilitate judicial cooperation in criminal matters by improving mutual recognition of judicial decisions between Member States through harmonization of the grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person. As is apparent in particular from recital 4, the EU legislature, in defining those common grounds, wished to allow 'the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's right of defence'.[163]

Accordingly, the Court held that as indicated by Article 1 of the amended Framework Decision, the objective of the harmonization of the conditions of execution of European arrest warrants issued for the purposes of executing decisions rendered at the end of trials at which the person concerned has not appeared in person, effected by that framework decision, is to enhance the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States. In the light of the foregoing, Article 4a(1) of the Framework Decision does not disregard either the right to an effective judicial remedy and to a fair trial or the rights of the defence guaranteed by Articles 47 and 48(2) of the Charter respectively.[164]

Finally, the Court emphasized that allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under the amended Framework Decision, in order to avoid

160 See *supra* note 64.

161 Court of Justice, judgment of 29 January 2013, case C-396/11, *Radu*, paras 33-34.

162 Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni*, paras 36-37.

163 Ibid., para. 43.

164 Ibid., paras 51, 53.

an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.[165]

Consequently, it follows that the fact that the Framework Decision complies with the Charter does not mean that European arrest warrants must always be executed automatically. Instead, the executing judicial authorities are under an obligation to verify whether the provisions of the Framework Decision that strike a delicate balance between the principle of mutual trust and the fundamental rights of the persons who are the subject of an European arrest warrant are, in fact, applicable to the case.[166]

Accordingly, in *West* case, the reference for a preliminary ruling concerned the interpretation of Article 28(2) of the Framework Decision. The reference has been made in the context of the execution in Finland of a European arrest warrant issued by the Regional Court, Paris, in respect of Mr West, a national and resident of the United Kingdom, for the purposes of execution of a three-year prison sentence imposed on him for the theft of rare and ancient maps. In that judgment the Court interpreted Articles 27 and 28 of the Framework Decision, based on the principle of mutual trust. As a result, the Court considered that Articles 27 and 28 of the Framework Decision, which confer on the Member States certain precise powers in relation to the execution of a European arrest warrant, as provisions, where they lay down rules derogating from the principle of mutual recognition stated in Article 1(2) of that Framework Decision, cannot be interpreted in a way which would frustrate the objective pursued by that Framework Decision, which is to facilitate and accelerate surrenders between the judicial authorities of the Member States in the light of the mutual confidence which must exist between them. In that regard, as Article 28(3) of the Framework Decision makes clear, the executing judicial authorities must in principle consent to a subsequent surrender. It is only if the conditions set out in Articles 3 to 5 of the Framework Decision are satisfied that the authorities may or must, as the case may be, refuse such consent.[167]

In *Aranyosi* and *Căldăraru* joined cases, both requests for a preliminary ruling concerned the interpretation of Article 1(3), Article 5 and Article 6(1) of the Framework Decision. These requests have been made in the context of the execution, in Germany, of two European arrest warrants issued in respect of Mr Aranyosi by the examining magistrate at the District Court of Miskolc, Hungary, and of a European arrest warrant issued in respect of Mr Căldăraru by the Court of first instance of Fagaras, Romania.

In its judgment the Court of Justice, after recalling the purpose of Framework Decision to establish a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of conducting prosecutions, that system of surrender being based on the principle of mutual recognition, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of

165 Ibid., para. 63.

166 Lenaerts K. , cit. p. 821.

167 Court of Justice, judgment of 28 June 2012, case C-192/12 PPU, *West*, para. 77.

freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States,[168] by relying on the above mentioned judgment in *Melloni* case, observed that the principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognized at EU level, particularly in the Charter. [169]

In this context, the Court held that both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. Furthermore, in the area governed by the Framework Decision, the principle of mutual recognition, which constitutes, as is stated notably in recital (6) of that Framework Decision, the 'cornerstone' of judicial cooperation in criminal matters, is given effect in Article 1(2) of the Framework Decision, pursuant to which Member States are in principle obliged to give effect to a European arrest warrant.[170]

Accordingly, the Court considered that it has already recognized that limitations of the principles of mutual recognition and mutual trust between Member States can be made 'in exceptional circumstances'.[171] Also, that as is stated in Article 1(3), the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights as enshrined in, inter alia, the Charter.[172]

To that end, the Court introduced the 'Aranyosi test' by ruling that the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN. Nonetheless, a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State. The mere existence of evidence that there are deficiencies, which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State. Consequently, in order to ensure respect for Article 4 of the Charter in the individual circumstances of the person who is the subject of the

168 See *supra* note 69, paras 75-76.
169 Ibid., para. 77 and the case law cited.
170 Ibid., para. 78-79 and the case-law cited.
171 See *supra* note 109.
172 See *supra* note 69, paras 82-83.

European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4.[173] To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.[174]

Consequently, what derives from that significant judgment is that 'systemic or generalized deficiencies' in detention conditions are not the only requirement for rebutting the presumption of equivalent protection of fundamental rights and that the national judge of the executing Member State must consider the individual case and make a specific and precise assessment as to whether the individual concerned will be exposed to a real risk of inhuman and degrading treatment. In other words, limitations on the principle of mutual trust must remain exceptional. In order to balance the principle of mutual trust and the exception to its operation the Court set out a two-step analysis that the executing judicial authority is to follow when determining whether the execution of a European arrest warrant would breach the prohibition set out in Article 4 of the Charter. Last but not least, the Court accepted that the prohibition of inhuman or degrading treatment or punishment, as provided for in Article 4 of the Charter is absolute and is closely linked to respect for human dignity, the subject of Article 1 of the Charter.[175]

Furthermore, in *ML* case, the request for a preliminary ruling concerned the interpretation of Article 4 of the Charter and of Article 1(3), Article 5 and Article 6(1) of the Framework Decision. The request has been made in connection with the execution in Germany of a European arrest warrant issued by the District Court, Hungary against ML for the purpose of executing a custodial sentence in Hungary.

In that judgment, the Court provided further specifications as to the application of the 'Aranyosi test' by ruling that the executing judicial authority is required to assess only the conditions of detention in the prisons in which, according to the information available to it, it is likely that that person will be detained, including on a temporary or transitional basis.[176] Thus, by considering first, that in accordance with the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties.[177] Second, that when an assurance provided by the competent authorities of the issuing Member State that the person concerned, irrespective of the prison he is detained in in the issuing Member State, will not suffer inhuman or degrading treatment on account of the actual and precise conditions of his detention, has been given, or at least

173 Ibid., paras 89-94.
174 Ibid., para. 104.
175 Ibid., paras 85-87.
176 Court of Justice, judgment of 25 July 2018, case C-220/18 PPU, *ML*, para. 117.
177 Ibid., para. 109 and the case-law cited.

endorsed, the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the Member States and on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter.[178] Third, that the executing judicial authority must assess solely the actual and precise conditions of detention of the person concerned that are relevant for determining whether that person will be exposed to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter.[179]

In *RO* case, the Court ruled that mere notification by a Member State of its intention to withdraw from the European Union in accordance with Article 50 TEU does not have the consequence that, in the event that that Member State issues a European arrest warrant with respect to an individual, the executing Member State must refuse to execute that European arrest warrant or postpone its execution pending clarification of the law that will be applicable in the issuing Member State after its withdrawal from the European Union. In the absence of substantial grounds to believe that the person who is the subject of that European arrest warrant is at risk of being deprived of rights recognized by the Charter and the Framework Decision, following the withdrawal from the European Union of the issuing Member State, the executing Member State cannot refuse to execute that European arrest warrant while the issuing Member State remains a member of the European Union.[180] Thus, after considering that mere notification by a Member State of its intention to withdraw from the European Union in accordance with Article 50 TEU cannot be regarded, as constituting an exceptional circumstance, capable of justifying a refusal to execute a European arrest warrant issued by that Member State. However, it remains the task of the executing judicial authority to examine, after carrying out a specific and precise assessment of the particular case, whether there are substantial grounds for believing that, after withdrawal from the European Union of the issuing Member State, the person who is the subject of that arrest warrant is at risk of being deprived of his fundamental rights and the rights derived from the Framework Decision.[181]

In *Bob-Dogi* case, the reference for a preliminary ruling concerned the interpretation of Article 8(1)(c) of the Framework Decision. The reference has been made in connection with the execution in Romania of a European arrest warrant issued by the District Court, Hungary against Mr Niculaie Aurel Bob-Dogi.

In that judgment, the Court after recalling that the principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognized at EU level, particularly in the Charter, ruled that where a European arrest warrant based on the existence of an 'arrest warrant' does not contain any reference to the existence of a national arrest warrant, the executing judicial authority must refuse to give effect to it if, given that Article 8(1)(c) of the Framework Decision lays down a requirement as to lawfulness which must be observed if the European arrest warrant is to be valid, and failure to comply with that requirement must, in principle, result in

178 Ibid., paras 111-112.
179 Ibid., para. 117.
180 Court of Justice, judgment of 19 September 2018, case C-327/18 PPU, *RO*, para. 62.
181 Ibid., paras 48-49.

the executing judicial authority refusing to give effect to that warrant.[182] However, before adopting such a decision, which, by its very nature, must remain the exception in the application of the surrender system established by the Framework Decision, as that system is based on the principles of mutual recognition and confidence,[183] the executing judicial authority must, request the judicial authority of the issuing Member State to furnish all necessary supplementary information in order to examine whether the necessary requirements are satisfied.

In this context, it is apparent that when European (secondary) legislation leaves a margin of discretion to the Member States authorities, as in the application of optional grounds for refusal in the Framework Decision, that discretion should be exercised in compliance with the principle of mutual trust.

Finally, in *F.* case, the Court observed that even in criminal proceedings for the enforcement of a custodial sentence or detention order, or indeed in substantive criminal proceedings, which lie outside the scope of the Framework Decision and of European Union law, the Member States are still obliged to respect fundamental rights as enshrined in the Convention or laid down by their national law, which may include the right to a second level of jurisdiction for persons found guilty of a criminal offence by a court.[184] Also, in *Kovalkovas* case, the Court provided that the Framework Decision is founded on the principle that decisions relating to European arrest warrants are attended by all the guarantees appropriate for decisions of such a kind, inter alia those resulting from the fundamental rights and fundamental legal principles referred to in Article 1(3) of the Framework Decision. This means that not only the decision on executing European arrest warrants, but also the decision on issuing such a warrant, must be taken by a judicial authority, such that the entire surrender procedure between Member States provided for by the Framework Decision is carried out under judicial supervision.[185]

B. Recent case-law of the Court of Justice of the European Union on the Asylum procedure

As far as the European asylum system is concerned, the Court of Justice has provided important case-law as to the application of the principles of mutual trust and mutual recognition in the area of freedom, security and justice.

In *N.S.* case, the two references for preliminary rulings concerned the interpretation, first, of Article 3(2) of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national and, second, the fundamental rights of the European Union, including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter. The references have been made in proceedings between asylum seekers who were to be returned to Greece pursuant to Regulation No 343/2003 and, respectively, the United Kingdom and Irish authorities.

The Court, after considering that the texts which constitute the Common European Asylum System show that it was conceived in a context making it possible

182 See *supra* note 152, para. 67.
183 Ibid., para. 65.
184 See *supra* note 113, para. 48.
185 See *supra* note 120, *Kovalkovas*, para. 37.

to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard, stated that it is precisely because of that principle of mutual confidence that the European Union legislature adopted Regulation No 343/2003 (...) in order to rationalize the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim.[186]

Accordingly, the Court emphasized that "At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights."[187]

Nevertheless, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.[188] As a result, the Court ruled that in situations such as that, in order to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.[189]

Important conclusions can be derived from that judgment. First of all, the Court based on the texts of the European Asylum system, accepted that this system is also governed by the principle of mutual trust, despite the fact that the rules that constitute the European Asylum system do not contain a reference to mutual recognition or mutual trust. Second, the Court not only stated, that the European Asylum system is governed by the principle of mutual trust, but also considered that in certain circumstances the need to protect fundamental rights places limits on that principle. By accepting limits to mutual trust a delicate matter occurs of balancing between upholding the presumption of equivalent protection and offering sufficient protection of fundamental rights. Third, the automaticity for the system of mutual trust on which the Dublin II Regulation is based, is brought to an end, as national authorities are required to examine whether there are 'systemic deficiencies' in the 'Member State responsible' that prevent them from transferring the asylum seeker to that Member State. Fourth, the rationale underpinning the judgment only applies in exceptional circumstances as the concept of 'systemic deficiencies' is to be distinguished from an 'infringement of a fundamental right by the Member State

186 See supra note 106, *NS and others*, paras 78-79.
187 Ibid., para. 83.
188 Ibid., para. 86.
189 Ibid., para. 94.

responsible' which may not affect the obligations of the other Member States to comply with the provisions of the Dublin II Regulation. Otherwise, the principle of mutual trust would become devoid of purpose and substance, leading to the fragmentation of the Area of freedom, security and justice. It is worth noting that Article 3(2) of the Dublin III Regulation codifies the *N.S.* judgment.[190]

In *Abdullahi* case, the request for a preliminary ruling concerned the interpretation of Articles 10, 16, 18 and 19 of Council Regulation (EC) No 343/2003 and has been made in the course of proceedings between Ms Abdullahi, a Somali national, and the Austrian Federal Asylum Office, concerning the determination of the Member State responsible for examining the asylum application that Ms Abdullahi had lodged with that authority. In that case, the Court held that the only way an asylum seeker can challenge the responsibility of a Member State, as Member State of the asylum seeker's first entry into EU territory, is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.[191]

Nevertheless, in *Ghezelbash* case, the Court ruled that in the light of developments in the Dublin system as a result of Regulation No 604/2013,[192] an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility laid down in Chapter III of the regulation. Moreover, the court hearing such an application will not be required to make a Member State that is to the asylum seeker's liking responsible for the examination of the asylum application, but to verify whether the criteria for determining responsibility laid down by the EU legislature have been applied correctly. In that regard, that if it were established in the course of such an examination that an error had been made, the Court considered, nonetheless, that could have no bearing on the principle of mutual trust between Member States on which the Common European Asylum System is based, as such a finding would simply mean that the Member State to which the applicant was to be transferred was not the Member State responsible within the meaning of the criteria laid down in Chapter III of the Dublin III Regulation.[193] In other words, the Court held that Article 27(1) of Dublin III Regulation provides an asylum applicant with an effective remedy against a transfer decision made in respect of him, which may, inter alia, concern the examination of the application of that regulation and which may therefore result in a Member State's responsibility being called into question, even where there are no systemic deficiencies in the asylum process or in the reception conditions for asylum applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter.[194]

In *C.K.* case, the Court clarified some issues left open by the *N.S.* case. More specifically, in that case, the request for a preliminary ruling concerned the interpretation of Articles 3(2) and 17(1) of the Dublin III Regulation, Article 267 TFEU and Article 4 of the Charter. The request has been made in proceedings between, C. K., H. F. and their child A. S. and the Republic of Slovenia, concerning

190 Lenaerts K., cit. p. 829.

191 Court of Justice, judgment of 10 September 2013, case C-394/12, *Abdullahi*, para. 60.

192 The Dublin III Regulation, see *supra* note 148.

193 Court of Justice, judgment of 7 June 2016, case C-63/15, *Ghezelbash*, paras 54-55 and 61.

194 Court of Justice, judgment of 7 June 2016, case C-155/15, *Karim*, para. 22.

the transfer of those persons to Croatia, designated as the Member State responsible for examining their application for international protection in accordance with the provisions of the Dublin III Regulation.[195] [196]

In this context, the Court ruled as to the interpretation of Article 4 of the Charter, first of all that, even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum seeker within the framework of the Dublin III Regulation can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter. Second, that in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment, within the meaning of that Article 4 of the Charter. Third, that it is for the authorities of the Member State having to carry out the transfer and, if necessary, its courts to eliminate any serious doubts concerning the impact of the transfer on the state of health of the person concerned by taking the necessary precautions to ensure that the transfer takes place in conditions enabling appropriate and sufficient protection of that person's state of health. If, taking into account the particular seriousness of the illness of the asylum seeker concerned, the taking of those precautions is not sufficient to ensure that his transfer does not result in a real risk of a significant and permanent worsening of his state of health, it is for the authorities of the Member State concerned to suspend the execution of the transfer of the person concerned for such time as his condition renders him unfit for such a transfer, and where necessary, if it is noted that the state of health of the asylum seeker concerned is not expected to improve in the short term, or that the suspension of the procedure for a long period would risk worsening the condition of the person concerned, the requesting Member State may choose to conduct its own examination of that person's application by making use of the 'discretionary clause' laid down in Article 17(1) of the Dublin III Regulation.[197]

Moreover, the Court accepted that as far as the Article 3(2) of the Dublin III Regulation is concerned, nothing in the wording of that provision suggests that the intention of the EU legislature had been to regulate any circumstance other than that of systemic flaws preventing any transfer of asylum seekers to a particular Member State. That provision cannot, therefore, be interpreted as excluding the possibility that considerations linked to real and proven risks of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, might, in exceptional situations such as those envisaged in the judgment concerned, have consequences for the transfer of a particular asylum seeker. Moreover, such a reading of Article 3(2) of the Dublin III Regulation would be, irreconcilable with the general character of Article 4 of the

195 Article 3 of that regulation, entitled 'Access to the procedure for examining an application for international protection', provides: '2. … Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the [Charter], the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.'

196 Article 17 of that regulation, entitled 'Discretionary clauses', provides in paragraph 1: 'By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.'

197 Court of Justice, judgment of 16 February 2017, case C-578/16, *C.K.*, para. 96.

Charter, which prohibits inhuman or degrading treatment in all its forms, and it would be manifestly incompatible with the absolute character of that prohibition if the Member States could disregard a real and proven risk of inhuman or degrading treatment affecting an asylum seeker under the pretext that it does not result from a systemic flaw in the Member State responsible.[198]

Most importantly, the Court considered that the above interpretation fully respects the principle of mutual trust since, far from affecting the existence of a presumption that fundamental rights are respected in each Member State, it ensures that the exceptional situations referred to in the present judgment are duly taken into account by the Member States.[199]

However, with reference to Article 4 of the Charter, in *Jawo* case, the Court provided the criteria that should guide the competent national authorities in carrying out an assessment concerning the living conditions of beneficiaries of international protection in a Member State. In order to fall within the scope of Article 4 of the Charter, the deficiencies systemic or generalized to the standard of protection of fundamental rights guaranteed by EU law must attain a particularly high level of severity. That particularly high level of severity is attained where the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity. That threshold cannot cover situations characterized even by a high degree of insecurity or a significant degradation of the living conditions of the person concerned, where they do not entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment.[200]

As is apparent from all the foregoing, the principle of mutual trust is subject to a number of limitations.[201] For instance, according to the 'systemic deficiencies' exception, which was first introduced by the Court in case *N.S.*, where there is a serious risk that the rights of an asylum seeker may be violated, the Member States should have a great deal of discretion and the EU law presumption of trust may thus be broken. Despite the fact that this exception only applies in exceptional circumstances, some commentators have suggested that the Court of Justice has in recent case-law broadened this exception by no longer requiring 'systemic' deficiencies.[202]

As is also clear from recent case-law, individuals may challenge a transfer decision taken by a Member State under the Dublin Regulation, on the ground that it has systemic flaws in its asylum procedure, but also on the ground that it has incorrectly applied the criteria for determining responsibility laid down in Chapter III of the Dublin Regulation, as applied in *Ghezelbash* case. If successful, such a challenge may have the result that another Member State should be considered the

198 Ibid., paras 92-93.

199 Ibid., para. 95.

200 Court of Justice, judgment of 19 March 2019, case C-163/17, *Jawo*, paras 91-93.

201 See Court of Justice, judgment of 28 April 2011, case C-61/11, *El Dridi*, concerning the principle of proportionality as limitation to mutual trust and mutual recognition.

202 For instance, Halberstam D., "The Judicial Battle over Mutual Trust in the EU: Recent Cracks in the Façade", in verfassungsblog.de.the-judicial-battle-over-mutual-trust-in-the-eu-recent-cracks-in-the-facade, 9 June 2016.

responsible Member State. This is possible even if all Member States involved are satisfied that these criteria have been correctly applied, as the judgment in *Karim* case provided. As a result, the wide appeals possibilities given to individuals may also limit the trust Member States have in each other and, consequently, undermine the efficient working of the Dublin system based on mutual trust.[203]

C. Recent case-law of the Court of Justice of the European Union on Civil Matters

As already mentioned above, the principle of mutual recognition was imported in the Area of freedom, security and justice from the Internal Market. It has developed as a regulatory integration method over a number of decades in the context of the four fundamental freedoms related to free movement of goods, services, capital and persons.[204] The free movement of judgments has therefore been called the 'fifth' freedom.[205]

However, it is the field of judicial cooperation in civil matters that has strong connection with the Internal Market. The political connection between trust in the legal systems and economic growth is highlighted in the European Council's strategic guidelines for legislative and operational planning within the Area of freedom, security and justice for 2015–2019, as follows: "The smooth functioning of a true European area of justice with respect for the different legal systems and traditions of the member states is vital for the EU. In this regard, mutual trust in one another's justice systems should be further enhanced. A sound European justice policy will contribute to economic growth by helping businesses and consumers to benefit from a reliable business environment within the internal market".[206]

In civil justice, the question of mutual trust has been strongly related to the achievement of implementing mutual recognition of judgments, that a judgment from one Member State shall be granted the same effect in other Member States, thus supporting the interests of private parties. Indeed, "the big problem [...] with the principle of mutual recognition [...] is that it requires mutual trust [and] requires in its extreme, that a domestic legal system allows for enforcement of judgments based on procedural rules and ideological values over which the member state has no influence and very little knowledge".[207] In that regard, the intermediary exequatur procedure (the application for enforcement) and the possibility to refuse to recognize a foreign judgment on limited grounds such as public policy has traditionally and historically been a general safeguard against unwanted effects of mutual recognition. Thus, recognition in a foreign jurisdiction has always been predicated upon checks and balances, on balancing the public policy of the forum against the rights of private parties.[208]

By contrast, the most far-reaching provisions in terms of automatic recognition, thus in terms of mutual trust, without review mechanism in the Member

203 Cambien Nathan , cit., p. 104.

204 See Articles 5, 28, 45 and 63 TFEU.

205 Storskrubb E. (2019), cit., p. 162.

206 European Council's conclusions, 26-27 June 2014, concerning the area of freedom, security and justice and some related horizontal issues (OJ C 240/13, 24 July 2014).

207 Andersson T. (2005), *Harmonisation and mutual recognition: How to handle mutual distrust*. In M. Andenas, B. Hess, & P. Oberhammer (Eds.), Enforcement agency practice in Europe. British Institute of International and Comparative Law, as cited in Storskrubb Eva (2019), cit., pp. 161-162.

208 Paul J. R. (2008), "The transformation of international comity", *Duke Law and Contemporary Problems*, 71(19), 19-38, as cited in Storskrubb E. (2019), cit., p. 162.

State of enforcement, concern the Brussels IIa Regulation[209] and its rules for judgments concerning the return of unlawfully removed children.

In this context, the Court of Justice delivered the most debated judgment in *Aguirre Zarraga* case. The reference for a preliminary ruling concerned the interpretation of the Brussels IIa Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility and was made in proceedings between Mr Aguirre Zarraga and Ms Pelz where the issue was the return to Spain of their daughter Andrea, who was at that time in Germany with her mother.

The referring German court asked, whether the certificate provided for by Article 42 of the Brussels IIa Regulation ordering the return of a child could be disregarded by a court in the Member State of enforcement in circumstances where its issue amounted, in its view, to a serious violation of fundamental rights, notably Article 24 of the Charter (the child concerned was not heard), or where that certificate contained a statement that was manifestly incorrect (it stated that the child was heard when in fact, she was not). In particular, the referring court asked whether it could oppose the enforcement of a judgment ordering the return of a child where – contrary to what was, in its view, required by Article 42(2)(a) of the Brussels IIa Regulation – that child had not been given the opportunity to be heard.[210]

The Court, after emphasizing that the systems for recognition and enforcement of judgments handed down in a Member State which are established by that regulation are based on the principle of mutual trust between Member States in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognized at European Union level, in particular, in the Charter, ruled that it is within the legal system of the Member State of origin that the parties concerned must pursue legal remedies which allow the lawfulness of a judgment certified pursuant to Article 42 of Brussels IIa Regulation to be challenged.[211] Therefore, the court with jurisdiction in the Member State of enforcement cannot oppose the enforcement of a certified judgment, ordering the return of a child who has been wrongfully removed, on the ground that the court of the Member State of origin which handed down that judgment may have infringed Article 42 of Brussels IIa Regulation, interpreted in accordance with Article 24 of the Charter, since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin.[212] As a result, the fact that the court of the Member State of enforcement lacks the powers to review a certified judgment adopted in accordance with Article 42(2) does not mean that the fundamental rights of the child concerned, notably his or her right to be heard, are deprived of judicial protection.

There are also other judgments of the Court in relation to civil justice.

In *Gasser* case[213] the Court considered that the Brussels Convention (of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters), as amended, is necessarily based on the trust which the

209 Regulation (EC) 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II a Regulation), repealing Regulation (EC) 1347/2000 (Brussels II Regulation).

210 Court of Justice, judgment of 22 December 2010, case C-491/110 PPU, *Aguirre Zarraga*, paras 35-36.

211 Ibid., paras 70-71.

212 Ibid., para. 74.

213 Court of Justice, judgment of 9 December 2003, case C-116/02, *Gasser*, paras 72-73.

Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction, therefore it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

However, both in *Turner* case[214] and in *West Tankers* case[215], the Court held that the mutual jurisdiction rules of the Brussels Convention and Brussels I Regulation (Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), respectively) are founded on the mutual trust that Member States have to one another's legal systems and judicial institutions. Thereby, the Court implicitly imposes on national courts in Member States an obligation to trust the courts of other member states and their capacity to correctly follow the mutual jurisdiction rules.[216]

Furthermore, as far as the Enforcement Order Regulation is concerned, in cases *G*[217] and *Imtech Marine*[218] the Court gave strong emphasis to the safeguard mechanisms as a means to support the trust underlying free movement of judgment showing that without such safeguards free movement is not possible. The ruling in joined cases *eco cosmetics and Raiffeisenbank*[219] regarding the European Payment Order Regulation points in the same direction.

Last but not least, case *Diageo Brands* is worth to be mentioned. In that judgment the Court considered that the rules on recognition and enforcement laid down by Regulation No 44/2001 (Brussels I Regulation) are based on mutual trust in the administration of justice in the European Union. It is that trust which the Member States accord to one another's legal systems and judicial institutions which permits the inference that, in the event of the misapplication of national law or EU law, the system of legal remedies in each Member State, together with the preliminary ruling procedure provided for in Article 267 TFEU, affords a sufficient guarantee to individuals.[220]

It follows from the foregoing, that the field of civil justice is based on the presumption of mutual trust, hence the expectations on national courts to trust each other in civil justice matters by presumption, are high. However, most of the civil justice legislative measures so far include some safeguard mechanisms to mediate mutual recognition, and in those where exequatur has been removed, these safeguards are coupled with a minimum level of procedural harmonization. By contrast, the

214 Court of Justice, judgment of 27 April 2004, case C-159/02, *Turner,* para. 24.

215 Court of Justice, judgment of 10 February 2009, case C-185/07, *West Tankers,* para. 30.

216 Hartley T. (2015), "Anti-suit injunctions in support of arbitration: West Tankers still afloat", *International and Comparative Law Quarterly*, 64(4), 965-975, as cited in Storskrubb E. (2019), cit., p. 167.

217 Court of Justice, judgment of 15 March 2012, case C-292/10, *G.*

218 Court of Justice, judgment of 17 December 2015, case C-300/14, *Imtech Marine.*

219 Court of Justice, judgment of 4 September 2014, joined cases C-119/13 and 120/13, *eco cosmetics and Raiffeisenbank.*

220 Court of Justice, judgment of 16 July 2015, case C-681/13, *Diageo Brands.*

automatic enforcement rules for return of children, as the only exception, and the *Zarraga* case points to the distrust that may arise among national courts.

CONCLUSION

As regards the judicial independence the case-law of the Court of Justice of the European Union is stable and clear: Since the very existence of effective judicial review is the essence of the rule of law, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. Therefore, in order to ensure that protection, Member States are obliged to maintain judicial independence of their courts as long as national courts and tribunals, in collaboration with the Court of Justice, fulfil jointly the duty of ensuring that in the interpretation and application of the Treaties the law is observed. Any restriction on the different guarantees of judicial independence, even if it is justified and proportionate, should not raise doubts as to the imperviousness of the court. As a consequence, although the organization of justice in the Member States falls within the competence of Member States, they are required to comply with their obligations deriving from EU law and, in particular, with the principle of judicial independence, hence that principle is important enough to shape their discretion when exercising that competence.

By contrast, the Court's case-law regarding the principles of mutual trust and mutual recognition struggles to balance between those principles and the protection of fundamental rights. On the one hand, the Court essentially introduced mutual trust as a concept of EU law and has elevated it to the status of a constitutional principle, essential to the structure and development of the Union, as far as the internal market and the area of freedom security and justice is concerned. Additionally, it emphasizes in its case-law the importance of the principle of mutual recognition concerning judicial cooperation in civil and criminal matters.

On the other hand, the Court in its recent case-law, in particular with regard to the area of freedom security and justice, constantly extends the field of exceptions to the presumption of mutual trust, by accepting new limits to the principle; judicial independence is one of them. The impact of those decisions is difficult to be predicted, yet, in my view, this could be a dangerous path with serious complications concerning mutual trust and mutual recognition and eventually the Union's legal order. It should not be forgotten that the implementation of those principles is already difficult, due to distrust that arise among national courts of different Member States. Whether the Court will achieve the appropriate balance between mutual trust and effective protection of fundamental rights remains to be seen in the future.

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