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The European Union as a Community of Values: the Importance of the Dialogue between the Court of Justice of the European Union and National Courts*

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Summary. The article deals with the gradual development of the EU as a community of values and the role of the CJEU and national courts in upholding and developing these values. The analysis of judicial practice reveals the crucial role performed by national courts and the CJEU in protecting the fundamental rights and the principle of the rule of law both at the EU and national levels. On the one hand, „upstream", national courts act as guardians of the fundamental values at the EU level by referring questions to the CJEU concerning the interpretation of the Charter and the legality of the secondary EU legislation vis-à-vis the Charter, thus contributing to the functioning of a decentralised constitutional control of EU legislation and stabilising the EU level of governance. On the other hand, "downstream", recent developments of the CJEU jurisprudence interpreting Article 19 of the Treaty on the European Union confirm the thesis that the CJEU treats national courts as European courts that are cornerstones of the decentralised EU judicial system. The CJEU practice shows that differently from Article 47 of the Charter, Article 19 of the TEU is perceived not as providing protection of individual rights but rather as a systemic and permanent guarantee of judicial independence as a part of a fundamental value of the Union, thus aiming at stabilisation of national judicial systems and assuring the effectiveness of protection of the rights stemming from EU law at the national level.

Keywords: The EU as a community of values; protection of fundamental rights; EU Charter of Fundamental Rights; cooperation between the CJEU and national courts; preliminary ruling procedure; Article 19(1), second subparagraph, TEU; principle of the rule of law; principle of the independence of the judiciary.

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Europos Sąjunga kaip vertybinė bendruomenė: Europos Sąjungos Teisingumo Teismo ir nacionalinių teismų dialogo svarba

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Santrauka. Straipsnyje analizuojama laipsniška Europos Sąjungos, kaip vertybinės bendruomenės, plėtra ir Europos Sąjungos Teisingumo Teismo (ESTT) bei nacionalinių teismų vaidmuo ginant ir plėtojant šias vertybes. Teismų praktikos analizė atskleidžia lemiamą nacionalinių teismų ir ESTT vaidmenį ginant pagrindines teises ir teisės viršenybės principą ir ES, ir nacionaliniu lygmenimis. Viena vertus, nacionaliniai teismai veikia kaip pagrindinių vertybių sergėtojai ES lygmeniu, pateikdami ESTT klausimus dėl Chartijos aiškinimo ir ES antrinės teisės aktų teisėtumo Chartijos atžvilgiu, taip prisidėdami prie decentralizuotos konstitucinės ES teisės aktų kontrolės funkcionavimo ir ES valdymo lygmens stabilizavimo. Kita vertus, naujausi ESTT jurisprudencijos pavyzdžiai, aiškinantys Europos Sąjungos sutarties 19 straipsnį, patvirtina tezę, kad ESTT nacionalinius teismus traktuoja kaip ES teismus, kurie yra kertiniai decentralizuotos ES teismų sistemos akmenys. ESTT praktika rodo, kad ES sutarties 19 straipsnis, skirtingai nei Chartijos 47 straipsnis, suvokiamas ne tiek kaip užtikrinantis pavienio asmens teisių apsaugą, o, būdamas pamatinės Sąjungos vertybės dalis, kaip sisteminė ir nuolatinė teismų nepriklausomumo garantija, taip siekiant stabilizuoti nacionalines teismų sistemas ir užtikrinti veiksmingą iš ES teisės kylančių teisių apsaugą nacionaliniu lygmeniu.

Pagrindiniai žodžiai: ES kaip vertybinė bendruomenė; pagrindinių teisių apsauga; ES pagrindinių teisių chartija; ESTT ir nacionalinių teismų bendradarbiavimas; prejudicinio sprendimo procedūra; ES sutarties 19 straipsnio 1 dalies antra pastraipa; teisės viršenybės principas; teismų nepriklausomumo principas.

Introduction

There was a good reason for the press to refer to the accession of the ten Central and Eastern European countries to the European Union (hereinafter the EU) on 1 May 2004 as to the Big Bang enlargement. Historically, this was the largest enlargement of the EU in terms of its geographical scope and the number of countries that joined the Union. What is more important, it essentially marked the end of the division of the European continent that had occurred after the Second World War; in addition, it was the logical finale of the fall of the Berlin Wall. The sense of euphoria palpable at the time was genuine and completely understandable: the countries that had been in the grip of the Soviet empire for half a century were returning to the values of the European civilisation and becoming part of a united Europe. Thus, this enlargement closed the former page and at the same time opened a new page of one of the most important chapters in the history of Europe in the 20th century. The scale of the transformation in the new member states was universal and unique; it was reflected in the Copenhagen criteria which required the then-acceding countries to return to the traditions of liberal democracy, to build efficient free-market economies, and to undertake significant legal reforms in implementing EU law. Besides, the accession process was challenging in the sense that the EU, which they were joining, was a kind of a moving target as the EU itself was undergoing significant changes in the scope and nature of its powers. Having applied for EU membership with the Maastricht Treaty in force, these countries joined the Union when the Nice Treaty was already in force. In fact, the ratification of the Treaty establishing a Constitution for Europe, drafted by the European Convention, was on the agenda of the Member States at the date of the new members joining the EU. From what is stated below, we shall see that this evolution is interesting in the sense that the European Communities, and later the EU, have over time increasingly outgrown their original economic mantle and the Treaty of Lisbon in 2009 presented the EU as a fully-fledged community of values.

Needless to say, both the old and the new EU Member States then had some anxiety about how living together would work. A cursory glance at the negotiations would suggest that they tended to

focus more on developments in specific sectors of economic and social activity; i.e. there was no separate negotiating chapter[1] on the 'protection of fundamental rights' or the 'rule of law', although the reading of the European Commission's opinions on the candidate countries' applications for accession and of the annual progress reports on accession to the EU shows that the Commission always included in its assessment of the candidate countries their conformity with the Copenhagen political criteria, including compliance with the principles of democracy, the rule of law and respect for fundamental rights. However, the overall analysis of this criterion was visually overshadowed by a detailed assessment of the capacity to assume the obligations arising from the membership in specific negotiating chapters.[2] It is interesting to note in retrospect that at the time it was the economic issues that were more of a concern than the questions related to the values of the EU. Some of those fears were reflected in the transitional periods mutually obtained by both negotiating parties. In popular terms, the old Member States had a fear of what was then called the Polish plumber (a fear which may be said to have contributed, for example, to the originating of the notion of "social dumping" in the case-law of the Court of Justice of the European Union (hereinafter, the CJEU, the Court); whereas the new Member States had a fear, among other things, of the rich Westerners coming in and buying up all the agricultural land for a derisory price. Time has proved that such fears were unfounded, as the economic and social convergence of the EU has been in principle successful; the economies of the new Member States have proved sufficiently competitive to withstand the pressures of the Internal Market with their Gross Domestic Product (GDP) and standard of living approaching or even exceeding the EU average, besides, a significant number of these countries have become part of the Euro zone.

However, after the honeymoon period came to an end, certain value-based divides have slowly begun to emerge in relation to the EU founding principles, exacerbated by the tectonic crises that have been endlessly unfolding in recent times, such as the financial crisis in 2007–2008, the migration crisis in 2015, the COVID pandemic, and the military aggression of Russia against Ukraine. In addition, one should not forget about the systemic challenges to the rule of law that have emerged in some EU countries. These crises act as both centrifugal and centripetal forces in the EU. On the one hand, they encourage the European Union and its Member States to join forces to find common solutions at EU level in order to counter systemic threats. On the other hand, they inevitably highlight disagreements on how, to what extent and by what means to tackle the above-mentioned threats. What is more, doubts about the effectiveness of responses to these crises lead to dissatisfaction with the EU policies and have a serious impact on Member States' domestic political agendas. All of these aspects to a variable extent are intertwined and fundamentally linked to the intensity of solidarity at EU level as well as to the balance of power between the EU and national level. At the same time, the emerging challenges have an inevitable impact on the fundamental values on which the EU and its Member States are founded, in particular, an effective protection of fundamental rights as well as the principle of the rule of law. Although the search for responses to the emerging challenges is primarily a field of debate and action for the EU and national political institutions, once decisions are (or are not) taken, part of the debate inevitably shifts to the EU and national courts who are confronted with these issues when interpreting and applying EU law. As will be seen below, the EU and its Member States share a systemic commonality in terms of values, i.e. they are based on the same fundamental values. The EU is also founded on the idea that powers of public authority are disaggregated into different levels

[1] For more information on the progress of EU accession negotiations, see, for example: Europos Teisės Departamentas, 2007.

[2] See, for example, 2002 Regular Report on Lithuania's Progress Towards Accession https://neighbourhood-enlargement.ec.europa.eu/system/files/2016-12/lt_en.pdf [last viewed 7 January, 2024].

so that, among other things, these different levels were able to exercise at least some degree of control over each other in order to ensure that these fundamental values are effectively protected. The EU history has shown that the dialogue between the CJEU and national courts is a perfect reflection of this idea. Indeed, the time has confirmed the importance of national courts and their contribution to the development of the idea and standards of protection of fundamental rights at the EU and national level. In addition, the systemic problems that have arisen in some EU countries concerning the respect for the rule of law and the experiments with the so-called illiberal democracy that have begun to emerge over the past few years have highlighted the importance and the potential (as well as the limits of this potential) of EU law in the defence of fundamental values by national courts at the *national level*. In both cases, the dialogue between the CJEU and the national courts is crucial; it is naturally the national courts that are most often confronted with issues of the application of EU law at the national level. Thus, by identifying problems and raising relevant questions on interpretation or legality of EU law, they bring the dispute to the EU level where the CJEU is in a good position to reflect on the problems and to provide a universal solution for the entire EU. On the other hand, in such a setup, the importance of independence of national judiciary is obvious, since only independent courts are able to effectively protect these fundamental values.

Thus, the *object* of the research is developments of EU primary law, which gradually reveals the value-based nature of the European Union and the role of the dialogue between the CJEU and national courts in upholding fundamental values of the EU, including judicial independence.

The aim of the research is to reveal and evaluate the changes of the EU primary law shifting the focus from the initial economic mantle of the European Communities to the value-based nature of the European Union and the role of the dialogue between the CJEU and national courts in protecting and developing the EU fundamental values.

The tasks of the research is to reveal the gradual development of EU as a Union of values; to explore the contribution of the CJEU and national courts in upholding and developing fundamental EU values through their dialogue both at the EU and national levels.

This article will, therefore, first discuss the value-based nature of the EU reflected in the primary EU law as amended by the Lisbon Treaty in 2009. The second part of the article, in turn, will analyse concrete examples of the dialogue between the CJEU and the national judiciaries revealing its potential to defend and develop the fundamental values of the EU, including the importance of the protection of the independence of national judiciary as essential prerequisite of this dialogue.

Numerous studies have been undertaken in this field, making it too complicated to mention even a portion of them. However, last several years have witnessed the immense growth of the jurisprudence of the CJEU related to protection of fundamental rights both at the EU and national levels, thus, these developments merit a reflection providing for an overall picture in this field.

The undertaken research is based on historical, systemic, and critical methods of analysis. Historical method is used to evaluate the developments of EU primary law, while systemic and critical analysis methods are significant in assessing the developments and dynamics of the dialogue between the CJEU and national courts in the field of protection of the EU fundamental values.

1. From the Economic Communities to the European Union as a Union of Values

One may have ambivalent feelings when looking back at the original Treaties of the European Coal and Steel Community (ECSC) of 1952 and the European Economic Community (EEC) of 1957. On the one hand, the preambles of these Treaties refer to the fundamental objective of European integration, i.e.,

ensuring peace in Europe and cohesion among its peoples, which was the value-based[3] starting point of the integration process. On the other hand, however, the provisions of these Treaties are rather technical and "boring" in the sense that they essentially refer only to a gradual economic integration while the afore-mentioned value-based aspect is largely absent, i.e. they do not mention the deeper objectives of the integration process, the principle of solidarity, the principle of respect for fundamental rights, etc.[4] Certainly, when reading these Treaties, one should not forget the context of the time. Although the ambitions for European political integration were high at the time, they had to face the reality: the treaties on the European Political Community and the European Military Community, which had been drawn up, were not ratified for political reasons. Thus, Schuman's words that Europe could not be created overnight or according to a single plan came true. It was necessary to wait another 40 years to have the explicit expression of a political community, i.e., the European Union established by the Maastricht Treaty in 1992. The Preamble of the Maastricht Treaty declares the importance of the principles of liberty, democracy, the rule of law, and respect for human rights, and Article F (2) of the Treaty states succinctly that the European Union shall respect the fundamental rights guaranteed by the European Convention on Human Rights (ECHR) and stemming from the constitutional traditions common to the Member States. This brief reference in the EU primary law was rather misleading, as back then the CJEU had already developed a vast case law on the protection of fundamental rights, at least partly inspired by national courts (See, for example: Jarukaitis, 2011, p. 373-393). The Lisbon Treaty, which entered into force in 2009, was a qualitatively new step whereby the European Union presented itself as a community of values (See, for example: Jarukaitis, 2009, p. 55-74). An assessment of the provisions of this Treaty suggests that the EU no longer sees itself as a forum for economic cooperation but rather as a fully-fledged political community with a deep background of values and a clear identity[5]. In particular, Article 3(1) of the TEU explicitly identifies the EU objective of promoting peace, *its own* values, and the well-being of *its peoples*; Article 2 identifies the EU-specific fundamental values[6], and Article 6(1) of the TEU makes the EU Charter of Fundamental Rights binding on both the EU and its Member States and gives it the status of the primary EU law. In addition, Article 49 of the TEU explicitly links a State's aspiration to become an EU Member State to its respect for and commitment to the values enshrined in Article 2 of the TEU.[7] What is more, Article 21 of the TEU specifies, inter

[3] The preamble to the ECSC Treaty states, among other things, that the signatory states signed the Treaty „considering that world peace can be safeguarded only by creative efforts commensurate with the dangers that threaten it", and „convinced that the contribution which an organised and vital Europe can make to civilisation is indispensable to the maintenance of peaceful relations". The preamble to the EEC Treaty states, inter alia, that the founding members of this Community are determined to establish the foundations of an ever closer union among the European peoples and resolved to strengthen the safeguards of peace and liberty by establishing this combination of resources, and calling upon the other peoples of Europe who share their ideal to join in their efforts.

[4] Article 2 of the ECSC Treaty states that its task is to contribute through the establishment of a common market, to economic expansion, growth of employment and a rising standard of living in the Member States; whereas Article 2 of the EEC Treaty states that its aim is to promote the harmonious development of economic activity in the Community, the raising of living standards and closer links between Member States through the creation of a Common Market and the progressive approximation of the Member States' economic policies.

[5] Looking at these developments through the prism of constitutionalism: Jarukaitis, 2024.

[6] Article 2 of the Treaty on European Union: 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. For a deeper analysis, see Lenaerts, 2017, p. 132-136; Rossi, 2020, p. 639-657; Wouters, 2020, p. 11-38.

[7] The CJEU first referred to respect for the values enshrined in Article 2 of the TEU in the context of a country's accession/withdrawal in its *Wightman* judgement: Judgement of the Court (Full Court) of 10 December 2018, *Wightman and others* (C-621/18, EU:C:2018:999, paragraphs 62 and 63).

alia, that the EU action on the international stage shall be based on the above-mentioned values, and emphasises that the EU common foreign policy shall seek to, *inter alia*, uphold *its own* values. It should be noted that the recent case law of the CJEU also emphasises the value-based identity of the EU as well as the binding nature and interrelationship of the general principles of law that elaborate on the EU's fundamental values. In this respect, judgments of the Full Court in cases *Hungary v Parliament and Council* (C-156/21) and *Poland v Parliament and Council* (C-157/21) of 16 February 2022 are of great importance.[8] The main issue in the above-mentioned cases was the relationship between the principle of the rule of law and the principle of solidarity, which serves as the basis for the EU budget, and, more specifically, the question of whether the so-called Conditionality Regulation which makes payments to a Member State from the EU budget conditional on respect for the rule of law, may be considered to be a "financial rule". The insights of the CJEU into the very nature of the EU and into its founding principles are particularly interesting, where special attention should be given to paragraphs 124–129 of the Judgment in *Hungary v Parliament and Council*. In response to Hungary's arguments that there was allegedly no legal basis in the EU primary law for the adoption of the Conditionality Regulation and that it essentially circumvented the special procedure laid down in Article 7 of the TEU, the CJEU pointed out, among other things, that the EU is founded on the values enshrined in Article 2 of the TEU, including the principle of the rule of law where this principle is a principle common to all the EU member states. By joining the EU, a state joins the legal framework based on the fundamental assumption that each Member State respects the common values enshrined in Article 2 of the TEU. This presumption is based on specific principles of EU law; besides, it implies the principle of mutual trust between Member States. Therefore, a Member State's respect for the values enshrined in Article 2 of the TEU is a condition for exercising the rights of the EU membership. The CJEU emphasized that the values enshrined in Article 2 of the TEU are common to all Member States; therefore, they define the core of the EU identity as a common legal order. It is for this particular reason that the EU must be able to defend these fundamental values in accordance with the competencies conferred on it, and the rule of law, a fundamental value of the EU, can serve as the basis for a conditionality mechanism adopted under Article 322 of the Treaty on the Functioning of the European Union (hereinafter TFEU). In addition, the CJEU linked the existence of the EU budget to the principles of solidarity and mutual trust which, in turn, are fundamental principles of EU law. Furthermore, in response to the applicants' arguments that the values enshrined in Article 2 of the TEU, including the concept of *the rule of law*, are allegedly too vague, may be interpreted differently, and are of a political rather than legal nature, and that the EU is allegedly obliged to respect the national identity of the Member States, the CJEU stressed that *Article 2 of the TEU is not just a set of policy guidelines or intentions;* it enshrines the fundamental values, which are at the heart of the very identity of the EU, and that these values are expressed in concrete legal principles which establish legally binding obligations on the EU Member States. Thus, while the EU respects the national identities of the Member States under Article 4(2) of the TEU, which are intrinsic to their basic political and constitutional structures, and while this respect entails a certain degree of discretion in the implementation of the rule of law principle, such respect does not imply that the results of the duty to respect the rule of law principle may be different in individual Member States.[9]

[8] Judgement of the Court (Full Court) of 16 February 2022, *Hungary v Parliament and Council* (C-156/21, EU:C:2022:97); Judgement of the Court (Full Court) of 16 February 2022, *Poland v Parliament and Council* (C-157/21, EU:C:2022:98).

[9] The CJEU takes the same position on (systemic) principles of EU law such as the principle of primacy of EU law: Judgement of 22 February 2022, *RS (Effet des arrêts d'une cour constitutionnelle)* (C-430/21, EU:C:2022:99).

As for the national level, a number of national constitutions of EU Member States reflect the value-based nature of EU membership and the systemic compatibility between the EU primary law and national constitutions (Jarukaitis, 2011, p. 94-127). The Constitution of the Republic of Lithuania adopted in 1992 and the jurisprudence of the Constitutional Court of the Republic of Lithuania on the Republic of Lithuania's membership in the EU serve as a good reflection of this statement. First of all, the Preamble of the Constitutional Act of the Republic of Lithuania on the Membership of the Republic of Lithuania in the European Union that entered into force in 2004 (hereinafter referred to as the "Constitutional Act") explicitly states that the Seimas of the Republic of Lithuania adopted the Constitutional Act in the conviction that the European Union respects human rights and fundamental freedoms and that Lithuania's membership in the EU will contribute to a more efficient respect for human rights and freedoms; the Seimas was seeking to guarantee the Republic of Lithuania's full participation in the integration into the European Union, and to ensure security of the Republic of Lithuania as well as the well-being of the Lithuanian citizens. The case-law developed by the Constitutional Court of the Republic of Lithuania reinforces the impression of the value-based nature of our country's membership in the European Union. In its case-law, this Court has consistently emphasized the fundamental importance of EU membership both for the country and for its citizens. It explicitly underlines the close links (Ruling of 24 January 2014) between the fundamental constitutional values and EU membership as a positive expression of the state's geopolitical orientation (as opposed to a negative geopolitical orientation towards the post-Soviet structures); full membership of the EU is perceived as a constitutional value (Ruling of 19 November 2015); besides, the constitutional imperative of proper implementation of the EU law into national law is established. Finally, the EU law is treated as a source for interpreting the Constitution (Decision of 20 December 2017). Thus, a state's membership in the EU is perceived not only as a participation in a bloc of economic cooperation with the aim of developing international economic relations between states (although, the economic dimension of the EU integration has always been and continues to be of a paramount importance), but as an aspiration to take part in the plan for the unification of the European Continent. Undoubtedly, this practice of the Constitutional Court of the Republic of Lithuania can be regarded as a reflection of our nation's historical experience of living on a tectonic fault line and the conviction that securing peace in Europe is inextricably linked to the effective protection of the fundamental values of the Western civilization.

2. Synergies of a Dialogue Between the CJEU and National Courts in the Field of Protection of EU Fundamental Values

Turning to the nature and importance of the dialogue between the CJEU and national courts in ensuring the effective protection of the EU fundamental values, including fundamental rights and the rule of law, it is necessary to refer in particular to Article 19(1) of the TEU which reflects the idea of a decentralised EU court system (Jarukaitis, 2023, p. 45-47). It states that the Court of Justice of the European Union comprises the Court of Justice, the General Court, and specialised courts. This Court ensures that the interpretation and application of treaties *comply with the law (fr. elle assure le respect du droit)*. For their part, Member States have the obligation to provide the remedies necessary to ensure effective judicial protection in areas falling within the Union law (fr. *une protection juridictionelle effective dans les domaines couverts par le droit de l'Union*). On the one hand, it could be argued that this provision of the TEU introduced by the Lisbon Treaty is a general reflection of the CJEU jurisprudence on the

complementarity and completeness of judicial remedies at the EU and national level.[10] On the other hand, as can be seen below, the CJEU has in recent years developed an innovative jurisprudence on the scope of application of the second subparagraph of Article 19(1) of the TEU in cases where there is a need to ensure the independence of national courts (along with the effectiveness of EU law). In this context, national courts are perceived as European courts, i.e., they are an essential element of the EU constitutional architecture (Lenaerts, 2023, p. 33-34) where one of their missions is to ensure efficient protection at the national level of the values enshrined in EU law.

As mentioned above, in retrospect, in the early days of the European Communities, the role of national courts was crucial in inspiring the very idea of the protection of fundamental rights at the supranational level. This case law was based, *inter alia*, on the thesis that national constitutions allow the transfer of public powers to the supranational level but only on the condition that they are exercised in such a way as to ensure the effective protection of fundamental rights. Since national courts are the courts who are most often confronted with the application of EU law and the problems raised thereby, a close dialogue between national courts and the CJEU has naturally developed over time on the basis of the preliminary ruling procedure where national courts have been raising specific questions (and providing arguments concerning the interpretation of EU law) related to the protection of fundamental rights. In this way, they have created preconditions for the development of a supranational case law concerning the protection of fundamental rights. This dialogue enabled the CJEU to develop a rich jurisprudence in this field, which later gave impetus to the drafting and promulgation of the EU Charter of Fundamental Rights in 2000, as well as its incorporation into the EU primary law by the Lisbon Treaty. In turn, the fact that the Charter became part of the EU primary law has created a qualitatively new basis for the CJEU to further develop its jurisprudence.[11]

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[10] See, for example Judgement of 23 April 1986, *Les Verts* (294/83, EU:C:1986:166) paragraph 23; Judgement of 25 July 2002, *Unión de Pequeños Agricultores v Council* (C-50/00 P; EU:C:2002:462), paragraphs 38 to 41; Judgement of 1 April 2004, *Commission v Jégo-Quéré* (C-263/02 P; EU:C:2004:210), paragraphs 29 to 31); Judgement of 3 October 2013, *Inuit Tapiriit Kanatami and others v Parliament and Council* (C-583/11 P, EU:C:2013:625), paragraphs 100 to 101; Judgement of 22 June 2021, *Venezuela v Council (Affectation d'un État tiers)* (C-872/19 P; EU:C:2021:507), paragraphs 48 to 50; Judgement of 14 July 2022, *Italy v Council (Siège de l'Agence européennes des médicaments)* (Joined Cases C-59/18 and C-182/18; EU:C:2022:567) paragraph 59. It should be noted that in some cases the EU primary law provides for limitations on the CJEU competence, most notably in the field of the Common Foreign and Security Policy (CFSP): see Article 275 of the TFEU. It is no coincidence that the CJEU interprets this restriction narrowly: for example in Judgement of 28 March 2017, *Rosneft* (C-72/15; EU:C:2017:236). It is worth mentioning some other specific limitations on the CJEU competence resulting from the EU primary law and its institutional architecture, in particular Article 7 of the TEU and Article 269 of the TFEU. Again, it is no coincidence that the CJEU interprets these provisions narrowly: see Judgement of 3 June 2021, *Hungary v Parliament* (C-650/18; EU:C:2021:426). In addition, it follows from the case law of the CJEU that only decisions of EU institutions can be challenged on the basis of Article 263 TFEU. For example, as the Conference of the Representatives of the Governments of the Member States is not an EU institution, it is not for the CJEU to assess the legality of decisions taken by the Conference: see Order of 16 June 2021, *Sharpston v Council and les Représentants des Gouvernements des États membres* (C-685/20 P; EU:C:2021:485).

[11] A good example of how the Charter has changed the paradigm of protection of the EU fundamental rights is the development of the principle of prohibition of discrimination on grounds of age in the case law of the CJEU. Having delivered *Mangold* judgement (Judgement of 22 November 2005, *Mangold* (C-144/04; EU:C:2005:420), the CJEU was facing criticism for treating the principle of prohibition of discrimination on the grounds of age as a general principle of EU law but without elaborating further on this (note: at the time, the Charter had already been proclaimed but had not yet become part of the EU primary law, and the CJEU was reluctant to refer to it before the entry into force of the Lisbon Treaty). Meanwhile, while developing this principle, the CJEU, in its judgement of 19 January 2010 in Kücükdeveci (Judgement of 19 January 2010, *Kücükdeveci* (C-555/07; EU:C:2010:21), simply referred to Article 21(1) of the Charter which prohibits discrimination on the grounds of, inter alia, age. Two CJEU judgements in the context of infringement proceedings can also be mentioned: Judgement of 18 June 2020, *Commission v Hungary (Transparency of associations)*

Depending on where the real or notional problems concerning the protection of fundamental rights lie, references for preliminary rulings from national courts can be divided into two large groups. The first group covers the cases where national courts have doubts about the compatibility of *national law* (or the practice of its application) with EU law (obviously, it is not always the compatibility of national law that is directly questioned by national courts, and it is not always the case that such doubts are confirmed). The second group, in turn, covers the situations where national courts question the compatibility of the *EU secondary law* with regard to the EU primary law, including the Charter. In both cases, such doubts can (and in practice do) arise in virtually any area of EU legal regulation. In fact, recent practice shows that a significant number of such references are made in the Area of Freedom, Security, and Justice (in particular, it concerns asylum and criminal law) which is logical, as the EU gained legislative competence in this area relatively recently; in addition, it means that the EU legislator is quite active and that the CJEU is still developing its case-law. Moreover, this area by its nature is inherently linked to fundamental rights and their restrictions. It is, therefore, natural that questions arise in practice as to the compatibility of such restrictions with the standards of protection of fundamental rights. The migration crisis in Europe in 2015 has led to a relatively high number of references to the CJEU asking for clarification of the EU legal provisions on asylum and, more generally, on the legal status of foreigners.[12] Despite the fact that the European Arrest Warrant system[13] has existed for more than 20 years, the CJEU still receives a considerable number of requests concerning the interpretation of the Framework Decision on the European Arrest Warrant[14]. In addition, since the EU legislator first started to regulate aspects of the protection of personal data in the field of criminal

(C-78/18, EU:C:2020:476) and Judgement of 6 October 2020, *Commission v Hungary (Enseignement supérieur)* (C-66/18, C:2020:792). These judgements applied the provisions of Internal Market freedoms and those of the Charter in parallel, but the substantive issues addressed in the judgements should be linked with the fundamental principles of a liberal democratic society rather than with proper functioning of the Internal Market. According to the CJEU case-law, national measures restricting Internal Market freedoms are considered to be an implementation of EU law within the meaning of Article 51(1) of the Charter, and their existence, therefore, determines the application of the Charter to the facts of the case. Accordingly, such a parallel application of EU primary law and the Charter creates synergies that could hardly have been imagined before the entry into force of the Treaty of Lisbon, especially given the fact that the EU does not have a substantive general competence to regulate the activities of associations, and that in the field of education, the EU competence is only a complementary one. Interestingly, in Case C-78/18, the CJEU found infringements of Article 63 TFEU (i.e. the free movement of capital) and of Article 7 of the Charter (the right to respect for his or her private life), Article 8 of the Charter (the right to the protection of personal data) and Article 12 (the freedom of association) of the Charter; whereas in Case C-66/18, the Court found a parallel infringement of Article 49 TFEU (freedom of establishment) and Article 16 of the Charter (freedom to conduct a business), as well as of Article 13 of the Charter (academic freedom) and Article 14(3) of the Charter (freedom to found educational establishments). See also *Digital Rights Ireland* judgement covered below.

[12] See, for example Judgement of 15 March 2017, *Al Chodor and others* (C-528/15, EU:C:2017:213); Judgement of 19 March 2019, *Ibrahim* (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219); Judgement of 14 May 2020, *Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367); Judgement of 20 May 2021, *L.R.*(C-8/20; EU:C:2021:404); Judgement of 9 September 2021, *Bundesamt für Fremdenwesen und Asyl (Demande ultérieure de protection internationale)*(C-18/20; EU:C:2021:710).

[13] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision (OJ L 190, 18.7.2002, p. 1–20), amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ L 81, 2009, p. 24).

[14] See, for example Judgement of 27 May 2019, *OG (Parquet de Lübeck)* (C-508/18 and C-82/19 PPU, EU:C:2019:456); Judgement of 22 February 2022, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)* (C-562/21 PPU and C-563/21 PPU, EU:C:2022:100); Judgement of 21 October 2021, *Okrazhna prokuratura – Varna* (C-845/19 and C-863/19, EU:C:2021:864); Judgement of 6 June 2023, *O. G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)* (C-700/21; EU:C:2023:444).

law[15] in 2016, this area has also attracted the attention of national courts as well as, consequently, of the CJEU.[16] In this context, four cases initiated by Lithuanian courts are worth mentioning. Two of them directly questioned the compatibility of national regulation with EU law and in both cases, the CJEU upheld their doubts.[17]

Where national courts address issues related to the protection of fundamental rights, they, in certain cases, refer to the CJEU questions on the compatibility of national legislation that restricts the powers of national courts with EU law, in particular Article 47 of the Charter, which guarantees the right to an effective judicial remedy. The cases *Torubarov*[18]*, Braathens*[19]*, Staatssecretaris van Justitie en Veiligheid*[20] and *X*[21] are good examples of such situations. It should be noted that in some cases the limitations of the powers of national courts or the scope of litigants' rights (and, consequently,

[15] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89–131).

[16] Judgement of 21 June 2022, *Ligue des droits humains* (C-817/19, EU:C:2022:491); Judgement of 8 December 2022*, Inspektor v Inspektorata kam Visshia sadeben savet (Finalités du traitement de données – Enquête pénale)* (C-180/21; EU:C:2022:967); Judgement of 26 January 2023, *Ministerstvo na vatreshnite raboti (Enregistrement de données biométriques and génétiques par la police)* (C-205/21; EU:C:2023:49); Judgement of 16 November 2023, *Ligue des droits humains (Vérification du traitement des données par l'autorité de contrôle)* (C-333/22; C:2023:874).

[17] Judgement of 7 September 2023, *Lietuvos Respublikos generalinė prokuratūra* (C-162/22; EU:C:2023:631); Judgement of 30 June 2022, *Valstybės sienos apsaugos tarnyba* (C-72/22 PPU; EU:C:2022:431); Judgement of 1 August 2022, *Vyriausioji tarnybinės etikos komisija* (C-184/20; EU:C:2022:601); Judgement of 12 January 2023, *Migracijos departamentas (Motifs de persécution fondés sur des opinions politiques)* (C-280/21; EU:C:2023:13).

[18] Judgement of 29 July 2019, *Torubarov* (C-556/17; EU:C:2019:626). The case concerned a Hungarian regulation prohibiting national courts from deciding on the merits in asylum cases (i.e. they were only entitled to annul the decision of the migration authority and refer the case back to it for re-examination). After having interpreted the EU secondary legislation in the light of the Charter, the CJEU stated that where a court, after a full and detailed *ex nunc* examination of all the relevant factual and legal circumstances presented by an applicant for international protection, finds that the asylum seeker should be granted such protection under the provisions of Directive 2011/95/EU on the basis of the grounds set out in his/her application, and the administrative or quasi-judicial authority subsequently adopts the opposite decision without finding new circumstances justifying a reassessment of the applicant's need for international protection, *this court must alter the decision*, which is inconsistent with its earlier decision, and adopt its own decision *on the application for international protection*, where appropriate, without applying the national law which prohibits it from doing so.

[19] Judgement of 15 April 2021, *Braathens Regional Aviation* (C-30/19;EU:C:2021:269). The case concerned a Swedish regulation which prohibited national courts from hearing discrimination cases and finding a fact of existence of discrimination despite the plaintiff's explicit claim, provided that the defendant paid monetary compensation. The CJEU held that such legal regime was contrary to Article 47 of the Charter; in addition, the CJEU confirmed the direct horizontal effect of this provision, i.e. its application to disputes between private parties.

[20] Judgement of 8 November 2022, *Staatssecretaris van Justitieen Veiligheid (Examen d'office de la rétention)* (C-704/20 and C-39/21; EU:C:2022:858). The case concerned the question whether the administrative procedural law of the Netherlands which prohibits administrative courts from assessing *ex officio* the lawfulness of a person's detention on grounds that have not been indicated by the applicant is compatible with EU law. Taking into account the importance of the right to liberty and effective judicial protection (Articles 6 and 47 of the Charter) and the provisions of the secondary EU law, the CJEU ruled that such regulation is contrary to EU law.

[21] Judgement of 20 February 2024, *X* (C-715/20, ECLI:EU:C:2024:139). The CJEU ruled that national legislation according to which an employer is not required to state, in writing, the reasons for the termination of a fixed-term employment contract with a notice period, although it is bound by such an obligation in the event of termination of an employment contract of indefinite duration, undermines the fundamental right to an effective remedy enshrined in Article 47 of the Charter, since a fixed-term worker is deprived of the possibility of assessing beforehand whether he or she should bring legal proceedings against the decision terminating his or her employment contract and, where appropriate, to bring an action challenging in a precise manner the reasons for such a termination.

the limits to the effectiveness of EU law) may have to be balanced against the imperatives[22] of the protection of other fundamental rights, or seen through the prism of the procedural autonomy of Member States.[23] Similarly, the imperatives to protect fundamental rights may create the need to strike a balance between them and other fundamental principles of EU law, in particular, the principles of mutual trust and mutual recognition.[24] In addition, the interpretation of EU law in such contexts may in parallel raise other closely related issues. In particular, the question on the scope of the application of the EU secondary legislation may need to be evaluated, as the answer to this question determines the scope of the Charter's application in the case of Member States. For example, in the case *NH v Associazione Avvocatura per i diritti LGBTI*, the application of the Charter was predetermined by the interpretation of the notion of 'conditions of employment ... or working conditions' established in Directive 2000/78/EC.[25] A question may arise on EU Member States retaining their discretion to adopt a different/higher level of protection for a certain right. In fact, this question goes hand in hand with the question of the comprehensiveness of legal regulation at the EU level, i.e. it is necessary to assess whether a certain aspect of a legal relationship is comprehensively regulated at the EU level? If the answer to this question is in the affirmative, the logical conclusion follows that EU Member States no longer have such discretion[26], but if the answer is in the negative, Member States may retain it.[27] Finally, the interpretation of EU law may also trigger the question on how the level of protection

[22] Judgement of 19 December 2019, *Deutsche Umwelthilfe* (C-752/18; EU:C:2019:1114). The question in the present case was whether EU law required a national court, in order to ensure the binding effect of a judgment (and thus the effectiveness of EU law), to apply *by analogy* the provisions of national law permitting an arrest of a person who has failed to comply with the judgment of a national court. The CJEU ruled that Article 47 of the Charter must be interpreted as meaning that where a national authority persistently refuses to comply with a court decision ordering it to comply with a clear, precise and unconditional obligation under EU law, the national court must order the arrest of the officials exercising public authority, *where there is a legal basis under national law for such an arrest which is sufficiently accessible, precise and foreseeable, and on condition that the restriction of the right to liberty enshrined in Article 6 of the Charter as a result of the arrest imposed satisfies the other requirements laid down in Article 52(1) of the Charter to that effect*. However, in the absence of such a legal basis under the national law, the court cannot take such a measure under EU law.

[23] See Judgement of 21 December 2021, *Randstad Italia* (C-497/20; EU:C:2021:1037).

[24] See, for example Judgement of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-619/15 PPU;EU:C:2016:198); Judgement of 22 February 2022, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)* (C-562/21 PPU and C-563/21 PPU; EU:C:2022:100).

[25] Judgement of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI* (C-507/18; EU:C:2020:289). In the main proceedings, the defendant argued that there was no employment relationship and that, consequently, the provisions of Directive 2000/78/EC and those of the Charter did not apply in the present case. According to the defendant, the only applicable law was the law of Italy, in particular, the freedom of expression guaranteed by the Constitution of Italy. Undoubtedly, after the CJEU found the Charter to be applicable in the case at hand, Article 11 of the Charter, which deals with freedom of expression, was interpreted in conjunction with Articles 15 (right to engage in work) and 21 (non-discrimination).

[26] See, for example Judgement of 26 February 2013, *Melloni* (C-399/11; EU:C:2013:107). Although *Melloni* judgement has been criticised for allegedly not allowing a higher standard of protection of fundamental rights, it should be held that this criticism is not justified. In this respect, it should be noted that the relevant provisions of the Framework Decision on the European Arrest Warrant regulate this aspect comprehensively at EU level, i.e. leaving no discretion to the Member States to regulate it differently. On the one hand, this is a common enough situation in EU law, i.e. the use of a (comprehensive) method of harmonising national law at EU level is at the discretion of the EU legislator (subject, of course, to the scope and nature of the EU competences). In this respect, such an argument for a (higher/different) standard of protection of a fundamental right (e.g. freedom to conduct a business) could be raised in virtually any area where the EU legislator has chosen to regulate a particular issue in detail. Moreover, in this case, the Spanish Constitutional Court did not raise the question of the compatibility of the provisions of the EU secondary legislation in question with the EU primary law; therefore, the CJEU did not examine this aspect.

[27] See, for example Judgement of 17 December 2020, *Centraal Israëlitisch Consistorie van België and others* (C-336/19; EU:C:2020:1031).

provided thereby compares with that of the ECHR and the case law of the European Court of Human Rights (ECtHR) which develops the Convention.[28]

Although quite rarely, the CJEU faces situations where national courts, in their references for a preliminary ruling, question the legality of provisions enshrined in the *EU secondary legislation*, including their compatibility with the Charter. In principle, when dealing with such references and depending on a particular legal context, the CJEU can do three things. First, after weighing the pros and cons, it can decide that the EU legislator has not violated the Charter.[29] Second, as in the case law of some national courts, the CJEU may apply the method of consistent interpretation, i.e. the Court may decide that the EU secondary legislation is not contrary to the Charter only if it is interpreted in a certain way.[30] Third, where the method of consistent interpretation cannot be applied, the CJEU may declare a particular piece of the EU secondary legislation (or part of it) to be invalid. Due to its (ongoing) scale of impact and the exposure of the potential of the Charter, a particularly characteristic example of such a scenario is *Digital Rights Ireland* case[31] where the CJEU ruled that an act of the secondary EU legislation, namely the Data Retention Directive[32] was contrary to the Charter.[33]

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[28] See, for example Judgement of 23 November 2021, *IS (Illégalité de l'ordonnance de renvoi)* (C-564/19; EU:C:2021:949).

[29] See, for example Judgement of 22 January 2013, *Sky Österreich* (C-283/11; C:2013:28); Judgement of 14 May 2019, *M (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17; EU:C:2019:403); Judgement of 28 January 2021, *Spetsializirana prokuratura (Déclaration des droits)* (C-649/19, EU:C:2021:75).

[30] See, for example Judgement of 2 February 2021, *Consob* (C-481/19, EU:C:2021:84); Judgement of 21 June 2022, Ligue *des droits humains* (C-817/19, EU:C:2022:491); Judgement of 16 November 2023, *Ligue des droits humains (Vérification du traitement des données par l'autorité de contrôle)* (C-333/22; C:2023:874). For more information on the CJEU methodology for interpreting EU law, see K. Lenaerts, J. A. Gutiérrez-Fons. Les méthodes d'interprétation de la Cour de justice de l'Union européenne. Bruylant, 2020.

[31] Judgement of 8 April 2014, *Digital Rights Ireland and others* (C-293/12 and C-594/12, EU:C:2014:238) declaring the Data Retention Directive invalid on the grounds that it was contrary to Articles 7 and 8 of the Charter. This judgement is a good example of the potential of the Charter. This is due to the fact that the CJEU had already assessed the validity of the Directive before. More specifically, in judgement of 10 February 2009, *Ireland v Parliament and Council* (C-301/06, EU:C:2009:68), i.e. before the Charter became a part of the EU primary law, the CJEU assessed whether the Directive could have been adopted on the basis of Article 114 TFEU. For the sake of justice it should be mentioned that the applicant did not raise the issue of the compatibility of this act with requirements of fundamental rights but rather the issue of the division of competences between the EU and the Member States. In this judgment, the CJEU confirmed that the Directive in question could have been adopted on the basis of Article 114 TFEU, i.e. that it could be regarded as an instrument for the harmonisation of the Internal Market. In *Digital Rights Ireland*, by contrast, the national courts specifically raised the question of the compatibility of the Directive with the Charter. With this judgment, the CJEU has essentially shown that the EU legislator cannot adopt 'only' an Internal Market harmonisation measure but is also bound by the requirements of the Charter when adopting it. Theoretically, it could be argued that such an Internal Market harmonisation instrument could exist at the EU level, and that it is up to the Member States to determine the appropriate standards of privacy protection at national level on the basis of their national constitutions. However, such an argument would not be very convincing, since according to Article 51(1) of the Charter, the EU institutions are bound by the provisions of the Charter, and, therefore, cannot, when adopting legislative acts, create any preconditions to infringe its provisions.

[32] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ L 105, 13.4.2006, p. 54–63) (OJ L 105, p. 54).

[33] At the same time, it should be noted that prior to this case, the CJEU had adopted judgements that the EU secondary legislation was contrary to the Charter, see Judgement of 9 November 2010, *Volker und Markus Scheckee and Eifert* (C-92/09 and C-93/09; EU:C:2010:662); Judgement of 1 March 2011, *Association Belge des Consommateurs Test-Achats and others* (C-236/09; EU:C:2011:100). Also see Judgement of 22 November 2022, *Luxembourg Business Registers* (C-37/20 and C-601/20, EU:C:2022:912).

Importantly, the annulment of the Data Retention Directive was not the end of the story. On the one hand, after the Directive was repealed, national courts made further references for a preliminary ruling on the lawfulness of the national legislation transposing the Directive.[34] On the other hand, national courts have subsequently repeatedly questioned the compatibility of a national legislation with the requirements of the Directive on privacy and electronic communications[35]. The CJEU has developed a complex jurisprudence[36] based on the above-mentioned references but recently the sensitivity of the issues raised has led to an unprecedented situation where one of the cases was referred to the Full Court instead of the Grand Chamber.[37] Finally, it should also be noted that the above-mentioned case-law has had a direct impact on Lithuania, since in a case where the Supreme Administrative Court of Lithuania referred for a preliminary ruling, the CJEU found that the national legislation was contrary to the requirements of the Charter.[38]

The above-mentioned examples of a dialogue[39] between the CJEU and national courts provide an overall picture of the importance, scale, and impact of this dialogue on the effective protection of fundamental rights at both EU and national level. It is true that preliminary ruling proceedings are not the only measure available in EU law to ensure its effectiveness. For example, the infringement procedures conducted by the European Commission also perform essentially the same function. However, limited resources and political nature of that institution naturally limit its ability to react.[40] It is for this reason that the powers enjoyed by national courts, as well as operational guarantees, including their independence, are essential not only from the point of view of national law but also from the point of view of EU law. Systematically, in the context of the independence of national courts, at least three provisions of the EU primary law are relevant: the above-mentioned Article 19 of the TEU, Article 267 of the TFEU laying down the legal basis for the preliminary ruling procedure and the first paragraph of Article 47 of the Charter which guarantees the right of individuals to effective judicial protection (For more information, see: Jarukaitis, Morkūnaitė, 2021, p. 47-72). It is obvious that the content of the principle of independence of the judiciary cannot vary according to the context in which it operates (Prechal, 2020, p. 175). However, the three provisions mentioned above have their own scope of application and

[34] Judgement of 21 December 2016, *Tele2 Sverige* (C-203/15 and C-698/15, EU:C:2016:970).

[35] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 2002, p. 37; 2004 Lithuanian special edition., Ch. 13, Vol. 29, p. 514), amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ L 337, 2009, p. 11)

[36] Judgement of 6 October 2020, *Privacy International* (C-623/17, EU:C:2020:790) and *La Quadrature du Net and others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791); Judgement of 2 March 2021, *Prokuratuur (Conditions d'accès aux données relatives aux communications électroniques)* (C-746/18, EU:C:2021:152); Judgement of 5 April 2022, *Commissioner of An Garda Síochána* (C-140/20, EU:C:2022:258); Judgement of 27 October 2022, *Space Net* (C-793/19 and C-794/19; EU:C:2022:702); Judgement of 20 September 2022, *VD* (C-339/20 and C-397/20; EU:C:2022:703).

[37] Reference for a preliminary ruling of *Conseil d'État* of France of 30 July 2021 in case *La Quadrature du Net and others () and lutte contre la contrefaçon*) (C-470/21). At the time of writing, the CJEU has not yet ruled on this case.

[38] Judgement of 7 September 2023, *Lietuvos Respublikos generalinė prokuratūra* (C-162/22; EU:C:2023:631).

[39] In fact, the above-mentioned CJEU case-law is just the tip of the iceberg as far as judicial cooperation in practice is concerned. In 2022 alone, the CJEU handed down 808 judgements, including 564 preliminary rulings. For more information, see the Court of Justice of the European Union Annual Report 2022 https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-04/20230323_pdf_qdaq23001ltn_002.pdf [last viewed 12 January 2024].

[40] In 2022, the CJEU handed down 18 judgments in failure to fulfil obligations cases brought by the European Commission against a Member State. Most of the infringement procedures initiated do not reach the CJEU because they end at the administrative stage. For more information, see the European Commission's 2022 monitoring report on the application of EU law: https://commission.europa.eu/law/application-eu-law/implementing-eu-law/infringement-procedure/2022-annual-report-monitoring-application-eu-law_en [last viewed 12 January 2024].

the specific assessment determined by this scope. Article 47 of the Charter is essentially devoted to the *right of individuals* to effective judicial protection, the scope of application of which is defined by Article 51(1) of the Charter.[41] In the context of Article 267 of the TFEU, the principle of judicial independence is simply one of the elements of the concept of the court to determine whether a national body referring to the CJEU is a 'court or tribunal' and, consequently, whether its reference for a preliminary ruling is admissible.[42] In the context of this study, the above-mentioned second subparagraph of Article 19(1) of the TEU is most interesting. Naturally, the question arises as to the content of that provision, its scope of application and its added value in comparison with Article 47 of the Charter. The recent financial crisis, the consequences of which had to be assessed before the *Supremo Tribunal Administrativo* of Portugal, provided an excellent opportunity to answer that question, in so far as it dealt with the legality of the rules which led to the reduction in the remuneration of Portuguese judges resulting from that crisis.[43] In its reference, the referring court stated, in essence, that the effective protection of rights under EU law is ensured primarily by national courts, which presupposes the obligation to guarantee the independence of the national courts; it also referred to other links with EU law, which it considered to be relevant to the case.[44] The Advocate General who delivered his Opinion in the case did not see significant potential in the second subparagraph of Article 19(1) of the TEU.[45] However, the CJEU moved in a completely different direction and issued a judgment the importance of which is difficult to overestimate. The assessment of the arguments of the Court judgment shows that it considered national courts to be an essential part of the overall EU judicial architecture, one of the functions of which is the effective judicial protection of rights deriving from EU law.[46] Such judicial review goes hand in hand with one of the founding values of the EU, i.e., the principle of the rule of law. The obligation of the Member States under that provision of the TEU was therefore linked to the right to a fair trial. The independence of the judiciary is a fundamental guarantee of this right.[47] An essential element in this context is the definition of the scope of application *ratione materiae* of the second subparagraph of Article 19(1) of the TEU. In its judgment, the CJEU made it very clear that it differs from the scope of Article 47 of the Charter as it does not take into account the circumstances under which Member States are implementing EU law, and in this particular case it stated that the questions examined by the *Tribunal de Contas may concern* the application and interpretation of Union law.[48] It is, therefore, sufficient for such a national court to have jurisdiction to interpret and apply EU law *in general*. It follows

[41] According to Article 51(1) of the Charter, the Charter applies to Member States when they "are implementing Union law".

[42] In this context, it should be noted that the challenges to the principle of the rule of law that have emerged over the past few years have led to an interesting and dynamic development of this case-law. Historically, the CJEU has interpreted the concept of court in the context of Article 267 TFEU quite extensively; see, for example Jarukaitis, Morkūnaitė, 2021, p. 50-55. However, the Court's case-law in recent years has shown an increasingly stricter view on the importance of the principle of independence in the context of Article 267 TFEU. See Judgement of 21 January 2020, *Banco de Santander* (C-274/14; EU:C:2020:17); Judgement of 29 March 2022, *Getin Noble Bank* (C-132/20; EU:C:2022:235) and, lastly, Judgement of 21 December 2023, *Krajowa Rada Sądownictwa (Maintienen fonctions d'un juge)* (C-718/21 ; EU:C:2023:1015).

[43] Judgement of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16; EU:C:2018:117).

[44] In its reference for a preliminary ruling, the Portuguese court argued, in essence, that there was a link with EU law because the contested national regulation was the result of the requirements of the EU institutions to reduce the state's budget deficit surplus. This argument carries rather little weight as the EU institutions certainly did not call for salary cuts (let alone for judges), so it was not by accident that the CJEU did not emphasise this argument in its judgement.

[45] Opinion of Advocate General Saugmandsgaard Øe delivered on 18 May 2017 in case *Associação Sindicaldos Juízes Portugueses* (C-64/16; EU:C:2017:395).

[46] Paragraphs 31 to 33 of the judgement.

[47] Paragraphs 34 to 38 of the judgement.

[48] Paragraphs 29, 39 and 40 of the judgement.

from those considerations that the second subparagraph of Article 19(1) of the TEU is not intended to guarantee only the independence of individual judges as litigants who defend *their* rights[49] but, more generally, the independence of the national courts as an element of the EU constitutional architecture. The function of that provision is, therefore, to ensure the continued protection of the independence of national courts and thus to stabilise both the EU and national constitutional systems.[50] This systematic guarantee of the independence of national courts should be understood in the broader context of EU law and the role of national courts in its interpretation and application. In addition, it should be noted that the judgment in case *Associação Sindicaldos Juízes Portugueses*, discussed above, was delivered at the same time as *Achmea* judgment[51], which, from a general point of view, is to be seen as an expression of the CJEU trust in national courts. Undoubtedly, such trust is not an end in itself[52] but it can only be gained if national courts can perform their role properly, and their independence is a necessary precondition for performing such a role.[53] In summary, such an understanding of that provision differs significantly from, for example, the scope of application and the underlying logic of Article 6 of the ECHR, the equivalent of which is partly Article 47 of the Charter[54]. One may say that to some extent *Associação Sindical dos Juízes Portugueses* judgement reflects the idea put forward by the former ECtHR Judge and President *Sicilianos* of a more extensive definition of the scope of application of Article 6 of the ECHR in order to include the right of a judge to defend his independence.[55]

The judgment in case *Associação Sindical dos Juízes Portugueses* opened a completely new stage in the development of EU law and the involvement of national courts paved the way for the CJEU to develop a sufficiently broad case law from general principles to concrete guarantees of independence of the judiciary.[56] Even though most of the questions raised so far concerned guarantees of judicial

[49] The following judgement may serve as a good example of such a situation: Judgement of 19 November 2019, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18; EU:C:2019:982). The factual situation in the main cases was such that the legality of the dismissal of national judges was at issue, with the latter claiming, inter alia, discrimination on grounds of age. In such a case, the provisions of Directive 2000/78/EC as well as those of the national law implementing it and, accordingly, Article 47 of the Charter, which enshrines the right of such litigants to an effective remedy, were applicable.

[50] Some good examples of subsequent CJEU case law to support this statement are as follows: Judgement of 23 November 2021, *IS (Illégalité de l'ordonnance de renvoi)* (C-564/19; EU:C:2021:949); Judgement of 13 July 2023, *YP and others (Levée d'immunité and suspension d'un juge)* (C-615/20 and C-671/20; EU:C:2023:562). Also see: Lenaerts, 2023, p. 34-40.

[51] Judgement of 6 March 2018, *Achmea* (C-284/16; EU:C:2018:158).

[52] In the reasoning of *Achmea* judgment which led to the answer to the question referred for a preliminary ruling the CJEU emphasised the specific nature of EU law and its autonomy, the important role of the national courts in the interpretation and application of EU law, and the fundamental role of the CJEU in the development of EU law in the context of cooperation between the CJEU and the national courts under the preliminary ruling procedure. See paragraphs 33, 35-37 of the judgement.

[53] In this context, it is necessary to mention the importance of the principles of mutual trust and mutual recognition in the cooperation between the national courts of the EU Member States in the Area of Freedom, Security and Justice. This point was made directly by the CJEU in paragraph 30 of the *Associação Sindical dos Juízes Portugueses* judgement.

[54] Judgement of 29 July 2019, *Gambino and Hyka* (C-38/18; EU:C:2019:628) paragraph 39.

[55] See the ECtHR judgement of 23 June 2016 in *Baka v Hungary* (Application No 20261/12) and paragraph 13 of Judge Siciliano's concurring opinion in that case.

[56] On the principle of non-regression, see Judgement of 20 April 2021, *Repubblika* (C-896/19; EU:C:2021:311, paragraph 64); on the role of the judiciary's self-governing bodies, see Judgement of 19 November 2019, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18; EU:C:2019:982); on procedures for the appointment of judges, see Judgement of 20 April 2021, *Repubblika* (C-896/19; EU:C:2021:311); Judgement of 6 October 2021, *W. Ż. (Chambre de contrôle extraordinaire and des affaires publiques de la Cour suprême – nomination)* (C-487/19 ; EU:C:2021:798); Judgement of 29 March 2022, *Getin Noble Bank* (C-132/20; EU:C:2022:235); on delegation of judges to another court, see Judgement of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*

independence from unlawful interference by political authorities, later the courts have started to raise issues about the internal independence of the judiciary.[57]

One of the main challenges faced by the CJEU was the need to define the relationship between the second subparagraph of Article 19(1) of the TEU and Article 267 of the TFEU; i.e. to define the situations where references for a preliminary ruling from national courts are admissible. In this context, the case law of the Court of Justice requires a connection between the questions referred for a preliminary ruling and the dispute in the main proceedings. In other words, a request for a preliminary ruling must be 'necessary' for the referring court to be able 'to give judgment' in the case before it becomes relevant.[58] On the one hand, in cases where the *subject matter* of the dispute before the national court is *ratione materiae* directly related to the principle of the independence of the judiciary, the link between EU law and the pending case is obvious.[59] On the other hand, *Miasto Łowicz* judgement[60] and subsequent case law of the CJEU have shown that the range of situations where Article 19(1) of the TEU is applicable is wider, since questions relating to the independence of the judiciary may also arise in the course of proceedings, i.e. when dealing with various intermediate *procedural issues*[61] (or refraining from taking certain decisions).[62] Needless to say, given the complexity of the principle of judicial independence

(C-748/19 to C-754/19; EU:C:2021:931); on transfer of judges without their consent, see Judgement of 6 October 2021, *W. Ż. (Chambre de contrôle extraordinaire and des affaires publiques de la Cour suprême - nomination)* (C-487/19 ; EU:C:2021:798); on disciplinary responsibility of judges, see Judgement of 26 March 2020, *Miasto Łowicz (Régime disciplinaire concernant les magistrats)* (C-558/18 and C-563/18; EU:C:2020:234); Judgement of 23 November 2021, *IS (Illégalité de l'ordonnance de renvoi)* (C-564/19; EU:C:2021:949). On the latter issue, see also Judgement of 15 July 2021, *Commission v Poland* (Régime disciplinaire des juges) (C-791/19; EU:C:2021:596); Judgement of 5 June 2023, *Commission v Poland (Indépendance et vie privée des juges)* (C-204/21; C:2023:442).

[57] See references for preliminary rulings from Croatian courts in the following case *HANN-INVEST* (C-554/21, C-622/21 and C-727/21). It questions the compatibility of the internal procedures applied by second instance Croatian commercial courts to ensure consistency of their case-law with the principle of judicial independence. At the time of writing, the CJEU had not yet ruled on these cases.

[58] Judgement of 9 January 2024, *G. (Nomination des juges de droit commun en Poland)* (C-181/21 and C-269/21; EU:C:2024:1) paragraph 63.

[59] For example, the scenario of *Associação Sindical dos Juízes Portugueses* case, covered above, where the national court had to apply directly the second subparagraph of Article 19(1) of the TEU in its examination of the merits of the case, and the imperatives laid down by the principle of independence of the judiciary determined the outcome of the case. See also Judgement of 26 March 2020, *Miasto Łowicz (Régime disciplinaire concernant les magistrats)* (C-558/18 and C-563/18; EU:C:2020:234) paragraph 49.

[60] See footnote 56.

[61] It follows from paragraphs 50 to 51 of *Miasto Łowicz* judgment that a reference for a preliminary ruling on the interpretation of the second subparagraph of Article 19(1) of the EU Treaty may also be admissible even in case where the answer to the question referred would enable the national courts to resolve *procedural questions* of EU or national law. In practice, national courts often question whether the composition of the panel of judges hearing a case is/was lawful and, more specifically, whether one or more of the members of the panel of judges is/was independent, in case of doubts as to the lawfulness of their appointment (or, e.g., of the delegation of the panel member). However, this question is usually raised not by the litigants in the main case but by another member of the chamber hearing the case, or by another judge hearing the same or a related case. See Judgement of 6 October 2021, *W. Ż. (Chambre de contrôle extraordinaire and des affaires publiques de la Cour suprême - nomination)*(C-487/19 ; EU:C:2021:798); Judgement of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim* (C-748/19 to C-754/19; EU:C:2021:931); Judgement of 29 March 2022, *Getin Noble* (C-132/20; EU:C:2022:235); Judgement of 9 January 2024, *G. (Nomination des juges de droit commun en Poland)* (C-181/21 and C-269/21; EU:C:2024:1).

[62] See Judgement of 13 July 2023, *YP and others (Levée d'immunité and suspension d'un juge)* (C-615/20 and C-671/20; EU:C:2023:562). See also the references for a preliminary ruling cited in footnote 67 and Opinion of Advocate General Pikamäe delivered on 26 October 2023 in case *HANN-INVEST* (C-554/21, C-622/21 and C-727/21, EU:C:2023:816). The Advocate General in this case raised doubts about the admissibility of the references for preliminary rulings; although this question had not previously been raised in the proceedings, it is likely that the CJEU will have to rule on it.

and the different legal traditions of the Member States in the field of organisation of their judicial branch, the Court of Justice will have many opportunities to develop its practice in the years to come.

Conclusions

Although the initial steps of the European integration were framed in economic terms, later developments of the European Communities and the EU gradually revealed its deeper value-oriented background. With the entry into force of the Lisbon Treaty, the EU has entered a new stage of its development by presenting itself as a fully-fledged union of values. The internal and external challenges faced by the EU over the last decade clearly demonstrate the need for further changes to maintain the EU's viability and its importance in the modern world, as this is the only way to ensure respect for its fundamental values. Such developments and emerging challenges inevitably lead to tensions in ensuring the effective protection of fundamental rights. In this context, a dialogue between national courts and the CJEU is essential for the effective protection of the EU's fundamental values.

The EU primary law establishes a decentralised judicial system in which the CJEU and national courts complement each other in ensuring the effectiveness of the EU law both at the EU and national levels. Having a mandate to apply the EU law at the national level national courts face challenges posed by national and EU legislation and posing preliminary questions before the CJEU creates preconditions for the latter to develop its jurisprudence protecting the EU fundamental values.

References for a preliminary ruling from national courts concerning the compatibility of EU legislation with the Charter guarantee a decentralised constitutional review function, thus contributing to the stabilisation of the EU level. Meanwhile, the case law of the CJEU, inspired by national courts based on the second subparagraph of Article 19(1) of the TEU, is primarily aimed at stabilising the national courts, which are treated as European courts, and such stabilisation, in turn, contributes to the effectiveness of EU law at national level.

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