SETTING THE LIMITS OF THE MEMBER STATES' INSTITUTIONAL AUTONOMY IN THE CASE OF ROMANIA, HUNGARY, AND POLAND: CHANGES IN THE CASE LAW OF THE CJEU CONCERNING THE CONTROL OF NATIONAL JUDICIAL SYSTEMS

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ABSTRACT

Until recent years, the measures taken for EU law implementation in domestic legal systems did not address the institutional issues of national courts, namely the institutional autonomy of Member States in the context of domestic judicial systems. The application of EU law in domestic law is based on two principles: institutional and procedural autonomy. In the interpretation of procedural autonomy, EU law is to be enforced by applying national procedural rules, subject to the limits of effectiveness and the principles of equal treatment. The principle of equal treatment requires that the procedural rule of a Member State for the enforcement of EU law should not be less favourable than the procedural rule of a Member State for the enforcement of claims arising under national law in a comparable situation. The principle of effectiveness requires that national procedural rules should not make it impossible or excessively difficult to enforce rights deriving from EU law. The institutional autonomy meant that the enforcement of EU law took place within the framework of the Member States' institutions: they were not bound by EU law, except in very specific areas or criteria. Before the change under our examination occurred, the Court of Justice of the European Union defined specific criteria for the establishment of national courts, but these were not aimed at ensuring the independence of domestic courts. Instead, they were limited to the cases in which the CJEU found questions referred for the preliminary ruling admissible; these criteria guaranteed, inter alia, that the given court is established by law, operates permanently, applies the law, and renders binding decisions. In recent decades, a change occurred in the case law of the CJEU, and while issues regarding the judicial system remain under the Member States'

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competence, EU law defines several criteria in that regard. In this paper, we will examine the decisions taken in the three Member States under review, Hungary, Romania and Poland, but we will also look at the background: the limitation of institutional autonomy by the practice of the CJEU was not 'without precedent', i.e. this case law started to be applied in other Member States already in the first half of the 2010s. Following an examination of the decisions concerning the three Member States, an attempt is made to compare the EU criteria set out in those decisions in relation to the national courts with each other and with the decisions examined in the precedents. An analysis will also be made of whether the EU requirements for courts can be systematised on the basis of the current decisions.

KEYWORDS

EU law implementation
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comparative analysis

1. Introduction

Since the first decades of integration, the implementation of European Union (EU) law in the domestic laws of Member States has led to vigorous debates, raising serious related issues. This, in part, stems from the fact that the founding Treaties did not provide the means to deal with Member State conflicts of interest mostly regarding the internal market. The case law of the Court of Justice of the European Union (CJEU) was supposed to establish, inter alia, the principles of primacy, direct applicability, and state liability. Although the principles and institutions set by the case law of the CJEU to guarantee EU law implementation in national law were subjects of debate, they have undoubtedly been necessary for maintaining integration based on the internal market.

The evolution of the case law of the CJEU has also been limited by the institutional and procedural autonomy of the Member States. For at least three or four decades, the CJEU has consistently striven to set the limits of the procedural autonomy of Member States,[2] but rarely have we seen examples of limits being imposed on the institutional

2 | The principles of effectiveness and equal treatment serve to set the limits of the procedural autonomy of Member States. The former principle provides that the procedural rules of Member States must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law; according to the latter principle, the procedural rules of Member States aimed at enforcing the rights arising from EU law must not be less favourable for that type of action than for similar actions of a domestic nature (C-676/17). The principle of legal certainty should also be outlined as it is also applicable in EU law; according to this principle, in the event of the expiration of the time limits specified in the procedural rules of Member States or of the exhaustion of the remedies available, as a

autonomy of Member States in the case law of the CJEU.[3] The CJEU addressed the concept of national courts only in connection with the preliminary ruling procedure. According to the definition developed by the CJEU, a body can be considered a Member State Court if it is established by legislation, exists permanently, its decisions are legally binding, and it applies the law in rendering its decisions.[4] From this jurisprudence, it becomes clear that the CJEU only dealt with the national courts in relation to the preliminary ruling procedure. Furthermore, the established criteria merely served to determine whether the questions formulated by the court regarding the CJEU in the preliminary ruling procedure are admissible in the given context.[5]

Meanwhile, the CJEU refrained from excessive, clear condemnation of Member State courts when establishing principles related to EU law implementation in domestic laws.[6] In the case of inadequate EU law implementation by national courts, the CJEU often 'held against' the Member State legislature;[7] specifically, the

general rule, EU law does not require for the national court to dispense with these procedural rules, even if this would open up the possibility of remedying situations that violate EU law. Overall, the actual enforcement of the procedural autonomy of Member States and the principles of equal treatment result in a relatively limited 'review'.

3 | In the case law of the European Convention on Human Rights, numerous judgements are contrary to this.

4 | The case law of the CJEU in that regard will be analysed in detail below.

5 | The national institutional autonomy allows, inter alia, for Member States to adjudicate legal disputes regarding EU law within their institutional frameworks, to which, in principle, no criteria are attached by EU law. This institutional autonomy plays a more significant role especially in terms of national courts, as the case law of the CJEU reaffirms that the CJEU did not formulate criteria regarding, among other things, national court independence. As we shall see below, until the 2010s, the case law of the CJEU formulated requirements only in terms of the questions referred for a preliminary ruling. The 'sanction' applied in the case of non-compliance with these requirements was limited to the inadmissibility of the given question. The case law of the CJEU examined below, which changed the criteria of the institutional autonomy of Member States in terms of national courts, also formulated criteria related to the independence of the courts for cases where the national court adjudicates legal disputes potentially related to EU law.

6 | According to the case law established in the judgement handed down by the CJEU in the Köbler case (C-224/01), the State is liable for damages sustained by individuals arising from the violation of EU law even if such violation can be attributed to the decision rendered by the court adjudicating at last instance. Still, the CJEU considered the specificities of national judicial systems, rendering this form of liability enforceable on the basis of more strict criteria. Incidentally, the establishment of this liability has been criticised on numerous occasions in the literature, voicing concerns that, in practice, lower courts will not rule against Member States in cases where damage was caused by courts adjudicating at last instance. Many authors believed that the liability system established by the Köbler test is some kind of 'sword of Damocles', existing only in theory with little chance of practical implementation, especially since the CJEU does not intend to alienate national courts. However, practice has thoroughly refuted these concerns; in recent years, numerous judgements implementing the Köbler test have been delivered, especially in connection with Central European Member States that acceded to the EU after 2004. In that regard, the Hotchtief (C-620/17) (in relation to Hungary) and the Târșia (C-69/14) (in relation to Romania) cases can be mentioned.

7 | CJEU, European Commission v Italian Republic. In this judgement, the CJEU clearly wanted to 'spare' the national judicial system.

CJEU 'came to the aid' of the concerned national court when domestic legislation or other circumstances prevented it from referring questions to the CJEU in the preliminary ruling procedure.[8]

In this study, we will examine the case law (i.e. on the restriction of Member States' institutional autonomy) that significantly advanced the aforementioned jurisprudence, paying particular attention to whether this law had any relevant antecedents prior to the most important judgements related to the Member States examined in this paper. After engaging in a comparative analysis of judgements related to the Republic of Poland, Hungary, and Romania,[9] we attempt to systematise the case law concerned and answer the question of why this change of direction was necessary on the part of the CJEU. Importantly, our analysis does not cover the problems experienced by the examined Member States regarding the implementation of the principles established in these judgements. It also does not address the secondary EU legal acts adopted based on these judgements, nor to what extent the provisions of such acts influenced the Member States' access to EU funds.

2. Judgement in the IS case[10]

In the main proceedings of the judgement[11] handed down in relation to Hungary,[12] the criminal proceedings brought against a Swedish national for the infringement of the provisions of Hungarian law governing the acquisition or transport of firearms or ammunition were conducted by the Central District Court of Pest.[13] The person concerned was interrogated with the help of an interpreter, but interpretation quality was not ensured during the procedure. In particular, the referring court had no information regarding whether the person concerned and the interpreter understood each other. The person concerned was subsequently released and then left the territory of Hungary. Since the prosecutor did not propose a custodial sentence, it was not possible to issue a national/European arrest warrant according to the relevant legislation. The referring court informed the CJEU that the responsibility for the central administration and management of the judicial system had lain since 2012 with the President of the National Office for the Judiciary. The latter, in turn, had extensive powers that encompass

8 | The judgement of the CJEU in the Cartesio (C-210/06) case can also be classified here.
9 | For reasons of length and other reasons, we will not examine all judgements related to Member States under scrutiny and mentioned in the title. Instead, we selected judgements and strove to provide an unbiased, detailed, and independent analysis of the relevant parts in an attempt to answer the questions posed in the title, focusing on the heated debates surrounding the area and the challenges related to the absorption of EU funds.
10 | Judgement of the CJEU, C-564/19.
11 | Ibid.
12 | We will primarily focus on the analysis of the court-related parts.
13 | In relation to the judgement, we primarily focus on the restriction of the institutional autonomy of Member States in the context of the judicial system.

decision-making on judicial appointments, making senior judicial appointments, and commencing disciplinary proceedings against judges.[14] The referring judge added that the National Judicial Council[15] was responsible[16] for overseeing the actions of the President of the National Office for the Judiciary, and approving the President's decisions in certain cases.

The most significant findings formulated in the opinion of Advocate General Priit Prikamae may also be relevant in relation to our topic. In conclusion, he rather considered the national legislation to be incompatible with Art. 267 of the Treaty on the Functioning of the European Union (TFEU); under certain circumstances, the national legislation allows the Supreme Court of the concerned Member State to establish that the order referring the questions in the preliminary ruling procedure infringes the law on the grounds that the questions have no relevance in deciding the legal dispute.[17] The CJEU came to the following conclusion:[18] it is not compatible with Art. 267 TFEU if the Supreme Court of a Member State finds that an order of a lower court referring questions to the CJEU in a preliminary ruling procedure is unlawful on the grounds that the questions referred are not necessary[19] nor relevant in resolving the legal dispute. Based on EU law, the referring national court must ignore the decision of the national Supreme Court rendered in that regard.[20] The CJEU also found that it is contrary to Art. 267 TFEU[21] if disciplinary proceedings are initiated against a judge of the national court on the grounds[22] that he turned to the CJEU in the framework of the preliminary ruling procedure.

14 | Judgement of the CJEU, C-564/19, Paras. 33–36.
15 | It is clear from one of the questions referred for preliminary ruling that the NJC adopted a report which described that a cardinal act was violated by the President of the National Office for the Judiciary's practice of invalidating applications without due justification, and filling the judicial positions by direct temporary appointments. At the same time, the President of the National Office for the Judiciary stated that the NJC's functioning did not comply with the law, and refused to cooperate with it.
16 | Ibid.
17 | As opposed to that, the CJEU focused on the Supreme Court of the given Member State.
18 | These findings are set in Para. 148 of the operative part of the CJEU's judgement.
19 | At this time, the CJEU followed the case law established in the Ognyanov case (C-614/14), where it is contrary to EU law to narrow down the opportunities to initiate a preliminary ruling procedure, as it is a procedure necessary to enforce the rights of legal entities arising from EU law.
20 | The CJEU referred to the establish case law where a Member State cannot hinder the uniform application and effectiveness of EU law in the context of the primacy enjoyed by EU law over domestic laws, even if the given Member State relies on constitutional provisions. It follows that, in this respect, the issue concerned is not the limitation of the institutional autonomy of the Member States, but the principle of implementing EU law in domestic laws.
21 | Ibid.
22 | The fifth question referred to by the CJEU in the preliminary ruling procedure is of particular importance. The question was aimed at whether the Art. 19 (1) TEU and Art. 47 of the Charter should be interpreted in such a way that is contrary to the said provisions to initiate disciplinary proceedings against a judge of a national court on the grounds that he or she referred questions to the CJEU in the framework of a preliminary ruling procedure. In the end, the CJEU did not examine the issue on the basis of Art. 19 (1) TEU and Art. 47 of the Charter, but with regard to Art. 267 of the TFEU concerning the preliminary ruling

3. Judgement in the Asociatia case

In the Asociatia joined cases,[23] the CJEU examined the proper functioning of the mechanism for monitoring the progress achieved in the field of judicial reform and the fight against corruption, focusing on the Treaty of Accession of Romania. Decision 2006/928, made in connection with Romania's accession to the EU, also covers[24] the investigation of crimes regarding the organisation of the national judiciary, and crimes committed within the judicial system. From the opinion of the Advocate General,[25] it is clear that the evaluation criteria specified the commitments undertaken by Romania in the Treaty of Accession, which served to remedy the shortcomings identified by the European Commission in the field concerned before accession to the EU.[26]

The question referred to the CJEU for a preliminary ruling in relation to the limitation of the institutional autonomy of Member States by EU law is also relevant to our topic. The referring court asked whether Arts. 2 and 19 (1) Treaty on European Union (TEU) and Decision 2006/928 should be interpreted in such a way that a national regulation is contrary to the said provisions if it allows for the temporary appointment of the heads of judicial bodies entrusted with procedures related to the conduct of disciplinary proceedings against judges and prosecutors without the application of the criteria set for the ordinary procedure. Based on the settled case law, Member States must guarantee the functioning of an effective legal remedy system in cases regulated by EU law,[27] where the requirement of courts' independence is fundamental.

In its judgement, the CJEU clarified the fact that the senior officers of the body entrusted with conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors are appointed by the government of a Member State is not such as to give rise to doubts that the powers and functions of the given body will be used as an instrument to exert pressure on judicial activity.[28] Similar criteria, as established by EU law, must be applied to national provisions if a management position in such a body falls vacant and substitution is required until the position is filled in compliance with legal requirements.[29] According to

procedure; according to the CJEU's interpretation, the former provisions call into question the competences of the referring court set forth in Art. 267 of the TFEU.
The CJEU referred to the jurisprudence of the Republic of Poland, remarking that the provision of the national law allowing disciplinary proceedings to be initiated against judges of the national court on the grounds of turning to the CJEU in the framework of a preliminary ruling procedure is contrary to judicial independence. It should be noted that the CJEU examined the issue based on Art. 267 of the TFEU, inter alia, in relation also to the judgement in the Miasto case.
23 | Judgement of the CJEU, C-83/19.
24 | Ibid., Para. 185.
25 | Opinion of the Advocate General, Para. C-355/19, 152.
26 | Judgement of the CJEU, Para. 171.
27 | Judgement of the CJEU, C-216/18.
28 | Judgement of the CJEU, C-83/19, Para. 202.
29 | Ibid., Para. 203.

the CJEU's interpretation, national legislation is likely to give rise to doubts about the risk of external pressure put on or political control exercised over the judiciary where, even if temporarily, it has the effect of allowing the government of the Member State concerned to make the said appointments by disregarding the ordinary appointment procedure laid down by the national law.[30] It might seem odd that the CJEU found that 'it is for the referring court to ascertain' whether the national legislation at issue has the effect of conferring on the national government a direct power of appointment, and whether that power is used for putting pressure on or exercising political control over the judiciary.[31]

The above question referred for a preliminary ruling was somewhat refined by the CJEU in the section summarising the relevant findings, as follows: Art. 2 and the second subparagraph of Art. 19 (1) TEU and Decision 2006/928 must be interpreted as precluding Member State national legislation allowing the government to make interim appointments to the management positions of the judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors, without following the ordinary appointment procedure laid down by national law, where that legislation is such as to give rise to reasonable doubts that the powers and functions of that body may be used as an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors.[32]

In another question referred for preliminary ruling, the referring court asked whether Art. 2 TEU and the second subparagraph of Art. 19 (1) TEU are to be interpreted as provisions that preclude a national regulation governing the material liability for damages resulting from judicial errors and on the personal liability of judges if it defines 'judicial error' succinctly and in the abstract.

Also potentially relevant, in the Köbler case, the CJEU ruled that the establishment of the liability of the national court adjudicating at last instance for decisions that violate EU law does not pose a threat to the independence of that court.[33] This assessment, provided in the judgement handed down in the Köbler case, is also relevant in the case under discussion, noting that this possibility applies to the responsibility of the State arising from judicial acts. The CJEU also clarified that the fact that the substantive legal conditions related to the concept of judicial error are only defined in abstract and in general terms by national legislation and that its clarification is left to jurisprudence, does not jeopardise courts' independence.[34] The CJEU recognised that the organisation of the justice system falls within the competence of the Member States, including the determination of the personal responsibility of judges within the framework of a claim for action for indemnity.[35] This system can contribute to increasing judiciary efficiency, but Member States must also consider the requirements set by EU law in that regard.[36]

30 | Judgement of the CJEU, C-83/19, Paras. 204–205.
31 | Ibid., Para. 206.
32 | Judgement of the CJEU, C-83/19, Para. 207.
33 | Judgement of the CJEU, C-224/01, Para. 42.
34 | Judgement of the CJEU, C-83/19, Paras. 227–228.
35 | Ibid., Para. 229.
36 | Ibid.

For the CJEU, it was clear from the files submitted in the preliminary ruling procedure that the existence of a judicial error is definitively established in the proceedings brought against the Member State for financial liability and that that finding of error is binding in the action for indemnity seeking to establish the personal liability of the judge concerned, although that judge was not heard in the first set of proceedings.[37] The CJEU acknowledged that such a rule is not only likely to create a risk of external pressure on judge activity,[38] but is also liable to infringe their rights of defence guaranteed by EU law. Nonetheless, the CJEU ruled that this is for the referring court[39] to ascertain.[40] Specifically, it is for the referring court to determine whether the decisions regarding the claim for an action for indemnity, where the report to that end drawn up by the Judicial Inspectorate is not binding and where it is ultimately for the Ministry of Public Finance alone to decide on the basis of its own assessment, are suitable for being used as means of putting external pressure on the judiciary.[41]

4. Judgement in the Commission v Republic of Poland case[42]

In the introductory section of his opinion, Advocate General Evgeni Tanchev described that this case presents the Court with the opportunity to rule, for the first time within the context of a direct action for infringement,[43] on the compatibility of certain measures taken by a Member State concerning the organisation of its judicial system with the standards set forth in the second subparagraph of Art. 19 (1) TEU combined with Art. 47 of the Charter.[44] Pursuant to Art. 19 (1) TEU,[45] Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, while Art. 47 of the Charter enshrines the right to an effective remedy and a fair trial.[46] According to the opinion, the complaints based on Art. 19 (1) TEU are well founded, albeit the Advocate General concluded that the

37 | Judgement of the CJEU, C-83/19, Para. 239.
38 | Ibid.
39 | Ibid.
40 | We do not see the reason why the CJEU found that it is 'for the national court to examine' the compatibility of the national provision at issue with EU law.
41 | Judgement of the CJEU, C-83/19, Para. 240.
42 | Judgement of the CJEU, C-619/18.
43 | In his opinion, the Advocate General noted that several other similar proceedings are pending.
44 | The Advocate General also noted that prior to the proceedings at issue, the European Commission initiated proceedings in 2017 against the same Member State on the basis of Art. 7(1) TEU.
45 | In this case, we examined the verbatim interpretation of the concerned provisions of the primary EU law.
46 | In principle, the Charter is applied only if Member States implement the EU law. We will not touch upon that issue in this paper.

complaints should be rejected as inadmissible in so far as they are based on Art. 47 of the Charter, given that no implementation of EU law occurred.[47] The opinion also made it clear that the concerned action is not barred by the initiation of the mechanism[48] based on Art. 7 TEU.[49]

As just mentioned, the European Commission based its action on the violation of the interpretation of Art. 19 (1) TEU in conjunction with Art. 47 of the Charter. The Republic of Poland maintained that the two provisions must be examined separately. Based on the case law of the CJEU,[50] the Advocate General shared the Polish position, according to which there is a connection between the two provisions; at the same time, Art. 47 of the Charter can only be applied under the conditions set forth in Art. 51 of the Charter (i.e. if the Member State is implementing EU law).[51] Regarding the application of the second subparagraph of Art. 19 (1) TEU to the present case, the opinion was based on[52] the judgement handed down by

47 | Opinion of the Advocate General, C-619/18, Para. 42.
48 | The opinion referred also to a part of the literature, according to which Art. 7 TEU functions as a kind of *lex specialis* regarding EU value monitoring and implementation, implying that it takes precedence over infringement proceedings or may even exclude them. In that regard, the opinion made reference to 'Safeguarding EU values in the Member States – Is something finally happening?' Common Market Law Review, Vol. 52, 2015, p. 619.
49 | Opinion of the Advocate General, C-619/18, Para. 42.
50 | Judgement of the CJEU, C-685/15, C-384/16.
51 | The opinion referenced the case law established in the cases of EUB ASJP (C-64/16), Achemea (C-284/16), and the Minister for Justice and Equality (C-216/18). In those judgements, the CJEU recognises the relationship between the two articles at issue in the interpretation of the opinion, and that the second sub of Art. 19 (1) TEU and Art. 47 of the Charter have different material scopes. According to the opinion, the CJEU recognises the limits of Art. 47 of the Chater, but without decreasing its significance. The judgement in the Minister for Justice and Equality case concerned a European arrest warrant within the framework of police and judicial cooperation in criminal matters. In the interpretation given by the CJEU in the operative part of the judgement, the relevant provisions of the Council Framework Decision on the European arrest warrant and extradition procedures between Member States must be interpreted as follows. If the judicial authority responsible for deciding on the extradition of a person affected by a European arrest warrant issued for the purpose of conducting criminal proceedings has such evidence as those included in the proposal adopted by the European Commission on the basis of Art. 7 TEU—which may be suitable for supporting the fact that there is a real risk of violation of the right to a fair trial enshrined in Art. 47 of the Charter (e.g., owing to systemic or other general shortcomings affecting the independence of the judiciary of the issuing Member State)—then the said authority must carry out accurate and specific investigations regarding whether (considering the personal situation of the person concerned, the nature of the crime, and the factual situation of the arrest warrant) it can be assumed for reasons supported by hard evidence that the right to a fair trial of the transferred person would be endangered.
In the judgement handed down in the Achmea case, the CJEU found, inter alia, that by concluding the BIT within the EU, the Member States and the investor created a mechanism that can exclude their legal disputes—although they may also affect EU law application—to be arranged in a way that ensures the enforcement of the requirements set forth by EU law. Art. 8 of the BIT also violates EU law autonomy because, by its very nature, it threatens EU law enforcement, especially through the system of the preliminary ruling procedure.
52 | Judgement of the CJEU, C-64/16.

the CJEU in the ASJP case.[53] The opinion then examined the merits of the claim submitted by the European Commission, which was initiated on the grounds that, first, the national measures lowering the retirement age of the judges appointed before 3 April 2018 infringe the principle of irremovability of judges. Meanwhile, the Polish government emphasised the guarantees of independence regulated in its constitution, and the fact that the measure in question essentially adjusts the retirement age of judges to the general retirement age. It also maintained that the Commission did not adequately demonstrate that the contested measures violate the principle of judicial independence, considering the limited number of judges affected.[54]

The Advocate General acknowledged that in the case Commission v Hungary initiated on the grounds of decreasing the retirement age of judges,[55] the CJEU recognised that certain objectives relating to the alignment of retirement age may be legitimate from the aspect of EU law. Concomitantly, the Advocate General emphasised that in another judgement of the CJEU that also affected Hungary,[56] the CJEU did not allow the operation of a supervisory authority established on the basis of EU law to be reduced by the authorities of the Member States in order to

53 | In the main proceedings of the judgement handed down in the ASJP case, the Portuguese legislator periodically reduced the salaries of public sector workers, including the salaries of judges of the Court of Auditors. On behalf of the members of the court in question, that court filed a lawsuit with the Portuguese Supreme Administrative Court, requesting the annulment of the provisions in question. The claim relied on a violation of judicial independence, which is guaranteed by EU law in the second subparagraph of Art. 19 (1) TEU and in Art. 47 of the Charter, as well as by the Portuguese constitution. In the interpretation of the CJEU, Member States must, among other things, ensure national courts' independence, which is closely related to the right to a fair trial enshrined in Art. 47 of the Charter. In the interpretation of the CJEU, the independence of national courts is also of fundamental importance regarding participation in the preliminary ruling procedure. In its ruling, the CJEU established that the independence of the courts presupposes that judicial duties can be exercised in a completely autonomous manner, which excludes any hierarchical relationship (i.e. the possibility that the judge is subordinate to anyone or can receive instructions from anywhere). Adherence to these criteria means that judges are protected against external influence or pressure that could affect their independence. In the interpretation of the CJEU, a precondition for courts' independence is a remuneration to judges at a level that corresponds to their activity. However, the CJEU emphasised that, in this case, the reduction of remunerations was temporarily defined as one of the conditions of the EU financial support program within the framework of another program aimed at reducing the excessive budget deficit of the Portuguese state. The CJEU also highlighted that the measures at issue apply not only to the members of the court in question but to the public sector in general. As a result, the reduction of remuneration at issue could not be assessed as a measure capable of undermining the independence of the court concerned. The CJEU also referred to the judgements handed down in the Wilson, Panicello, El Hassani, and Online Games, which resulted in significant 'evolution' of the law.
54 | Opinion of the Advocate General, C-619/18, Para. 70.
55 | Judgement of the CJEU, C-286/12.
56 | Judgement of the CJEU, C-288/12.

achieve[57] an effective objective.[58] According to the interpretation of the motion, despite the above, the contested Polish measures do not meet the requirements of EU law, as they constitute specific legislation adopted in respect of members of the concerned court. In addition, the adoption of the contested measures entailed a sudden and unforeseen removal of various judges, inevitably creating difficulties regarding public confidence.[59]

In its second complaint, the European Commission basically alleged that the relevant Polish provisions violated the principle of judicial independence,[60] as the President of the Republic's discretion to extend the active mandate of Supreme Court judges upon reaching the lowered retirement age allows him to exert influence on the Supreme Court and its judges. The Commission added that the President of the Republic's decision is not subject to binding criteria or judicial review, and his duty to request an opinion of the National Council of the Judiciary does not eliminate his excessive discretion because that opinion is linked to general criteria and is not binding on him. Poland contended that no violation of judicial independence was made out, particularly considering the role of the President of the Republic as guardian of the Polish constitution.[61] The opinion concluded that the position of the European Commission should be accepted by the CJEU.

At this point, it is worth examining the extent to which the findings of the opinion of the Advocate General were followed by the judgement of the European Court of Justice. The structure of the CJEU's judgement is very similar to that of the opinion: taking essentially a similar case law into account, it concludes that the legislation referred to in the claim can be examined from the point of view of the second subparagraph of Art. 19 (1) TEU. The CJEU found that the contested Polish measures were applicable retroactively to all judges in office, without any safeguards in place by way of appropriate measures to guarantee the irremovability of judges.[62] For similar cases, the CJEU essentially introduced a test, which can be called a test for limiting the competence of the Member States in the context of judicial systems (i.e. setting the limits of institutional autonomy): national measures resulting in the removal of judges are only allowed if they can be justified by a legitimate objective and are proportionate to the objective set. An additional requirement is that the measures at issue do not raise any concerns in individuals regarding external influence put on[63], or the impartiality of, the given court.[64]

57 | Opinion of the Advocate General, C-619/18, Para. 82.
58 | In this statement, the opinion did not consider that the referenced judgement related to Hungary was established based on EU law; thus, in our opinion, the situations cannot be fully compared.
59 | Opinion of the Advocate General, C-619/18, Paras. 76–78.
60 | Law on the Supreme Court, Paras. (1) and (4) of Sec. 37, and Paras. (1) and (1a) of Sec. 111.
61 | Opinion of the Advocate General, C-69/18, Paras. 85–88.
62 | Judgement of the CJEU, C-619/18, Para. 78.
63 | The criteria established by the CJEU, such as proportionality, necessity, and whether the regulation is aimed at a legitimate goal, are widely applicable in the jurisprudence. However, the criterion of whether the measures introduced by a Member State in this area raise legitimate doubts is very difficult to apply in practice.
64 | Ibid., Para. 79.

In accordance with these mentioned criteria, the CJEU first examined whether the measure in question could be justified by a legitimate objective. The Polish government contended that the lowering of the retirement age of the judges in question was introduced to harmonise the retirement age applied in this area with the general retirement age of employees, thus improving the age composition of the courts in question. According to the case law established by the CJEU, among others, in the judgements handed down in the Fuchs and Köhler[65] and the Commission v Hungary cases,[66] objectives seeking, on the one hand, to standardise the age limits for mandatorily ceasing activity and, on the other hand, to encourage the establishment of a more balanced age structure by facilitating the access of young people to, inter alia, the profession of judge may be regarded as legitimate,[67] just like in the case at hand. However, the CJEU also considered the positions of the European Commission for Democracy through Law ('Venice Commission') and the European Commission, which argue that the reasoning of the legislation in question raises serious doubts as to whether the reform at issue was made in pursuance of the aforesaid legitimate objectives, and not with the aim of side-lining a certain group of judges.[68]

According to the second complaint of the European Commission, the new law proposed by the Supreme Court of the Republic of Poland did not comply with the second subparagraph of Art. 19 (1) TEU because the President of the Republic enjoys discretionary powers to extend, beyond the statutory retirement age, the term of service of the judges of the Supreme Court two more times for periods of three years. Particularly in cases involving the interpretation and application of the provisions of EU law, the Commission contended that the independence of the judges of the Supreme Court could be threatened by possible pressure attempts of the President of the Republic, as there were no defined criteria for extending the term of service, these decisions need not be justified, and the judges themselves had to apply to the President of the Republic[69] with their requests.[70]

The Republic of Poland held that the Polish constitution grants the President of the Republic a prerogative, to be exercised personally by the President, in order to protect the judiciary from possible interference by the legislature and the executive branch.[71] In exercising this prerogative, the President of the

65 | Judgement of the CJEU, C-159/10.
66 | Judgement of the CJEU, C-286/12.
67 | Judgement of the CJEU, C-619/18, Para. 81.
68 | Ibid., Para. 82.
69 | The European Commission acknowledged that the President of the Republic is obliged by law to consult the National Council of the Judiciary, albeit that has no effect on the merits of the Commission's position, as the result of the consultation is not binding for the President of the Republic and the criteria set for the said consultation are too abstract. Meanwhile, the Republic of Poland contended that, in compliance with the legislation on the National Council of the Judiciary, the workload and the interest of the system of justice are considered. The Polish government also posited that the opinion of the National Council of the Judiciary cannot be binding as that would violate the prerogatives of the President of the Republic enshrined in the constitution.
70 | Judgement of the CJEU, C-619/18, Para. 99.
71 | Judgement of the CJEU, C-619/18, Para. 103.

Republic is obliged to consider the constitutional rules and principles, rendering this activity not a 'public administration activity' under Polish law; accordingly, these decisions could not be the subject of a judicial remedy either.[72] The Republic of Poland put forward additional arguments; first, regarding the Commission's objections to the composition of the National Judicial Council, Poland held that it was not relevant to the decision of the present procedure, since the European Commission essentially objected to the fact that the President of the Republic can make the relevant decision without considering the opinion of the National Judicial Council.[73] Second, the Polish government argued that the President of the Republic would not, in practice, influence the judges of the Supreme Court, given that the rule that deliberations are in secret would prevent the President from having any information as to how each judge voted.[74] The Polish government added that similar systems for the extension of the period of judicial activity beyond the normal retirement age furthermore exist in Member States other than the Republic of Poland,[75] and the renewal of the mandate of a judge of the CJEU also itself depends upon the discretion of the government of the Member State of the judge concerned.[76]

In response to these arguments, the CJEU did not question that it is for the Member States alone to decide whether they will authorise such an extension to the period of judicial activity beyond normal retirement age. Nonetheless, according to the interpretation of the CJEU, where those Member States choose such a mechanism,[77] they must ensure that the relevant conditions and the procedure do not undermine the principle of judicial independence. The fact that an organ of the State, such as the President of the Republic, is entrusted with the power to decide whether to grant any such extension is admittedly not sufficient in itself to conclude that that principle has been undermined. However, the provisions governing that procedure must be developed in such a way that they meet the criteria established by EU law. In this regard, the CJEU referred to the case law established, inter alia, in the cases D. and A.[78], Commission v Hungary[79], and Commission v

72 | Ibid.
73 | Judgement of the CJEU, C-619/18, Para. 105.
74 | Judgement of the CJEU, C-619/18, Para. 106.
75 | Importantly, unlike international public law, the breach of obligations of a Member State in EU law cannot justify the breach of obligations of another Member State. If there is a solution similar to the examined Polish regulation in several Member States, it indicates that in the case of Poland, political reasons also contributed to the initiation of the infringement procedures by the European Commission.
76 | Judgement of the CJEU, C-619/18, Para. 107.
77 | Judgement of the CJEU, C-619/18, Para. 110.
78 | Judgement of the CJEU, C-175/11, particularly Para. 103. It is a judgement resulting from a preliminary ruling procedure where the main procedure concerned a third-country national's application for refugee status in connection with a Common European Asylum System. The person concerned in the procedure referred, inter alia, to the fact that the court in question cannot be considered independent due to organisational relationships, and that the members may be exposed to external pressure.
79 | Judgement of the CJEU, C-288/12, Para. 51.

Austria.[80] The CJEU finally concluded that the examined legislation does not meet the criteria established above.

In that respect, first, the CJEU emphasised the discretionary power of the President of the Republic, which is not governed by any objective and verifiable criterion, for which reasons need not be stated, and which cannot be challenged in court proceedings.[81] The CJEU did not consider nor respond to the position of the Polish government, according to which the powers of the President of the Republic are necessary for the sake of the separation of powers and the independence of the judiciary.[82] Second, the CJEU referred to the role of the National Judicial Council in the procedure at issue, whose opinion—in so far as it is delivered on the basis of criteria which are both objective and relevant and is properly reasoned—may contribute to rendering the procedure at issue objective.[83] Finally, the CJEU explained its position regarding the arguments put forward by the Polish government on the existence of the examined provisions in other Member States, and on the similarities pertaining to the extension of the mandate of the judge of the CJEU. The CJEU did not see the Polish objections related to other Member States as proven[84] and referred to the established case law,[85] which posits that Member States cannot refer to the principle of reciprocity in EU law.[86] Much more interesting is the CJEU's response to the Polish objections to the new appointment of judges of the CJEU. CJEU judges are appointed for a fixed period of six years, and a possible extension requires the joint agreement of the governments of the Member States following the opinion of the Committee pursuant to Art. 255 of the TFEU.[87] According to the interpretation of the CJEU,[88] the said articles of the Treaties, which apply to the judges of the CJEU,[89] do not apply to the obligations of Member States regarding the second subparagraph of Art. 19 (1) TEU, nor do they modify their content.

In the end, the CJEU fully upheld the European Commission's second complaint that the regulation that grants the President of the Republic discretionary powers to extend the service of judges beyond their retirement age does not comply with Art. 19 (1) TEU.[90]

80 | Judgement of the CJEU, C-614/10, particularly Para. 43.
81 | Judgement of the CJEU, C-619/18, Para. 114.
82 | Here, a question can be raised as to what the administration of justice could be protected from by the competence at issue in the case under investigation regarding an interference on the part of the legislature or the executive power.
83 | Judgement of the CJEU, C-619/18, Para. 115.
84 | In accordance with the principles developed in this judgement, we must ask in which cases can similar problems be considered proven in other Member States.
85 | Judgement of the CJEU, C-619/18, Para. 120.
86 | Judgement of the CJEU, C-101/94.
87 | It is unclear from the relevant articles whether the opinion issued by this Commission complies with the requirements established by the CJEU regarding the Member States.
88 | Judgement of the CJEU, C-619/18, Para. 122.
89 | In EU law, cases in which EU legal acts do not have to meet the criteria that are binding on the Member States can be considered as the main rule rather than the exception.
90 | Judgement of the CJEU, C-619/18, Paras. 123–124.

5. Judgement in the second Commission v Republic of Poland case[91]

The infringement procedure against the Republic of Poland was initiated by the European Commission due to the disciplinary system developed for judges. The European Commission basically claimed that the CJEU should declare that the disciplinary board established by the Polish legislation does not meet the criteria set by EU law. First, the European Commission requested the declaration of the second subparagraph of Art. 19 (1) TEU, which requires Member States to guarantee that the bodies qualifying as courts within the meaning of EU law, and which may apply EU law, meet the requirements of effective legal protection related to, among others, independence and impartiality.[92] In our view, this means that it is not necessary for a Member State court to implement EU law in a given case; according to the Commission, the foregoing applies to all national courts[93] that could potentially apply EU law.

The CJEU recalled,[94] inter alia, the judgement handed down in the Repubblica case,[95] where—in a preliminary ruling procedure related to Malta—the CJEU examined the role of the Prime Minister in the appointment procedure of judges of the national courts, focusing primarily on the guarantees related to judge independence. Based on the settled case law, the national rules regarding disciplinary proceedings are clearly amenable to review, inter alia, in the light of Art. 19 (1)

91 | Judgement of the CJEU, C-791/19.
92 | Judgement of the CJEU, C-791/19, Para. 46.
93 | This definition 'improves' the previous concept of 'national court' developed by the CJEU. The previous definition was limited to whether the given national court could participate in a preliminary ruling procedure.
94 | Judgement of the CJEU, C-791/19, Paras. 50–51.
95 | Judgement of the CJEU, C-896/19. It is worth briefly summarising the most important findings of the judgement. First, the procedure started with an *actio popularis* type of action filed by a non-governmental organization based on the Maltese Constitution, claiming that the Maltese regulations on the appointment of judges are incompatible with the interpretation of Art. 19 TEU in conjunction with Art. 47 of the Charter. The action was also aimed at establishing that the appointment of a judge based on the regulation at issue should be considered null and void. In support of its claim, the Repubblika made reference to the Prime Minister's discretionary power regarding judge appointment, pointing out the active membership of the appointed judges in the ruling Labor Party, or the interference of political power in the justice system in the case of a group of judges. In the interpretation of the CJEU, after the 1016 reform of the Maltese Constitution, the establishment of the committee responsible for the appointment of judges set limits to the discretionary power of the Prime Minister of Malta regarding judge appointment, thus contributing to the improvement of the objectivity of the procedure. The body at issue must also be independent from the executive and legislative powers, as well as from the authority obliged to issue a resolution. In the interpretation of the CJEU, the established body meets these criteria, especially the rules on the prohibition of the participation of politicians.

TEU.[96] According to the second complaint submitted by the European Commission, the Disciplinary Chamber established by the Polish law infringes Art. 19 (1) TEU inasmuch as it does not meet the necessary requirements of independence and impartiality. Importantly, according to the Commission, the intervention of an executive body in the process of judge appointment is not, in general and in itself, such as to affect the independence or impartiality of those judges. Nonetheless, the Commission also remarked that the combination and simultaneous introduction of various legislative reforms in Poland no longer made it possible either to preserve the appearance of independence and impartiality of justice and the trust which courts must inspire in a democratic society, nor to dispel any reasonable doubt in the minds of individuals as to the imperviousness of the Disciplinary Chamber to external factors and its neutrality with respect to the interests before it.

In its defence, the Republic of Poland contended that the procedure for appointing members of the Disciplinary Chamber ensures the independence of that chamber, which is similar (according to the Polish government) to judiciary committees established in other Member States. The Polish government maintained that the independence of the Disciplinary Chamber is supported by safeguards relating in particular to the indefinite duration of the term of the office of Disciplinary Chamber members and their irremovability.[97] It was added that the Disciplinary Chamber enjoys a high degree of administrative, financial, and judicial autonomy, further strengthening its independence.[98] Upon examining the jurisprudence established by the Disciplinary Chamber, the Polish government found that its decisions are actually not influenced[99] by the Minister's opinion in practice.[100]

Second, in its assessment, the CJEU acknowledged that the Prime Minister of Malta has certain powers regarding judge appointment, but this is limited by the requirements for professional experience defined in the relevant legislation. The CJEU also recognised that the appointment of judges not recommended by the committee at issue are to be presented to the President of the Republic, a statement on the decision is to be made to the House of Representatives, and a declaration is to be published in the Official Gazette of Malta. Based on these, the CJEU found that it does not appear that the national provisions at issue are, per se, such as to give rise to legitimate doubts, in the minds of individuals, as to the imperviousness of the appointed members of the judiciary to external factors and as to their neutrality, and thus lead to those members of the judiciary not being regarded as independent or impartial. The consequence here would be to undermine the trust which justice in a democratic society governed by the rule of law must inspire in individuals.

96 | Judgement of the CJEU, C-791/19, Paras. 59–62.

97 | Judgement of the CJEU, C-791/19, Paras. 70.

98 | Ibid.

99 | Importantly, based on the case law of the CJEU, in examining the compatibility of a national provision with EU law, the decisive aspect is whether the administrative or even more judicial practice is compatible with EU law or leads to a result contrary to it.

100 | Judgement of the CJEU, C-791/19, Para. 71. The Minister for Justice brought 18 appeals against decisions of disciplinary tribunals delivered at first instance in respect of judges. In seven cases, the decisions under appeal were confirmed; in five cases, they varied by the imposition of more severe disciplinary penalties; in two cases, the Disciplinary Chamber imposed varied exonerating decisions and disciplinary penalties.

Based on the judgement in A. K. and Others, the Commission disputed the arguments of the Polish government by which it maintained that the members of the Disciplinary Chamber are protected after their appointment. According to the Commission, in addition to the safeguards mentioned by the Polish government, it remains necessary to ensure—by means of an overall analysis of the provisions of the national legislation relating to the creation of the body concerned and relating, in particular, to the powers conferred on it, its composition, and the manner in which the judges called upon to sit in that chamber are appointed—that those various factors are not such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of the judges concerned and their neutrality.[101]

The CJEU recalled that according to its case law, the mere prospect of judges running the risk of disciplinary proceedings which could lead to the bringing of proceedings before a body whose independence is not guaranteed is likely to affect their own independence.[102] The CJEU listed various factors in that regard, including that the Disciplinary Chamber consists of new judges appointed by the President of the Republic, and that the members of the Disciplinary Chamber receive remuneration exceeding that of other judges by approximately 40% as they must abandon research work, yet they are entitled to waive these rights.[103]

The Commission also submitted[104] that, pursuant to the relevant Polish law,[105] the disciplinary liability of judges of Polish ordinary courts could be put in issue on account of the content of their judicial decisions, which, according to the CJEU, is not compatible with the criteria set forth in the second subparagraph of 19(1) TEU. The Commission argued that the relevant law defines a disciplinary offence as encompassing, inter alia, cases of 'obvious and gross violations of the law'. Such wording permits an interpretation according to which the disciplinary liability of judges extends to the performance, by those judges, of their adjudicating duties.[106] To support that argument,[107] the Commission relied on the decisions of the Disciplinary Officer, who opened an investigation in respect of judges who submitted requests for preliminary ruling to the CJEU, and ordered each of those judges to file a written statement concerning a possible exceeding of jurisdiction relating to those requests.[108]

In its defence, the Republic of Poland contended that the Disciplinary Officer is merely an investigating and prosecuting body whose assessments are not binding on the disciplinary court. The Polish government also referred to the case law of the Supreme Court, which interpreted the concept of disciplinary penalty restrictively. It follows that a disciplinary offence cannot be the result of a common error

101 | Judgement of the CJEU, C-791/19, Para. 76.
102 | Ibid., Para. 82.
103 | Ibid., Paras. 93–96.
104 | Judgement of the CJEU, C-791/19, Para. 115.
105 | Sec. 1 of Art. 107 of the Law on ordinary courts and Secs. 1 and 3 of Art. 97 of the Law on the Supreme Court.
106 | Judgement of the CJEU, C-791/19, Para. 116.
107 | The Commission underpinned its position by numerous similar references.
108 | Judgement of the CJEU, C-791/19, Para. 117.

in the interpretation or application of the law stemming from a judicial decision, but solely of 'obvious and gross' violations of the law.[109]

According to the CJEU's interpretation, the second subparagraph of Art. 19 (1) TEU requires the disciplinary regime applicable to the judicial system of a Member State to be operated in such a way that it cannot be used as a system of political control of the content of judicial decisions.[110] The disciplinary regime applicable to judges falls within the Member States' competence, and can indeed be a factor which contributes to the accountability and effectiveness of the judicial system.[111] However, with reference to the judgement in the Asociatia case related to Romania,[112] the CJEU pointed out that Member States are obliged to exercise that competence in compliance, inter alia, with the principle of courts' independence.[113] The CJEU further builds on an analogy with the judgement in Asociatia when finding that, in order to preserve independence and prevent the disciplinary regime from being diverted from its legitimate purposes and being used to exert political control over judicial decisions or pressure on judges, the fact that a judicial decision contains a possible error in the interpretation and application of national and EU law—or in the assessment of the facts and the appraisal of the evidence—cannot in itself trigger the disciplinary liability of the judge concerned.[114] Consequently, in the CJEU's interpretation, the judiciary disciplinary system only meets the criteria set forth in EU law if the disciplinary liability of a judge as a result of a judicial decision is limited to entirely exceptional cases, and is governed, in that regard, by objective and verifiable criteria, with guarantees designed to avoid any risk of external pressure on the content of judicial decisions, thus helping to dispel, in the minds of individuals, any reasonable doubts.[115]

The fourth complaint is also relevant in the context of the legal dispute; according to the interpretation of the CJEU, the law on Polish courts[116] does not comply with Art. 19 TEU, because it fails to ensure, inter alia, that the judges' cases concerning disciplinary proceedings can be heard within a reasonable time and that the requirements regarding the right of defence are met. Further elaborating on the first part of the fourth complaint, the European Commission contended that the Minister of Justice can appoint a disciplinary officer at any stage of the procedure or after the decision concluding the disciplinary procedure; as a result, the charges against a judge can be maintained permanently, and, therefore, compliance with the reasonable time requirement would not be guaranteed.[117] The Com-

109 | Judgement of the CJEU, C-791/19, Paras. 120–123.
110 | Judgement of the CJEU, C-791/19, Para. 134.
111 | Ibid., Paras. 135–136.
112 | Judgement of the CJEU, Para. C-791/19, Para. 138.
113 | The CJEU clarified, in relation to judicial independence, that the safeguards required by EU law cannot have the effect of totally excluding the possibility that the disciplinary liability of a judge may, in very exceptional cases, be triggered as a result of a judicial decision, particularly in cases of acting arbitrarily or denying justice.
114 | Judgement of the CJEU, C-791/19, Para. 138.
115 | Judgement of the CJEU, C-791/19, Para. 139.
116 | Arts. 112b, 113a, and 115a of the Law on ordinary courts.
117 | Judgement of the CJEU, C-791/19, Para. 179.

mission submitted that the principle of the rights of defence is, among other things, infringed inasmuch as the relevant Polish provisions prescribe that proceedings before a disciplinary court may be continued without the appointment of a defence counsel to represent a judge who cannot participate in the proceedings on health grounds, or where the defence counsel appointed by that judge has not yet taken up the defence of his or her interests.[118] The Commission also noted that the provision allows for the disciplinary court to continue the disciplinary proceedings despite the justified absence of the accused judge or his or her defence counsel.[119]

According to the Polish government, the complaint of the Commission concerning the provision allowing for the Minister of Justice to maintain the charges permanently despite a final decision was a purely hypothetical reading, and it had never been verified in practice.[120] In addition, according to Polish law, the principle *ne bis in idem* precludes a fresh action in the same case. Regarding the right of defence, the Polish government argued[121] that the relevant law is to ensure effective conduct.[122]

According to the CJEU, Art. 19 TEU requires[123] disciplinary procedures for judges who can potentially apply or interpret EU law to consider the provisions of Arts. 47 and 48 of the Charter; namely, the right to effective legal remedies and to a fair trial, the right of defence, and the presumption of innocence. The CJEU recognised that the Commission's argument, according to which the possibility that the Minister of Justice can appoint a disciplinary officer based on the legislation at issue,[124] does not in itself lead to the systematic exceeding of reasonable deadlines.[125] Despite the aforesaid, the CJEU found that the complaint of the Commission—according to which, based on the relevant legal provisions,[126] the Minister of Justice may again appoint a disciplinary officer after the decision refusing to initiate disciplinary proceedings or concluding such proceedings—appeared to be well founded. In the CJEU's reading, the judge concerned is exposed to the threat of investigations of that kind, even if no such decision has been rendered so far.[127]

The CJEU also did not accept the arguments of the Polish government that the principle *ne bis in idem* precludes the application of investigations and procedures after the final decision.[128] This finding is underpinned by the CJEU in two remarkable ways. First, in the interpretation of the CJEU, the fact that the provisions at issue may prove to be incompatible with fundamental principles other than that to which the Commission referred in support of the first part of its fourth

118 | Judgement of the CJEU, C-791/19, Para. 180.
119 | Ibid., Para. 181.
120 | Ibid., Para. 183.
121 | Ibid., Paras. 185–186.
122 | According to the Polish government, it is for the court to decide whether, based on case facts, the procedure can be continued in the absence of the judge.
123 | Judgement of the CJEU, C-791/19, Paras. 187–188.
124 | Art. 112.b of the Law on ordinary courts.
125 | Judgement of the CJEU, C-791/19, Para. 194.
126 | Sec. 5 of Art. 112b of the Law on ordinary courts.
127 | Judgement of the CJEU, C-791/19, Paras. 196–197.
128 | Judgement of the CJEU, C-791/19, Para. 198.

complaint cannot in any way preclude a finding that the concerned Member State has committed infringement[129] by ignoring the referred principles.[130] Second, in the interpretation of the CJEU, the relevant Polish legislation does not ensure the independence of ordinary courts because the cases cannot be heard within a reasonable time limit. The fact that, so far, no new disciplinary officer has been appointed by the Minister of Justice after a final decision has no relevance in this respect; the adoption of the legislation in itself gives rise to the infringement[131] on the part of the Member State.[132]

The right to be heard is also part of the right to defence, which, however, is not an absolute right,[133] meaning that it can be limited by case law. The CJEU found that the procedural rules at issue are liable to restrict the rights of judges against whom disciplinary proceedings have been brought to be heard effectively by the disciplinary court and to be able to benefit from an effective defence before that court.[134] The CJEU further held that, contrary to the Republic of Poland's assertions, a sufficient guarantee does not follow either from the fact that the relevant provisions specify that the disciplinary court is to conduct the proceedings only if this is not contrary[135] to the interests of those proceedings, or from the fact that they provide that, when it serves the summons to appear, the disciplinary tribunal is to invite the accused judge to provide explanations[136] in writing and all the evidence that he or she considers useful.[137]

In its fifth complaint, the European Commission argued that, as evidenced by the jurisprudence, the relevant Polish provisions may expose a judge to disciplinary

129 | With this finding, the CJEU certainly disregarded the possibility of considering the principle of *ne bis in idem* referred to by the Polish government, which is also applied in national and EU law. This means that legally closed proceedings cannot be restarted in practice nor under Polish law.
130 | Judgement of the CJEU, C-791/19, Para. 199.
131 | Judgement of the CJEU, C-791/19, Paras. 201–202.
132 | It must be emphasised that, in the interpretation of the CJEU under the present circumstances, the mere possibility that the Minister of Justice may appoint a new disciplinary commissioner after the final decision is made jeopardises the courts' independence. This is despite the fact that the CJEU also acknowledged that such a case did not occur in practice, and according to Polish law, such a decision would be contrary to the principle of *ne bis in idem*. However, it is unclear to us to what extent this finding was influenced by the circumstances of the given procedure, as well as by the complaints formulated by the European Commission and recognised by the CJEU.
133 | Judgement of the CJEU, C-719/19, Para. 207.
134 | Judgement of the CJEU, C-791/19, Para. 210.
135 | Sec. 3 of Art. 115a of the Law on ordinary courts.
136 | The CJEU did not explain in detail why the legal provisions put forward by the government in question are not suitable for ensuring the right to defence of the judges involved in the proceedings. In the following paragraphs, the CJEU indicated that the examined provisions, or their absence, should be regarded as shortcomings in the system of judge liability, which could entail the risk that, owing to the violation of the right to defence, the said system could be subject to political control over court decisions. In this regard, the discretion of the disciplinary court regarding the interests related to the procedure was not considered adequate by the CJEU. A clearer legal provision most likely would have met the criteria established by Art. 19 (1) TEU.
137 | Judgement of the CJEU, C-791/19, Para. 211.

proceedings upon the adoption of a decision to submit a request for a preliminary ruling to the CJEU. According to the European Commission, if proceedings are initiated against judges participating in a preliminary ruling procedure, it may deter them from participating in this procedure and violate their independence. In its defence, the Republic of Poland explained that a clear distinction is drawn between two procedural stages: the first part represents an investigation stage, which is not initiated in respect of a particular person, while the second part represents a disciplinary procedure in the actual sense, which can be initiated based on the result of the first stage.

The CJEU emphasised that in its settled case law, the keystone of the judicial system established by the Treaties is the preliminary ruling procedure. The widest discretion of national courts is of particular significance in the preliminary ruling procedure, implying that Member State legislation must safeguard that national courts are not hindered in exercising their rights and fulfilling their obligations related to the preliminary ruling.[138] Consequently, in the interpretation of the CJEU, national law provisions which expose national judges to disciplinary proceedings as a result of the fact that they have made a reference for a preliminary ruling to the CJEU are incompatible with EU law, and the protection from such practice constitutes a guarantee that is essential to judicial independence.[139] The CJEU upheld the first objection, according to which the Polish legislation at issue concerning the courts does not meet the requirements of Art. 19 TEU; that is, it does not adequately ensure the protection of the courts against political pressure, and this risk covers also the orders rendered in the framework of requests for preliminary ruling.[140] In the interpretation of the CJEU, the aforementioned investigations, initiated against judges participating in preliminary ruling procedures, underpin the risk of political pressure on judges.[141] In this respect, the arguments of the Polish government, according to which the investigative and disciplinary phases must be separated, are irrelevant.

6. Summary

Although not the primary analysis in this paper, as indicated in the title, it is definitely justified to examine how the limits of the Member States' institutional autonomy are set by EU law, that is, the case law of the CJEU. It is also important to clarify whether the related far-reaching change in case law was formulated in the judgements related to the examined Member States, or whether it had additional precursors. It is worth briefly addressing the reasons underlying this change and the questions about its necessity.

138 | Judgement of the CJEU, C-791/19, Paras. 223–225.
139 | Judgement of the CJEU, C-791/19, Paras. 226–227.
140 | Judgement of the CJEU, C-791/19, Paras. 229–230.
141 | Judgement of the CJEU, C-791/19, Para. 231.

As mentioned, prior to setting the limits of the institutional autonomy of Member States, the CJEU essentially defined the concept of national court on the basis of Art. 267 of the TFEU, namely the preliminary ruling procedure. It also refrained from developing any control criteria related to the judicial systems of Member States. Pursuant to this practice—which, by the way, remains relevant after the limits of institutional autonomy are set with regard to the admissibility of questions formulated by Member State courts in the preliminary ruling procedure—a body that was created on the basis of legislation, operates on a permanent basis, has mandatory powers, is independent, and its procedure is adversarial, qualifies as a national court. Importantly, the CJEU 'gave a preferential treatment' to the judicial systems of the Member States in other areas as well. The question arises as to what factors may have contributed to the CJEU having altered its case law regarding the judicial system of Member States. In our opinion, it is important to implement[142] EU law in this area of integration built on the internal market,[143] otherwise economic conflicts of interest could mean the end of integration.[144]

The infringement procedure initiated by the European Commission has not proven to be a sufficient tool for EU law implementation. Instead, practice shows that the preliminary ruling procedure, despite having been originally intended to ensure a uniform interpretation of EU law, plays a significant role in EU law implementation.[145] In the preliminary ruling procedure, national courts play a central role as the procedure takes place from judge to judge. Even today, courts adjudicating at last instance dispense with their obligation to request a preliminary ruling procedure,[146] ignoring the criteria established in the Cilfit case. The question arises as to whether the intent to remedy this problem could have led the CJEU to change its case law regarding the limitations of the institutional autonomy of the judicial systems of Member States. This, however, is contradicted by the fact that even before the CJEU's case law, there were plenty of examples of hindrances to Member State judges requesting preliminary ruling,[147] and the literature also mentions situations where the founding Member States prevented their judges from referring cases to the CJEU in areas they found important.

The assumption that the disputes between the Member States under our examination and the EU could have led the CJEU to limit the institutional autonomy

142 | Importantly, in addition to the rules of the internal market, the last decade saw consumer protection and the combat against unfair contract terms 'catch up' with the practice of the CJEU. Still, this is demonstrably not an essential condition for the continuation of integration, since this area did not appear prominently in the legal order of the European Union for decades.

143 | The special importance of the internal market is also tangible in relation to the judgements in the Köbler and Traghetti cases; the former is not classified as a sufficiently serious violation, but is more likely linked to EU citizenship; the latter related to prohibited state aid, which caused other companies to go bankrupt.

144 | This approach appeared in the judgement of CJEU in the Köbler case, where the CJEU found that the implementation of EU law in the law of Member States can be considered as a *sine qua non* condition for integration continuation.

145 | Simon, 2001, p. 662.

146 | Naomé, 2001, p. 219.

147 | Broberg and Fenger, 2010, pp. 861–885.

of the judiciary[148] is not supported by the earlier CJEU case law in that regard. At this point, it is worth briefly recalling the jurisprudence establishing the limits of institutional autonomy. The judgement handed down by the CJEU in the Achmea case had a very serious impact on arbitration clauses within the EU; the evasive arbitration clauses that hindered the initiation of the preliminary ruling procedure did not prove to be compatible with EU law. However, this had little effect on the institutional autonomy of Member States. The judgement in the Minister for Justice and Equality case concerned a European arrest warrant; the CJEU considered the findings related to the independence of the judiciary of the given Member State based on Art. 7 of the TEU. Since the case concerned the implementation of a secondary EU legal act, this judgement does not yet cover all national courts that could potentially apply or interpret EU law.

Thus, it is clear that one of the most important decisions regarding the limitation of Member States' institutional autonomy in the judicial field is the judgement in the ASJP case. In this case, the Portuguese legislature periodically reduced the salaries of public sector workers, and the remuneration of the judges of the Court of Auditors was also reduced according to this framework. In the interpretation of the CJEU, the Member States must ensure, inter alia, the courts' independence, which is closely related to the right to apply to a court as enshrined in Art. 47 of the Charter. In its judgement, the CJEU established that the independence of the courts presupposes that the judicial duties can be exercised in a completely autonomous manner, hence excluding any hierarchical relationship (i.e. the possibility that the judge is subordinate to anyone or can receive instructions from anywhere). Adherence to these criteria provides protection for the members of the judiciary against external influence or pressure that could affect their independence. In the interpretation of the CJEU, one of the preconditions for the courts' independence is to grant remuneration to judges at a level that corresponds to the activity they perform. However, the CJEU emphasised that in the ASJP case, the reduction of salaries cannot be assessed as being capable of undermining the independence of the court in question under certain circumstances. The judgement clearly separated itself from the preliminary ruling procedure, and the safeguards to be provided for that procedure. This ruling clearly affects the institutional autonomy of Member States.

Undoubtedly, important judgements have been made in the area analysed by this study in relation to the Member States under scrutiny and mentioned in the title. Nonetheless, there are significant differences in the examined judgements. The decisions related to Hungary and Romania resulted from preliminary ruling procedures; in addition, the judgement resulting from the Hungary-related case concerned an EU directive, implying that the CJEU did not examine a court potentially applying and interpreting EU law. Meanwhile, the European Commission's decision played a role in the ruling related to Romania, which included the

148 | The judgement handed down by the CJEU in the Achmea case had a very serious impact on arbitration clauses within the EU. The evasive arbitration clauses that hindered the initiation of the preliminary ruling procedure did not prove to be compatible with EU law. Nonetheless, this case had little effect on the institutional autonomy of Member States.

commitments related to the administration of justice undertaken upon accession to the EU. The procedures resulting in the judgements related to Poland were initiated by the European Commission, and as a result and due to the nature of such proceedings, the CJEU gave a more definite answer, and the court of the participating Member State[149] had fewer opportunities for assessment based on the criteria established by the CJEU. No procedure according to Art. 7 TEU is pending against Romania, which, in the case of the other examined Member States and based on the judgements of the European Court of Justice, did not constitute an obstacle to the judgements resulting from the preliminary ruling procedure or from the infringement procedure.

In the judgement rendered in the Commission v Republic of Poland case, the CJEU examined the discretionary power of the President of the Republic regarding the retirement of judges and the extension of their service period, which were both affected by the provision at issue. The CJEU judgement marked a change of the case law because, in earlier decisions, the retirement of judges could be regarded as a legitimate goal with regard to provisions of discrimination based on age, and reducing the independence of an organisation could violate EU law. In the decision under examination concerning Hungary, nonetheless, the body at issue was established on the basis of EU law. After this decision, the Member State legislature must consider the principles of impartiality and irremovability of judges in the event of implementing similar measures, and the CJEU's case law established in this area must be considered when justifying the national measures in question. Regarding the discretion of the President of the Republic, the Member States may still allow the extension of the service period of judges, but they must do so in such a way that it cannot jeopardise the independence and impartiality of the judges, and the exclusion of direct influence must be ensured. In the case under examination, according to the CJEU's reasoning, the national provisions at issue do not meet the criteria established by Art. 19 TEU owing to the broad discretion of the President of the Republic and the lack of judicial review. In our opinion, it is not clear to what extent the procedure was initiated on the basis of Art. 7 TEU and the report of the so-called Venice Commission had an influence on EU court decisions.

According to the judgement in the second Commission v Republic of Poland case, the establishment of a disciplinary board related to Polish courts did not meet the criteria set by EU law. Although the CJEU recognised that the independence of the established council is ensured by several factors, and that the participation of the executive power in itself does not constitute a factor that fundamentally affects the independence of the courts, it also established that the national measures cannot cause the neutrality of the judges to be impaired, nor can they raise doubts in individuals regarding the courts' neutrality. The CJEU ruled that the possibility of being brought before a disciplinary committee whose independence is not guaranteed is in itself capable of undermining the independence of the courts. The European Commission also complained that a disciplinary offence

149 | At the same time, the *erga omnes* scope of judgements resulting from infringement procedures is somewhat different compared to judgements resulting from preliminary ruling procedures.

determined on the basis of the relevant legislation can be established for a judge erring in interpreting the law, and as a result, the established liability system can also be used to exert political pressure. In the interpretation of the CJEU, Member States can operate a disciplinary system, but it must be borne in mind that the system cannot give rise to legitimate doubts in individuals regarding the courts' impartiality. In the interpretation of the CJEU, according to EU law requirements, a judge's disciplinary responsibility cannot be established solely on the basis of their activities related to legislation interpretation and evidence assessment. The CJEU further found that the Polish regulation did not meet the criteria established by EU law because proceedings were initiated against a judge in relation to a preliminary ruling procedure. In the CJEU's interpretation, the infringement on the part of the Member State can be established regardless of whether it occurred during the investigation phase, which cannot yet be interpreted as an actual disciplinary procedure.

The CJEU also accepted the Commission's argument that the right to defence of a judge subject to the procedure and the principle of reasonable doubt are violated in Poland, since the Minister of Justice can initiate a new procedure after the conclusion of the procedure. This was despite the Polish government contending that this reading has never been verified in practice, and that the principle of *ne bis in idem* in Polish law precludes a fresh action in the same case.

In the CJEU judgement regarding Romania, a significant role was played by compliance with the commitment, undertaken upon the accession of the Member State to the EU, to the gradual elimination of deficiencies related, inter alia, to the judiciary's functioning. The examined legislation allows for the temporary assignment of the heads of the bodies entrusted with the conduct of disciplinary proceedings against judges and prosecutors, in which case the criteria required by law do not have to be complied with. In the interpretation of the CJEU, it is for the acting national court to examine whether the regulation actually allows temporary appointments that do not meet the criteria defined by legislation, or whether it is used for political control over the judiciary. According to the CJEU, it is also for the referred jurisdiction of the acting Member State court to establish whether the government uses the possibility that the Ministry decides on the claim for indemnity brought against a judge for political pressure on the judiciary, and whether the judge's right to defence is violated by the provision prescribing that a hearing may take place in their absence.

The CJEU judgement regarding Hungary has little to do with the limitation of institutional autonomy, but rather is a continuation and expansion of the case law that has existed for decades. The effort here was to eliminate Member State measures that prevent the acting national court from referring questions to the European Court of Justice in a preliminary ruling procedure. It is also a decades-old practice to apply the principle of direct effect and the primacy enjoyed by EU law over Member State law, which in this case required not dispensing with the application of a piece of law but that of a judicial decision.

With regard to the limitation of the institutional autonomy of Member State judicial system by EU law as established by the CJEU, in the two judgements under examination related to Poland, Art. 19 (1) TEU requires the neutrality and

impartiality of the courts, but does not require the national courts concerned to be implementing or having been established by EU law.[150] However, it remains somewhat unclear what caused the CJEU to show 'more understanding' in the above-mentioned judgement regarding Malta. Although the case law shows that the role of the executive power alone does not lead to the undermining of judge independence, according to the non-governmental organisation that expressed doubts in the main proceedings, political appointments and judicial appointments contrary to the position of the Venice Commission were also made. All of these may be suitable for raising doubts in individuals regarding the independence of judges and political control over the judiciary. At this point, it becomes difficult to understand why the CJEU found a violation of the judges' right to defence in the case related to Poland, seeing that the concerned reading of the provision at issue was not verified in practice, and that this practice was in fact not allowed by the principle of *ne bis in idem* applied also in Polish law.

In the case of Romania, it is also not entirely clear why would it be 'for the acting national' court to decide—especially considering the criteria set for the area at the time of accession—the question of whether the judges' right to defence is violated if they are not heard in certain cases, and whether the independence of the courts is infringed if the head of the body conducting the disciplinary proceedings of judges can be appointed on a temporary basis; that is, disregarding the criteria set out in the legislation. Moreover, it remains uncertain why the independence of the courts is not necessarily infringed if the initiation of the indemnity procedure against a judge is essentially decided by the Ministry.

The limitation of the institutional autonomy of Member States by the CJEU does not necessarily mean that the CJEU broke with its decades-long practice of showing the utmost respect vis-á-vis Member State courts and the related institutional issues. This legal development can also be interpreted, most likely in accordance with the CJEU's intentions, as the CJEU striving to 'protect' Member State courts from potential attempts of pressure by the executive power, the legislature, or the head of state.

Based on the above, it cannot be concluded that the case law of the CJEU aimed at limiting the institutional autonomy of Member States would have been absolutely necessary from the point of view of EU law,[151] as we have seen, for example, with the Köbler formula, and the case law did not indicate this either. The

150 | It is clear that the establishment of Member State courts is based on the law of the Member State, and this area falls within the Member States' competence, even if they must bear in mind the requirements imposed by the EU legal order. This legal development is to be pointed out, as the criteria laid down by EU law must also be observed in the case of courts established by Member State law, and not only in the case of an authority required by an EU regulation and established in its implementation.

151 | At developing this statement, we started from the fact that in order for the internal market to survive, a tool facilitating EU law implementation in internal law is absolutely necessary. However, if the centre of gravity of integration in the future is no longer the internal market and the economy, but the interpretation of values such as the rule of law by the CJEU and the European Convention on Human Rights, this legal development can also be identified as a fundamental element.

examination of future decisions is necessary to answer questions surrounding this area. As to the current situation, it is difficult to draw *erga omnes*-type conclusions, since the role that the CJEU manifested of engaging in case-by-case decisions can be of key importance in deciding individual cases compared to other areas.

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