Judicial Defense: The Mobilization of the Rule of Law by Member State Courts following *ASJP*

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Abstract

The recent case-law of the Court of Justice of the EU, starting with the 2018 *Portuguese Judges* case, has signaled a near revolutionary shift in the role that the value of the rule of law under Art. 2 TEU has in the EU legal order. By operationalizing those values through more concrete provisions, such as Article 19 TEU and Article 47 CFR, the Court has opened up the possibility for the review of provisions relating to the national judicial organization, in light of EU law. By operationalizing the rule of law in the EU legal order, the Court has created the ground upon several judicial dynamics have developed. Besides the continued importance of the Commission in this "Rule of Law Debate", Member State courts and judiciaries have increasingly become involved. It is precisely these dynamics, which have unfolded through the preliminary reference procedure, that this thesis identifies and defines. Increasingly, one can see Member State courts engaging in judicial self-defense, by attempting to challenge either national legislation concerning the judiciary, or the independence of courts in the judiciary. Further, Member States are beginning to engage in horizontal policing, where the compliance of courts or the legal system of one Member State is challenged by another Member State's courts. These developments empower Member State judiciaries, which are under threat by legislatures or executives, to rely on EU law and especially Art. 2 TEU, as a last shield in their defense against being captured. Further, more critically, these developments substantially increase the power of the CJEU, and raise pertinent questions on how this new case-law can be limited, so as to guarantee its effectiveness, while shielding it from abuse. Further, this thesis highlights how these developments shape the meaning of the rule of law within the legal order and how dynamics originating in the Member States can have a profound impact on EU law itself. Finally, it raises questions as to the possible future applicability of the rule of law to the EU itself, as an increasingly utilized and well-defined concept of the rule of law should be applicable at all levels of a legal system.

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Chapter 1

Introduction

Since the landmark *Les Verts*[1] judgment of the Court of Justice of the European Union (CJEU), in which it described the European Community as *"a Community based on the rule of law",* the question of what the rule of law means in the EU-setting has gained in importance. Following the introduction through the CJEU, the rule of law has been included in the Treaties as a fundamental "*value"* of the EU.[2] However, the concrete meaning of the rule of law or its possible legal effects in the EU legal order were left unresolved. The fact that there exists a diverse range of iterations of the concept on the national level, also has not helped clarify an EU rule of law.

When considering national constitutional concepts of the rule of law, a broad range of national conceptions can be identified. The German conception of *Rechtsstaat* has seen considerable changes following its abuse by the Nazi regime. Prior to WWII, Germany was an example of a purely formalistic and positivistic conception of the rule of law. Following WWII, Germany has placed great emphasis on human rights as being part of its definition of *Rechtsstaat*, thus taking on a substantive definition of the rule of law.[3] Further, Germany created a strong constitutional court, meant to police and ensure the *Rechtsstaat.* The Dutch system on the other hand, does not even recognize constitutional review of legislation by its highest court.[4] The French conception was similarly shaped by historical context, which saw post-revolution France go through 5 constitutions in 15 years.[5] Similarly, it was only in 2010 that the *Conseil constitutionnel* gained the power to perform constitutional review,[6] before that it was only

[1] C-294/83 *Parti écologiste "Les Verts" v European Parliament.* [1983] ECR 1986 -01339;
Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities. (Kadi)* [2009] ECR I-06351, para. 281
[2]Article 2 *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* [2012] OJ C 326/01;
Preamble *Treaty on European Union* [1992] OJ C 191/01*;*
Art. 6(1) *Treaty establishing the European Community* [2002] OJ C 325/33:
[3] Martin Loughlin, "Rechtsstaat, Rule of Law, l'Etat de Droit," in *Foundations of Public Law* (Oxford University Press, 2010), pg. 321
[4] Jurgen de Poorter, "Constitutional Review in the Netherlands: A Joint Responsibility," *Utrecht Law Review* 9, no. 2 (March 25, 2013), pg. 89–105
[5] Laurent Pech, "Rule of Law in France," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, September 10, 2006), pg. 7
[6] Otto Pfersmann, "Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective," *European Constitutional Law Review* 6, no. 2 (June 2010), pg. 223–48

possible *a priori.*[7] The new Eastern and Central European MS also showcase some diversity in the concept, with the Czech Constitutional Court favoring a material, content, and value driven interpretation of the rule of law, while the Croatian Constitutional Court for example combines a formalistic and material conception.[8] These examples are a short illustration of how these concepts, which can be said to have a common goal, unfold within their own national context.[9]

This diversity makes it rather difficult to come up with a common EU rule of law concept. On the other hand, its flexibility allows the concept to enjoy such broad consensus.[10] It is this undefined nature of the rule of law as a value, which is not judicially enforceable, that has played a key role in the ongoing democratic backsliding in several EU MS. In what has been termed the *"Copenhagen Dilemma",*[11] the EU has recently experienced several MS regressing in their rule of law standards, to a point their admission to the EU would be impossible. The diverse nature of the value of the rule of law and its vagueness, has allowed some MS to exploit this lacuna. This has created a tension between the need for the EU to more clearly formulate its own conception of the rule of law and the difficulty in finding a concept which pays sufficient respect to national iterations of the rule of law. It is in light of these considerations that a "*Rule of Law Debate*" [12] has been ongoing in the EU.

Different actors are involved in this "*Rule of Law Debate*". The European Commission, in its role as the *Guardian of the Treaties*, has usually taken a more active stance towards defining

[7] Op. Cit. Pech (2006), pg. 32
[8] Angela Di Gregorio, "Constitutional Courts and the Rule of Law in the New EU Member States," *Review of Central and East European Law* 44, no. 2 (June 11, 2019), pg. 206
[9] N. W. Barber, "The Rechtsstaat and the Rule of Law," ed. A. Jacobson and B. Schlink, *The University of Toronto Law Journal* 53, no. 4 (2003): 443–54;
Giovanni Cogliandro, "Lo Stato Di Diritto. Dibattiti Teorici e Analisi Funzionale" (PhD Thesis, Rome, L'Università degli Studi Roma Tre, 2009);
Rainer Grote, "Rule of Law, Rechtsstaat y État de Droit," *Pensamiento Constitucional* 8 (2002): 127–76; Op. Cit. Loughlin (2010)
[10] Simon Chesterman, "An International Rule of Law?," *The American Journal of Comparative Law* 56, no. 2 (2008): pg. 332
[11] European Parliament (2012), Plenary debate on the political situation in Romania, statement by V. Reding, 12 September 2012:
> *"Once this Member State has joined the European Union, we appear not to have any instrument to see whether the rule of law and the independence of the judiciary still command respect"*

[12] Dimitry Kochenov, Amichai Magen, and Laurent Pech, "Introduction: The Great Rule of Law Debate in the EU," *JCMS: Journal of Common Market Studies* 54, no. 5 (2016): 1045–49;
Amichai Magen, "Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU," *JCMS: Journal of Common Market Studies* 54, no. 5 (2016): 1050–61;
Fernandez Esteban and Maria Luisa, *The Rule of Law in the European Constitution* (Kluwer Law International, 1999)

the rule of law.[13] Further, through the infringement procedure under Art. 258 TFEU, it plays an integral role in securing rule of law compliance. [14] However, the Commission's recent failure to act under President von der Leyen has come under fire from the European Parliament,[15] which has proven to be another important institutional actor on the EU level.[16] The Council's role in this discussion has been less than proactive, due to the various difficulties surrounding Art. 7 TEU.[17] This has sidelined the Council in the discussion concerning rule of law enforcement, as the hopes for effectively guaranteeing rule of law compliance in the EU have shifted to other actors.

Finally, the Member States themselves play an important and active role in this debate. First, MS constitutions are essential in the discussion, which centers around the interplay between EU law and national constitutional law. The tension between Art. 2 and Art. 4(2) TEU, as well as the concept of EU law supremacy are also significant. An EU rule of law concept must be accepted by an overwhelming majority of MS for it to be effective. Further, MS executives may find themselves on the receiving end of an infringement procedure and thus thrust into the discussion surrounding the rule of law in the EU. Importantly, MS judiciaries have increasingly

[13] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions , COM/2020/580, *2020 Rule of Law Report: The rule of law situation in the European Union;*
for a definition of the rule of law by the Commission see: Communication from the Commission to the European Parliament and the Council, COM/2014/0158, *A new Framework to strengthen the Rule of Law*/

[14] For a thorough overview/analysis of the Commission's infringement procedures see: Dimitry Kochenov and Laurent Pech, 'Respect for the Rule of Law in the Case Law of the Court of Justice of the EU: A Casebook Assessment of Key Judgments since the Portuguese Judges Ruling' (Swedish Institute for European Policy Studies (Forthcoming)).

[15] European Parliament. *"Rule of Law: Parliament Prepares to Sue Commission for Failure to Act."* News release, June 10, 2021. News EU Parliament. Accessed June 10, 2021. https://www.europarl.europa.eu/news/en/press-room/20210604IPR05528/rule-of-law-parliament-prepares-to-sue-commission-for-failure-to-act.

[16]Judith Sargentini, "European Parliament Report on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded," 2017/2131(INL) (2018);
"Massive MEP Majority for Better Rule-of-Law Mechanism," EUobserver, accessed April 2, 2021, https://euobserver.com/political/149680;
Maurits J. Meijers and Harmen van der Veer, "MEP Responses to Democratic Backsliding in Hungary and Poland. An Analysis of Agenda-Setting and Voting Behaviour," *JCMS: Journal of Common Market Studies* 57, no. 4 (2019), pg. 838–56

[17] Leonard F. M. Besselink, "The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, January 15, 2016);
Bojan Bugarič, "Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism," in *Reinforcing Rule Fo Law Oversight in the EUropean Union*, ed. Dimitry Kochenov and Carlos Closa, 1st ed., 2016;
Iuliana-Mădălina Larion, "Protecting EU values. A Juridical look at Article 7 TEU," *LESIJ - Lex ET Scientia International Journal* XXV, no. 2 (2018);
Günter Wilms, *Protecting Fundamental Values in the European Union through the Rule of Law : Articles 2 and 7 TEU from a Legal, Historical and Comparative Angle* (European University Institute, Robert Schuman Centre for Advanced Studies, 2017)

gotten involved in the discussion. They have done so either because their own system is under threat, or some even intervene in cases concerning other MS. Here, both the threat posed by executive/legislative interference in the judiciary, as well as the active participation in an ongoing pan-European constitutional discussion, are important reasons for MS courts involvement.

The fact that the EU's approach to democratic backsliding in the MS has recently focused on the independence of the judiciary and the concept of judicial protection, is another important factor, which underpins this research. In that sense, the challenges to the rule of law in some MS, such as the judicial reforms in Poland, Hungary, or Romania, can be seen as a driving force in the elaboration of an EU rule of law concept. It is here, that the influence of certain MS systems and constitutions may be greatest, even if the effects are contrary to the wishes of the MS concerned. This thesis seeks to illustrate how this particular EU rule of law concept, which due to the ongoing developments in some MS has a judicial independence focus,[18] has empowered MS courts to become key actors in the "Rule of Law Debate".[19] In that sense the EU conception of the rule of law is different to the above-mentioned national ones. The key operational aspects of the EU rule of law concept are focused on judicial independence and effective judicial protection. Further, the enforcement is increasingly done through a diffuse and multi-level network of *EU* courts. This underlying comparative view of the rule of law in the EU as particularly focused on the judiciary is vital to understanding the possibly far-reaching consequences of the dynamics that this paper will introduce.

Through this judicialization of the rule of law, the CJEU has become the central actor in the development of this concept. Further, the Court is particularly concerned with develoments contrary to the rule of law, as the impact of democratic backsliding in one MS and the negative consequences this has on its judicial system, have a noticeable impact on the EU legal order itself.[20] Here, the constitutional court nature of the CJEU becomes apparent and the analysis of the dynamics identified in this paper can be seen as an analysis of the EU legal order in these

[18] R. Daniel Kelemen and Michael Blauberger, "Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU," *Journal of European Public Policy* 24, no. 3 (2017)
[19] This author is aware of the criticisms regarding the empowerment hypothesis concerning the CJEU's supremacy case-law, however the dynamics highlighted in this paper represent a different case: Tommaso Pavone and R. Daniel Kelemen, "The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited," *European Law Journal* 25, no. 4 (July 2019), pg. 352–73
[20] R Daniel Kelemen, "Is Differentiation Possible in Rule of Law?," *Comparative European Politics Volume* 17 (2019), pg. 246–60

constitutional terms. The CJEU, realizing the challenges which rule of law deficiencies in the EU could pose and possibly seeing an opportunity for increasing its powers,[21] has taken up this task.

This thesis makes use of preliminary questions referred to by MS courts, making use of the revolutionary *Portuguese Judges* (*ASJP*) Case.[22] In the past 2 years, MS courts have made over 65 preliminary references which have touched on the *ASJP* case-law.[23] By building on the general case-law of the CJEU, as well as the arguments raised by the Advocate Generals, and scholars, this paper will highlight how the operationalization of Art. 2 TEU, through Art. 19 TEU and Art. 47 CFR, has enabled MS courts to mobilize these concepts and take a proactive approach in defending the rule of law. Unfortunately, it seems that change on the ground in Poland and Hungary is still difficult to achieve. Nevertheless, this should not detract from the fact that this case-law represents a substantial change to the rule of law paradigm in the EU.[24]

In the course of the post-*ASJP* case-law, several dynamics have been identified and highlighted in this thesis. Looking at the preliminary references to be analyzed in this paper, Poland and Romania stick out, with a large number of references concerning the rule of law and the independence of the judiciary. This underlines the central nature of constitutional and systemic questions inside the MS, which give rise to the dynamics to be identified. The assessment of national provisions concerning the organization of the judiciary, be they ordinary or constitutional, plays a crucial role in these cases of judicial self-defense, where constitutional and systemic issues and concerns over the independence of another court or the referring court's independence itself, are of concern. Another dynamic, which this thesis will highlight is that of horizontal rule of law policing. Here, one can see a MS court question the independence of a court from another MS all together. Further, a few cases, which do not deal with systemic threats or with direct concerns regarding the effective judicial protection in the case at hand, will be critically assessed. Here, the limits of EU law's impact on national constitutional orders can be explored. All of these cases represent novel dynamics evolving from this case-law, while also bringing back arguments raised concerning the strategic use of

[21] Dimitry Kochenov, "Rule of Law as a Tool to Claim Supremacy," Working Paper No. 9 (Reconnect, 2020)
[22] C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* (*ASJP*) [2018] ECLI:EU:C:2018:117
[23] See Appendix for cases and data collection.
[24] Op. Cit. Kochenov (2020), pg. 5

EU law by MS courts.[25] Under the broader framework of seeing MS courts as strategic actors, these cases can reveal important and interesting dynamics in the way in which EU law can be used at the national level, to strengthen judicial independence and the rule of law. Through that having a considerable impact on the constitutional systems of the MS.

[25] Walter Mattli and Anne-Marie Slaughter, "Revisiting the European Court of Justice," *International Organization* 52, no. 1 (1998), pg. 177–209;
J H H Weiler, "The Transformation of Europe," *The Yale Law Journal* 100 (1991), pg. 82;
K.J. Alter, "The European Court's Political Power," *West European Politics* 19, no. 3 (1996), pg. 458–87

Chapter 2

Merging the Tracks: Operationalizing the Rule of Law in *ASJP*

The *concrete expression* logic of the CJEU, developed in *ASJP*, as well as the Commission's use of this new case-law, have already been extensively analyzed.[26] However, the effects of this new case-law inside the MS constitutional systems and the use of it by MS courts to engage in judicial defense, has not yet been studied in detail. Further, the active engagement of a diverse range of MS courts, will lead to a more comprehensive and diverse discussion surrounding the rule of law in the EU. The CJEU, as well as MS courts, could thus help establish a more concrete and defined basis of the rule of law in EU law, which in turn could lead to a stronger and more independent concept of the rule of law in the EU.

Starting with *ASJP*, the Court has increasingly made use of other EU law provisions, especially Art. 19 TEU, to "operationalize" Art. 2 TEU. This new case-law represents an interesting development in the debate, as it indicates a step towards both a more defined concept of the rule of law, as well as not losing sight of the practicalities surrounding democratic backsliding. The CJEU has long proclaimed the foundational importance of the values enshrined in Art. 2 TEU[27] and in *ASJP* it built on this logic, in order to establish the connection between Art. 19 TEU and Art. 2 TEU, holding:

> *"Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, (...)".*[28]

With this *concrete expression* linkage, the CJEU created a logic in which both Art. 2 TEU and Art. 19 TEU reinforce each other and lead to their mutual amplification[29] and established the foundation of the judicial operationalization of Art. 2 TEU through other provisions.[30]

[26] Op. Cit. Kochenov & Pech (Forthcoming);
Luke Dimitrios Spieker, "Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision," in *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions*, by Armin von Bogdandy et al., vol. 298, Beiträge Zum Ausländischen Öffentlichen Recht Und Völkerrecht (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: Springer, 2021).
[27] Opinion 2/13 of the Court [2020] ECLI:EU:C:2014:2454
[28] Op. Cit. *ASJP* Case, para. 32
[29] Op. Cit. Spieker (2021), pg. 251.
[30] Ibid. pg. 250

Much has already been written about this elevating logic and this thesis will build on this work.[31] Essentially, Art. 2 TEU, was operationalized and given legal effect, when it is considered in conjunction with Art. 19 TEU, which provides the necessary specificity, for the rule of law to be an applicable and measurable metric in legal proceedings. Art. 19 TEU, on the other hand, is amplified by the unlimited scope of application of Art. 2 TEU. Since Art. 2 TEU is explicitly applicable to all situations, regardless of their link to EU law, Art. 19 TEU's scope of applicability is amplified.[32] The fact that the Court chose to go down this route of operationalizing Art. 2 TEU and especially doing so based on Art. 19 TEU can be described as nothing short but revolutionary.

When considering the concept of effective judicial protection in EU law, the Court has repeatedly held that Art. 47 CFR and Art. 19 TEU are the most relevant provision, as they are concrete codifications of this principle. The Court of Justice, in an interpretation which went against the opinion of AG Saugmandsgaard Øe,[33] held that Art. 47 CFR and Art. 19 TEU essentially contain the same principle.[34] However, some differences between the two provisions remain. Art. 47 CFR can be seen as aimed providing a right to individuals, who can rely on it in cases directly relating to EU law. Thus, Art. 47 CFR ensures protection in concrete cases with individuals who can make use of a specific EU law provision.[35] Art. 19(1) TEU, on the other hand, takes a more institutional and systemic approach. This leads to the possibility of an abstract review of judicial organization in the Member States.

Another important contrast between Art. 19(1) TEU and Art. 47 CFR, which explains the importance of *ASJP*, is their scope of applicability. Art. 47 CFR is applicable in situations where a Member State is *implementing* EU law within the meaning of Art. 51(1) CFR. A combination of an *activating* EU law measure, and the Charter, thus creates a very solid but limited basis for actions against Member States. Recently, with the democratic backsliding in some Member States, the question of what to do in situations where a Member State is not implementing specific EU law provisions, which nevertheless has a negative impact on the EU legal order, has come up. Especially some recent cases, which have dealt with systemic

[31] Ibid.; Op. Cit. Kochenov & Pech (Forthcoming)
[32] For a description of this mutual amplification process, see: Op. cit. Spieker (2021), pg. 250-253
[33] Op. Cit. *ASJP* Opinion of AG Saugmandsgaard Øe [2017] ECLI:EU:C:2017:395
[34] Op. Cit. *ASJP*
[35] Michał Krajewski, "Associação Sindical Dos Juízes Portugueses: The Court of Justice and Athena's Dilemma," *European Papers* 3, no. 1 (2018), pg. 404

deficiencies in a Member State, have illustrated limitations of individual and concrete review of MS compliance. The reality is, that situations exists, in which no single deficiency rises to the level of an individual infringement, or which concern purely internal situations. These situations can represent a danger to the rule of law and thus to the EU legal order, just as much as situations which would fall under the more limited scope of Art. 47 CFR. Here, a more systemic view, which seeks to see both the forest and the trees, is necessary. Considering all of the various provisions at play, as well as their combined effect, can reveal considerable infringements of EU law provisions and principles.

Finally, the connection between Art. 19(1) TEU and Art. 47 CFR, plays a fundamental role in defining the concept of the rule of law in the context of EU law. Through the connection to Art. 47 CFR, the CJEU has explored the possibility of linking these provisions to Art. 6 and 13 ECHR,[36] and through that to the case-law on judicial independence of the ECtHR.[37] It is precisely the combination of a better-grounded definition of the concept of the rule of law with a view on its applicability and enforcement, which has improved the rule of law "train" in the EU. However, this judicial focus can also seen as limiting the concept of the rule of law compared to other national concepts of it.

The justification for the broad scope or applicability of Art. 19(1) TEU is based on both functional and axiological reasoning.[38] The axiological reasoning is based on the premise of the fundamental importance of Art. 2 TEU values to the EU legal order. Given their foundational character, arrangements vital to the functioning of the EU legal order, such as mutual trust, would be threatened. When considering the principle of effective judicial protection and the dual nature of Member State courts as both national courts and as *EU* courts, the functional justification of a broad reading becomes clear. Art. 19(1) TEU is applicable to all courts or judges who:

> *"are likely to exercise their judicial activity in areas* ***covered by EU law****, and therefore to act as European judges".*[39]

[36] See for example Joined Cases C-585/18, C-624/18 and C-625/18 *AK et al v Krajowa Rada Sądownictwa* (*A.K.*) [2019] ECLI:EU:C:2019:982, para. 118;
C-38/18 *Massimo Gambino and Shpetim Hyka v Procura della Repubblica presso il Tribunale di Bari and Others* [2019] ECLI:EU:C:2019:628, para. 39
[37] Joined Cases C-542/18 RX-II and C-543/18 RX-II *Simpson v Council & HG v Comm* [2020] ECLI:EU:C:2020:232, para. 73-74 and the ECHR case-law cited therein
[38] Op. Cit. Spieker (2021) pg. 248
[39] Op. Cit. *ASJP* Opinion of AG Saugmandsgaard Øe, para. 41.

It is through their nature as *EU* courts, that the organization of national courts becomes a matter of interest to EU law. [40] Through the combination of these two lines of reasoning, the CJEU effectively opened up the national judicial organization of the Member States to be reviewed in light of EU law. Further, contrary to AG Saugmandsgaard Øe's Opinion, the Court also held that Art. 19(1) TEU entails an *obligation* on the Member States, to ensure the independence of all courts adjudicating in the fields covered by EU law.[41]

Given that this thesis will focus on cases raised under the preliminary reference procedure and because of space limitations, the cases stemming from infringement procedures from the Commission will not be addressed in detail. Sufficient literature exists, which deals more specifically with those cases,[42] thus only a short sketch of the most relevant infringement proceedings against Poland will be undertaken. Following *ASJP,* the Commission has launched a total of four infringement proceedings on the basis of Art. 19(1) TEU against Poland.[43] Through the imposition of interim measures and the establishment of the possibility to issue penalty payments, these cases have strengthened the enforcement of EU law in Poland and helped empower the Commission. Further, in *Commission v Poland (Independence of the Supreme Court)*,[44] the Court reviewed, for the first time, the compatibility of MS provisions concerning the independence of the judiciary.[45] That case also strengthened the position of Art. 19(1) TEU, stressing that it is an autonomous standard, operating independent of the limitations set by Art. 51 CFR.[46] The Court confirmed this again in *Commission v Poland (Independence of the ordinary courts).*[47] In March 2021, the Commission referred its most recent case to the CJEU, where it challenges new changes to the laws organizing the national judiciary.[48] While distinct from the preliminary reference cases to be analyzed in the following chapters, as they

[40] Op. Cit. *ASJP*, para. 43;
C-824/18 *A.B., et al v. Krajowa Rada Sądownictwa* (*A.B.*) [2021] ECLI:EU:C:2021:153, para. 90
[41] Op. Cit. *ASJP*, para. 33-34
[42] Op. Cit. Kochenov & Pech (Forthcoming), pg. 18-50
[43] C-619/18 R *Commission v. Poland* (*Independence of the Supreme Court*) [2018] ECLI:EU:C:2018:910; C-192/18 - *Commission v Poland* (*Independence of ordinary courts*) [2019] ECLI:EU:C:2019:924;
C-791/19 R, *Commission v Poland* (*Independence of the Disciplinary Chamber of the Supreme Court*) [ongoing]; C-204/21 *Commission v Poland* (*"Muzzle Act"*) [ongoing]
[44] Op. Cit. *Commission v Poland* (*Independence of the Supreme Court*)
[45] Op. Cit. Kochenov & Pech (Forthcoming), pg. 39
[46] Op. Cit. *Commission v Poland (Independence of the Supreme Court)* Opinion of AG Tanchev [2019] ECLI:EU:C:2019:325, para. 58
[47] Op. Cit. *Commission v Poland (Independence of the ordinary courts)*
[48] Op. Cit. *Commission v Poland ("Muzzle Act")*

represent a different dynamic, both the infringement as well as the preliminary reference cases have elaborated on the meaning and effect of the rule of law.

The potential impact of *ASJP* was noted immediately, with the Court's President Koen Lenaerts himself highlighting the significant impact this case would have.[49] The post-*ASJP* case-law has also been much discussed in the literature and this thesis will not re-analyze the much written about aspects of these developments. Rather, as previously stated, the focus of this thesis will be on the reception and mobilization of these new developments by MS courts and how these help MS courts defend judicial independence and the rule of law in the MS constitutional systems, as well as shape the definition of the rule of law in the EU.

[49] Sébastien Platon and Laurent Pech, "Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case," *Common Market Law Review* 55, no. 6 (2018), pg. 1832;
on the role of the Court and the European legal field in general in shaping integration and the constitutionalization of Europe see: Antoine Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity*, Cambridge Studies in European Law and Policy (Cambridge: Cambridge University Press, 2015); Antoine Vauchez, "The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)," *International Political Sociology* 2, no. 2 (June 1, 2008), pg. 128–44

Chapter 3

Reviewing Legislation: Systemic Judicial Self-Defense

It is against the background of this revolutionary line of case-law, that the rule of law has taken on a substantive position within the EU legal order.[50] With the operationalization of the rule of law, we are witnessing nothing short of an entirely new trend in European constitutionalism.[51] Besides the Court of Justice and the Commission, MS courts are thrust center-stage with the new post-*ASJP* case-law. Through the preliminary reference procedure, MS courts are empowered and even *obliged*,[52] in certain situations, to check if they or other MS courts are independent courts under EU law. Further, they are called to assess the general organization of the judiciary within the MS against their compliance with the rule of law and the principle of effective judicial protection. This empowerment of MS courts, through the preliminary reference procedure is fertile ground upon which a broad range of courts have submitted preliminary references to the CJEU. Considering the ongoing rule of law crisis in the EU, this development offers an opportunity for judicial self-defense. As will be demonstrated in the following chapters, this broader dynamic of judicial self-defense, where MS courts seek to maintain their own independence, as well as that of the judiciary as a whole, against encroachments from other branches, is an important post-*ASJP* development. Besides the already mentioned function of empowering courts to engage in self-defense, it can also be seen as an important step towards the solidification of an *EU Judiciary.* At this point it is important to note that while these dynamics will be assessed individually, there exists considerable overlap between them and usually they act in concert.

Assessing national provisions concerning the organization of the judiciary, both ordinary and constitutional, in light of their compliance with EU law, often forms the basis upon which further dynamics build. It would be rare if not impossible to assess the independence of another court, without assessing the legislation establishing said court. However, this specific dynamic of assessing provisions, is broader, as it not only aims at a more specific defense against bodies masquerading as courts, but rather functions to bolster the independence of the judiciary as a whole. Thus, this dynamic is present in a broad range of MS.

[50] Op. Cit. Kochenov & Pech (Forthcoming), pg. 3
[51] Ibid. pg. 51
[52] Op. Cit. *Simpson v Council & HG v Comm,* para. 57; Op. Cit. Kochenov & Pech (Forthcoming), pg. 111

31 cases where the referring courts have sought to assess ordinary national measures concerning the organization of the judiciary, have been identified. These cases originate from nine different MS, including Poland and Romania, but also Finland or Italy. Further, in line with the concept of the primacy of EU law, MS courts are also seeking review of constitutional provisions concerning the organization of the judiciary. 18 different cases originating from 8 different countries have been identified. Naturally, considerable overlap exists between both the assessment of ordinary national provisions concerning the organization of the judiciary and constitutional provisions. Usually the reviewing of constitutional provisions takes on an auxiliary function, supporting the claims made against the ordinary provisions, in favor of a more EU law conform reading of national provisions.[53] Further, the national constitutional conception of the rule of law can be protected against encroachment by the executive/legislative through ordinary legislation. In some cases, constitutional provisions have also been challenged outright.[54]

Considering the breadth of cases, which have made use of the *ASJP* case-law, it seems advisable to draw some distinctions between different circumstances. First, we have cases which represent instances of judicial self-defense, where there is a general trend towards democratic backsliding and the systemic weakening of the independence of the judiciary. The cases *A.K.*[55] and *A.B.*,[56] represent good examples of this dynamic. These cases must be distinguished from those which aim at bolstering the position of the national judiciary, vis-à-vis other national actors, where, however, the judiciary is not under a systemic threat to its independence as such.[57] An active attitude by the judiciary, seeking to bolster and protect its independence, not waiting until the threat becomes systemic, should generally be welcomed. However, the CJEU should be careful to limit this case-law in order for it to not be coopted by MS courts, which are merely seeking to increase their power.

One of the first cases, post-*ASJP*, which saw a MS court challenge an ordinary provision concerning the organization of the judiciary, was the *Vindel* Case.[58] In a situation very similar

[53] C-256/19 *S.A.D. Maler und Anstreicher OG v Magistrat der Stadt Wien* [2020] ECLI:EU:C:2020:523
[54] C-896/19 *Repubblika v. Il-Prim Ministru* (*Repubblika*) [2021] ECLI:EU:C:2021:311
[55] Op. Cit. *A.K.*
[56] Op. Cit. *A.B.*
[57] C-272/19 *VQ v Land Hessen* (*Hessen*) [2020] ECLI:EU:C:2020:535; C-276/20 *A. G. E. v B AG* (*Erfurt*) [ongoing]
[58] C-49/18 Carlos Escribano Vindel v Ministerio de Justicia (*Vindel*) [2019] ECLI:EU:C:2019:106

to *ASJP*, the case saw the High Court of Justice of Catalonia question the compatibility of a national measure reducing the salary for judges on an unequal basis, with Art. 19(1) TEU.[59] Similar to *ASJP*, no fault was found. However, in *Vindel*, the CJEU confirms the applicability of Art. 19(1) TEU to situations falling within the scope of the *"fields covered by EU law."*[60] Further, the Court stresses that *"it is for the referring court, (…), to carry out the necessary verifications"*[61]

Similar to *ASJP*, the Court did not shy away from making its own precursory assessment of the general compatibility of the national provision and Art. 19(1) TEU. While it is the duty of the referring national court to make the final assessment inside its own legal system, it seems that the CJEU substantially guides this assessment with its recommendations. We will see a similar dynamic in the subsequent analysis the *A.K.* and *A.B.* Cases.

The assessment of national measures concerning the organization of the judiciary, in light of the MS' EU law obligations, such as in *ASJP* and *Vindel*, was already a substantial expansion of the impact of EU law. However, subsequent cases went a step further. The Court would apply a combined reading of the *ASJP* case-law, with the concepts of the primacy and effectiveness of EU law, to elevate this dynamic to a new level. In *Torubarov,*[62] the Court was confronted with a preliminary question which allowed for a first foray into this issue. The Administrative and Labor Court of Pécs raised the question, if a combined reading of Art. 47 CFR and Article 46(3) of Directive 2013/32[63] allow for the referring court to:

> *"vary that administrative decision and to substitute its own decision for that of the original administrative body that adopted it."*[64]

In this case, the focus was on the effectiveness of EU law, especially the applicant's right to an effective judicial remedy under Art. 47 CFR. More specifically, the case concerned a situation where the applicant had applied for refugee status, which was rejected by an administrative quasi-judicial body. The problem arose out of the fact, that following an appeal against the

[59] ibid. para. 61
[60] ibid. para. 62; Op. Cit. *ASJP*, para. 34
[61] Op. Cit. Vindel, para. 72
[62] C-556/17 *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal* (*Torubarov*) [2019] ECLI:EU:C:2019:626
[63] Directive 2013/32 of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180, Article 46(3)
[64] Op. Cit. *Torubarov*, para. 38

administrative body's decision, the administrative body's previous decisions was quashed, but the court had no way to control the content of future decisions by the administrative body. This would lead to a loop, where the appeal court would annul the administrative bodies decision, which would in turn issue a decision having the same effect. Thus, the national measures clearly hindered the effective judicial protection of the rights of the applicant, since he/she would be stuck in a sort of legal limbo. The CJEU would hold that any provision or ruling, which would:

> *"(…) impair the effectiveness of EU law (by) withholding from the national court (…) the power to (…) set aside national legislative provisions (…) are incompatible with those requirements, which are the very essence of EU law."*[65]

Further, the Court concluded, that these measures are not only incompatible with EU law, but that the MS court, acting also as an *EU* court, has an *obligation* to guarantee the applicant's effective judicial protection under Art. 47 CFR, varying and substituting its own decision.[66] Thus, this case-law essentially empowers MS courts to create a judicial power, which can offer a remedy for the individual concerned. This indirectly overrules, at least partially, the CJEU's previous case-law on national procedural autonomy, given that previously MS courts were not required to create new remedies.[67] Further, this gives courts a tool with which they can overrule politicized and captured administrations. With these cases as an example, we can see that the CJEU's case-law can empower courts to *proactively* defend both the principle of effective judicial protection and indirectly the independence of the judiciary.

Further examples of this can be seen in the cases *A.K.*[68] and *A.B,*[69] where we can clearly see the interplay between the present dynamic of reviewing MS provisions and other dynamics of judicial self-defense. *A.K.*[70] and *A.B.*[71] concerned the assessment of the independence of actors in the MS legal system., by another court within the same MS.

In *A.K.*, the Labor and Social Insurance Chamber of the Polish Supreme Court (SC) (not captured) sought to review the independence of the newly created Disciplinary Chamber (DC)

[65] ibid. para. 73;
Koen Lenaerts, "Limits on Limitations: The Essence of Fundamental Rights in the EU," *German Law Journal* 20, no. 6 (September 2019), pg. 779–93
[66] Op. Cit. *Torubarov*, para. 74 & 76
[67] Case 33-76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECLI:EU:C:1976:188; C-3/16 *Lucio Cesare Aquino v Belgische Staat* [2017] ECLI:EU:C:2017:209
[68] Op. Cit. *A.K.*
[69] Op. Cit. *A.B.*
[70] Op. Cit. *A.K.*
[71] Op. Cit. *A.B.*

of the Supreme Court (captured). [72] In light of the new *ASJP* case-law, the SC launched a two-pronged challenge. First, it used the rather familiar ground of Directive 2000/78,[73] in order to allege that the legislation at issue represents a case of age discrimination. Second, the court raises doubts as to the independence and impartiality of the DC, as the court which should ordinarily hear the case. Through that, the SC seeks to have the new DC declared "not a court or tribunal under EU law." The main claim of the Supreme Court is, that the appointment procedure to the DC, which sees the National Council of the Judiciary (KRS) (captured) recommend and the President of the Republic appoint the judges, is not in line with international and European standards of the separation of power.[74] Especially the fact that the KRS, with judiciary oversight powers, is dominated by politically appointed members, aggravates the fact that the appointment to the DC is carried out by the President of the Republic. A more detailed look at exactly how this assessment of judicial independence unfolds will be reserved to the following section of institutional judicial self-defense.

The second question in *A.K.*, asks whether, in the case that another court is found not to be an independent and impartial tribunal under Art. 47 CFR, it is required to disapply the relevant national provisions, which confer jurisdiction on the offending court.[75] This reasoning turns to the primacy of EU law, in order to give non-captured courts, the possibility to defend themselves, as well as the judiciary as a whole. The far-reaching consequences of such a ruling were also understood by the Polish government. First, the Polish government ignored an interim order by the CJEU in Case C-791/19, which sought to give effect to the Polish Supreme Court's rulings,[76] that the DC cannot be considered an independent and impartial tribunal under Art. 47 CFR. Additionally, the Polish government legislated to deny the *AK* ruling of the Polish Supreme Court any effect.[77]

In response to this question, the CJEU reiterated its case-law concerning the importance of the primacy of EU law, as well as the obligation of MS courts to interpret national legislation as

[72] Laurent Pech, Patryk Wachowiec, and Dariusz Mazur, "Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action," *Hague Journal on the Rule of Law* 13, no. 1 (April 1, 2021), pg. 1–43
[73] Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303
[74] Op. Cit. *A.K.*, para. 41
[75] Ibid. para. 155
[76] see the rulings of the Polish Supreme Court: Case III PO 7/18 and Cases III PO 8/18 and 9/18; C-791/19 R Order for interim relief *Commission v Poland (Régime disciplinaire des juges)* [2020] *ECLI:EU:C:2020:277*
[77] Op. Cit. Kochenov & Pech (Forthcoming), pg. 53

far as possible in light of EU law. If such an interpretation is not possible, then MS courts are under the obligation:

> *"to disapply any provision (…) contrary to a provision of EU law with direct effect in the case pending before it"*[78]

Basing itself on its previous case-law in *Egenberger* and *Torubarov,* the Court recalled that Art. 47 CFR is sufficiently clear, in order to give rise to claims of direct effect. The Court went to hold that if national law reserves jurisdiction to a court which cannot be considered as such under EU law, then another court which may seize jurisdiction has the obligation to do so.[79] Further, the Court went on to firmly equate Art. 47 CFR and Art. 19(1) TEU in conjunction with Art. 2 TEU.[80] The Court went so far as to say that separate analyses under Art. 2 TEU or Art.19(1) TEU would only reinforce its conclusion under Art. 47 CFR.[81] Thus, it seems to reason, that the obligation for MS courts to disapply national provisions which grant jurisdiction to bodies masquerading as courts, does not only apply to the narrower scope of Art. 47 CFR, but also to the expansive scope of Art. 19 TEU.

In *A.B.*, the CJEU would have the chance to specify this line of reasoning further. In the preliminary reference procedure, brought by the Supreme Administrative Court of Poland, the Court would reiterate and confirm its finding form *A.K.*. The CJEU, now faced with a case which did not allow for the application of Art. 47 CFR, due to its Art. 51 CFR limitation, stated that:

> *"(…) the principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of* the [*ECHR*] *, and which is now reaffirmed by Article 47 of the Charter"*[82]

By making reference to its previous case-law, linking Art. 47 CFR and Art. 19(1) TEU, the Court would apply its reasoning developed in *A.K.*, to situations in which the proceedings have only a very limited direct link to EU law.

[78] Op. Cit. *A.K.*, para. 161
[79] Ibid. para. 166
[80] Ibid. para. 168
[81] Ibid. para. 169
[82] Op. Cit. *A.B.*, para. 110

In *Inspecţia Judiciară*,[83] AG Bobek explored questions very similar to *A.K.* The referring court raised the question if the case-law of the Court and Art. 2 TEU, as well as Art. 19(1) TEU, *preclude* national provisions, which negatively affect the principle of effective judicial protection under EU law.[84] Reading the Opinion of AG Bobek, we can see that the new case-law of the CJEU has not only readily been taken up by MS courts, but that the AGs are also starting to warm up to the CJEU's newfound powers.[85] However, as will be outlined, AG Bobek raises some important concerns and criticisms as to the broad scope of Art. 19(1) TEU. Nevertheless, in this opinion, which followed *A.K.*, AG Bobek applied the new case-law and even indicated a possible development. By accepting the questions worded on the premise, that the EU law obligations *preclude* national provisions, which run contrary to the principle of effective judicial protection, AG Bobek's opinion seems to develop the positive obligations, which *A.B.* would also illustrate. If the CJEU were to take up AG Bobek's line of argumentation, it could very well help to form the basis of even stronger infringement proceedings from the EU Commission. Thus, just as they built on previous infringement proceedings by the Commission, we can see that the developments inside the preliminary reference procedure dynamics, could also empower other actors.

By framing the question in such a way, the referring court makes it clear, that they are seeking to perform an abstract review of constitutionality, possibly precluding certain national provisions, prior to them even being fully introduced. AG Bobek sees it similarly and thus makes a clear distinction between the concrete review of constitutionality and abstract review of constitutionality on the basis of Art. 47 CFR.[86] AG Bobek highlights, that this case differs from previous Art. Art. 47 CFR cases, in that:

> *"The Charter is not invoked as a source of individual rights for specific litigants. It is being invoked as an objective yardstick for the review of constitutionality (...)"*[87]

[83] Op. Cit. *Inspecţia Judiciară* Opinion AG Bobek
[84] Op. Cit. *Inspecţia Judiciară*, para. 49 & 56 & 63
[85] Initially, some AGs were apprehensive to acknowledge the broad powers, which stem from the *ASJP* case-law. See for example the change of opinion of AG Tanchev in regard to the broad scope of applicability of Art. 19(1) TEU: Op. Cit. *A.B.* Opinion AG, para. 90;
see also the continued attempts of AGs to create some kind of limitations to Art. 19(1) TEU:
Op. Cit. *Repubblika* Opinion AG Hogan, para. 79;
AG Bobek's criticism of Art. 19(1) TEU in Op. Cit. *Inspecţia Judiciară*, para. 202
[86] Op. Cit. *Inspecţia Judiciară*, para. 201
[87] Op. Cit. *Inspecţia Judiciară*, para. 198

He concludes, that by virtue of being "activated" through the MCV Decision and the Accession Act, the Charter is applicable, even if they cannot be said to form *"the basis of an actual 'right or freedom' for private parties'"*[88]. The AG concludes that therefore it is not necessary to invoke an "actual freedom or right" to have been violated.[89] Rather, the Charter can work, within the space opened up by the MCV Decision and the Accession Act, as a *"shadow"*, which forms the basis for an abstract assessment of the implementation of those measures, in line with the larger framework of the CFR.[90]

Finally, the AG takes up the CJEU's reasoning from *A.K.*, in which the Court held, that Art. 47 CFR and Art. 19(1) TEU cover essentially the same ground. However, the AG went even further. In *A.K.* it could still be said that the obligation to disapply conflicting national measures can only flow from the broader Art. 19(1) TEU. In the present case, the AG seems to suggest that Art. 47 CFR has reached a point where it is also capable of being the basis for an abstract review of constitutionality in light of the MS' EU law obligations, as well as the possible consequences, such as disapplication.[91] Having tied Art. 47 CFR and Art. 19(1) TEU so close together, the AG does not go into much detail on the applicability of Art. 19(1) TEU, as that question is already clearly addressed in the previous case-law of the Court.[92] It will be interesting to see, if the CJEU will take up the Art. 47 CFR arguments of the AG. Besides further elaborating on the interplay between Art. 47 CFR and Art. 19(1) TEU, helping with legal certainty, this development could also help reasonably expand the scope of Art. 47 CFR. This could help strengthen possible future claims under this dynamic, as Art. 47 CFR, with its much more clearly defined limits, offers a considerably more stable and palatable basis, than Art. 19(1) TEU. AG Bobek seems to be aware of this as well, even if he does not directly state it, as he hopes to expand Art. 47 CFR, critizing the near unlimited scope of Art. 19(1) TEU.[93]

Another important point is the question concerning the assessment of constitutional provisions, which run counter to the MS' EU law obligations. So far, we have established that national administrative decisions, decisions by bodies which cannot be considered independent courts, as well as ordinary legislation, which endanger the principle of effective judicial protection,

[88] ibid. para. 199
[89] ibid. para. 198-200
[90] Koen Lenaerts and José Antonio Gutiérrez-Fons, "The Place of the Charter in the EU Constitutional Edifice," in *The EU Charter of Fundamental Rights* (Nomos, 2014), pg. 1567-68
[91] Op. Cit. *Inspecţia Judiciară*, para. 202
[92] ibid. para. 204-211
[93] ibid. para. 212-225

must be disapplied. The *Maler* Case, represents an example of this more specific dynamic. In *Maler*,[94] the Administrative Court of Vienna sought a declaration, that itself cannot be considered an independent court under EU law. The basis for this claim is that the executive branch did not follow the national allocation procedure of random allocation of cases. This, in turn means that the court, which is assigned a case in contravention to this constitutional provision and when read in combination with Art. 19(1) TEU, should not be considered an independent and impartial tribunal. The allocation rule, dictating the random allocation of cases is a constitutional provision. Thus, a MS court attempted to use a combination of a constitutional provisions read together with EU law obligations under Art. 19(1) TEU, in order to assure the non-interference of the executive in the judicial organization. While the CJEU did not answer the question of the applicability of the case-law to constitutional provisions, it became a central question in *Repubblika.*[95]

In line with the concept of EU law primacy and the case-law of the CJEU,[96] in *Repubblika* AG Hogan does not make any specific note of the implied difference between ordinary and constitutional provisions.[97]

Applying the same logic as previously highlighted, AG Hogan concludes, that Art. 19(1) TEU, as well as Art. 47 CFR, through the *constitutional passerelle*,[98] are applicable to constitutional norms.[99] In *Repubblika*, the CJEU would confirm the application of Art. 19(1) TEU to constitutional provisions, as well as the indirect impact that Art. 47 CFR has through its linkage to Art. 19 TEU.[100] Much more important though, was the CJEU's development of a non-regression standard.[101] By linking the accession criteria and their fulfilment, to Art. 2 TEU, the Court states that:

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[94] Op. Cit. *Maler*
[95] Op. Cit. *Repubblika* Opinion AG Hogan, para. 19(1)
[96] Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1;
Case 6-64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66;
Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECLI:EU:C:1970:114;
Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECLI:EU:C:1978:49;
C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECLI:EU:C:1990:395
[97] Op. Cit. *Repubblika* Opinion AG Hogan, para. 37
[98] Op. Cit. *Independence of ordinary courts* Opinion AG Tanchev, para. 97; Op. Cit. *A.K.*, para. 85
[99] Op. Cit. *Repubblika* Opinion AG Hogan, para. 42-47
[100] Op. Cit. *Repubblika*, para. 44-46
[101] Op. Cit. *Repubblika*, para. 58-67; for a more detailed and critical analysis of this non-regression formula in *Repubblika* see also Dimitry Kochenov and Aleksejs Dimitrovs, "Solving the Copenhagen Dilemma" *Verfassungsblog* (blog), April 28, 2021

> *"The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, (…)"*[102]

In that sense, this case represents how developments in cases brought by MS courts can have a considerable impact in helping shape the way that the value of the rule of law, and possibly other Art. 2 TEU values, function in the EU legal order,[103] as well as the national constitutional systems. In this case we can see a careful approach at resolving the tension between the EU judicially focused conception of the rule of law and the constitutional identity of the MS. The non-regression principle elaborated in *Repubblika* could serve as the starting point for resolving this particular impasse.

In total we have identified 34 cases, since *ASJP*, which fit within this broader dynamic of reviewing national provisions in light of EU law. These cases stem from 10 different Member States. Nevertheless, it should be noted that alone 16 of these cases are from Poland, 7 from Romania, and 3 from Hungary. Thus, a large majority of the cases certainly fit the model of judicial self-defense. However, courts in Germany, Italy, or Austria have also started to make cautious use of these new judicial tools. This indicates that the CJEU may find a diverse range of allies in MS courts.

This dynamic, can also be of interest to courts which are not necessarily facing persistent or even systemic threats to their independence or the rule of law, which are however, still seeking to fortify the independence of the judiciary. Afterall, it was also appeasement and nonchalance on the part of the EU, which saw the Copenhagen Dilemma reach a point where it can now be said that the EU has Member States, that can no longer be described as democratic.[104] Thus, it should be welcomed that the CJEU case-law is not just offering opportunities for a sort of last-stand judicial self-defense, but rather is encouraging an active dialogue inside the national legal system, as well as between the EU level and national courts. It is through this dialogue and the

[102] Op. Cit. *Repubblika*, para. 64
[103] Op.Cit. Kochenov & Dimitrovs (2021)
[104] "Autocratization Turns Viral - DEMOCRACY REPORT 2021" (V-Dem, 2021), pg. 19 & 22 & 31;
"Hungary: Nations in Transit 2020 Country Report," Freedom House, 2020;
"Poland: Nations in Transit 2020 Country Report," Freedom House, 2020

prospect of a multi-polar supervision, protection, and promotion of the rule of law, that the fundamental values of the EU can be best protected.[105]

Nevertheless, it is important to not forget, that MS courts may also "abuse" these new opportunities. We should make a clear distinction between two types of cases. On the one hand there are attempts to mobilize the *ASJP* case-law, in order to engage in judicial self-defense, as well as cases where the effective judicial protection for the case concerned is in question, or where an issue may have a singular but spread across the whole legal system effect. On the other hand, there are cases in which the relevant courts are merely trying to strengthen their own position *vis-à-vis* other institutional actors, or possibly even against "rival" MS courts. Not all inter-court rivalries are due to one of the courts no longer being independent.

This author partially agrees with the assessment of AG Bobek, in *Inspecţia Judiciară*, where he question whether the near limitless scope of applicability of Art. 19(1) TEU, without an apparent *de minimis* rule, could lead to the diminishing of its impact for the cases where it really matters.[106] Similarly, AG Tanchev in *Commission v Poland* (*Independence of ordinary courts*), proposed limiting the applicability of Art. 19(1) TEU, to situations directly concerned with a *"structural infirmity in a given Member State"*. The current, near limitless scope of Art. 19(1) TEU, when considered in combination with the dynamics revealed in the present study, does raise concerns. The CJEU would do well to elaborate on the possible limitations of this case-law, lest the Court get bogged down an increasing number of cases from MS, which have a functioning judiciary. However, the proposals by both AG Bobek and AG Tanchev do not seem to have convinced the Court, which has continued to apply the broad scope of Art. 19(1) TEU. Additionally, this author does not believe that the correct response would be to *severely* limit the scope of Art. 19(1) TEU only to structural cases, or to an excessively high threshold, as this could undermine the progress in defending the rule of law in the EU, which the new *ASJP* case-law represents. Nevertheless, unless limited through restraint by the referring courts,

[105] Iris Canor, "Suspending Horizontal Solange: A Decentralized Instrument for ProtectingMutualTrustandtheEuropeanRuleofLaw," in *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions*, by Armin von Bogdandy et al., vol. 298, Beiträge Zum Ausländischen Öffentlichen Recht Und Völkerrecht (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: Springer, 2021).;
Armin von Bogdandy, Carlino Antpöhler, and Michael Ioannidis, "Protecting EU Values Reverse Solange and the Rule of Law Framework, Armin von Bogdandy, Carlino Antpöhler and Michael Ioannidis," in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, ed. András Jakab and Dimitry Kochenov (Oxford, New York: Oxford University Press, 2017), 218–33.

[106] Joined Cases C-83/19, C-127/19 and C-195/19 and C-291/19 and C-355/19 Opinion AG Bobek *Asociaţia "Forumul Judecătorilor din România" and Others v Inspecţia Judiciară and Others* (*Inspecţia Judiciară*) [2020] ECLI:EU:C:2020:746, para. 208 & 222

the CJEU could relive its experience from the *Zambrano*[107] and *Dano*[108] Cases, where it had to limit its earlier expansive interpretation.[109] Similar as to that situation, MS resistance and caseload considerations are most likely to place pressure on the CJEU. The near unlimited scope of Art. 19(1) TEU will have to be limited eventually.

[107] C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* (*Zambrano*) [2011] ECLI:EU:C:2011:124*;*
C-135/08 *Janko Rottman v Freistaat Bayern* (*Rottman*) [2010] ECLI:EU:C:2010:104
[108] C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* (*Dano*) [2014] ECLI:EU:C:2014:2358
[109] Andreas Hofmann, "Resistance against the Court of Justice of the European Union | International Journal of Law in Context | Cambridge Core," *International Journal of Law in Context*, Special Issue 2: Resistance to International Courts, 14, no. 2 (2018), pg. 269

Chapter 4

Monitoring other Courts in their own National Judicial System: Fighting Back Against Captured Courts

A more explicit form of judicial self-defense can be seen in the cases where a MS court attempts to review the independence of another *court*[110] within the MS system. As previously mentioned, this dynamic usually goes hand in hand with the previous one. The preliminary reference of the Polish Supreme Court, in *A.K.*, represents an example of this kind of judicial self-defense. In this dynamic, we can see an uncaptured part of the judiciary attempting to defend its independence, by seeking to "expel" the captured element. 22 preliminary references, which raise the issue of the independence of another MS court have been identified. The focus is fully on MS which are experiencing issues of democratic backsliding. We have twelve cases originating from Poland, eight cases from Romania, and one from Hungary.

Most preliminary references are still ongoing,[111] however in both *A.K.* and *A.B.*, saw the CJEU aid the referring court in finding that another actor in the MS legal system can no longer be considered an independent court or tribunal under EU law. In that regard, the CJEU reminded the referring court in *A.K.*, that the fact that judges are appointed by the President of the Republic, does not immediately "give rise to a relationship of subordination".[112] The CJEU stressed the importance of a more holistic analysis of the appointment procedure, as well as independence of the court after appointment. Another important development in the CJEU's case-law is the already discussed linking of Art. 47 CFR to Art. 19 TEU. Reflecting on the *A.B.* case previously discussed, it is important to remember that the CJEU has held that the principle of effective judicial protection, as expressed through Art. 19 TEU, is a general principle of EU law. When applying this to the assessment of another court within a MS legal system, the CJEU has ruled that, in light of EU law obligations of effective judicial protection and judicial independence, such an assessment is a general obligation, applicable to all cases falling under the broad new scope of Art. 19(1) TEU.[113] Further, the obligation to disapply national provisions, which negatively impacts the independence of the court hearing the case, also

[110] *Court* is used here to include any decision-making body, which makes judicial or quasi-judicial decisions.
[111] See Appendix for ongoing cases
[112] Op. Cit. *A.K.*, para. 133
[113] Op. Cit. *A.B.*, para. 112 & 146

extends to these cases.[114] In *A.K.*, the Court went on to meticulously connect the *ASJP* case-law, to the relevant ECHR provisions and the ECtHR's case-law on judicial independence.[115] The CJEU then reminded the referring court, that it is not for the CJEU, when carrying out a preliminary reference procedure, to rule on the substance of the case. Rather, it is for the referring court to apply the interpretation of EU law obligations, to the substantive questions of the case at hand. Nevertheless, the Court, *"in the framework of judicial cooperation"*, gave a more detailed analysis of how the EU law provisions, and through those the new EU-ECHR standard of judicial independence, apply to the question at hand.[116]

Finally, in *Euro Box Promotions,*[117] as well as *F.G. et al,*[118] AG Bobek addressed the question of whether a lower court, acting as an EU court, can disapply or disregard an otherwise binding decision from a superior court, if said decision is believed to be contrary to EU law.[119] AG Bobek based his argument on the previously outlined case-law concerning the disapplication of national law and the primacy of EU law, even over national constitutional provisions. Then the AG went on to highlight that the preliminary reference procedure under Art. 267 TFEU, already includes the obligation of a lower MS court to disregard a possible contrary ruling of a MS constitutional court.[120] AG Bobek concludes that it stems to reason, that court decisions of a MS superior court, which are contrary to EU law, can be disregarded by lower MS courts, acting in that moment in their capacity as *EU* courts.[121] Nevertheless, AG Bobek raises a substantial *but*, arguing that "*In my view, EU law provides a national judge a limited 'license to disagree', but no universal 'license to disregard, (…)'"*.[122] Here, AG Bobek stresses, that the possible antagonistic dynamics flowing from this reasoning should be limited to exceptional situations. Generally, this logic should be understood, as AG Bobek stressed, as empowering and facilitating the judicial dialogue between national judicial actors themselves, as well as national judicial actors and the CJEU.[123]

[114] Op. Cit. *A.B.*, para. 167
[115] Op. Cit. *A.K.*, para. 126-130
[116] Op. Cit. *A.K.*, para. 132; see also Op. Cit. Kochenov & Pech (Forthcoming), pg. 60
[117] Joined Cases C-357/19 and C-547/19 Opinion AG Bobek *Euro Box Promotion* [2021] ECLI:EU:C:2021:170
[118] Joined Cases C-811/19 and C-840/19 Opinion AG Bobek *FQ et al* [2021] ECLI:EU:C:2021:175
[119] Op. Cit. Opinion *Euro Box Promotion*, para. 25(3); Op. Cit. Opinion *FG et al*, para. 21(3)
[120] Op. Cit. Opinion *Euro Box Promotion*, para. 237-239
[121] Ibid. para. 239
[122] Ibid. para. 240
[123] ibid. para. 242

Looking at the few ongoing cases which have Advocate General Opinions published, we can also see that the logic of MS-internal judicial self-defense, is gaining acceptance. AG Bobek, in his Opinion in *Inspecţia Judiciară*,[124] following *A.K.*, applied the same logic to a situation of internal assessment of the independence of another actor in the MS legal system.[125] In that case, the CJEU saw several regional courts in Romania refer questions concerning the independence of the institution of the *Judicial Inspection*. This is in line with the rulings in *A.K.* and *A.B.* as well. In line with the broad character of the concept of effective judicial protection, the CJEU does not seem to limit this case-law to a strict interpretation of the term *court*.

Another reflection is the fact that there is only one case concerning Hungary. A more detailed analysis of certain key MS, and how these dynamics developed locally, or why their effect was limited, would be an interesting basis for further interdisciplinary study. The Hungarian situation can most likely be explained by timing. The ASJP case-law simply came too late in the process of judicial capture in Hungary. This also highlights a possible weakness of these judicial self-defense dynamics. In order to engage in self-defense, one must be under threat but not yet fully subdued. If one's arms are already tied behind ones back, then engaging in a meaningful self-defense becomes impossible. The same can be said for courts and the judiciary as a whole, if too much of it is captured, then the disease has become malignant and self-defense becomes increasingly unlikely.

[124] Op. Cit. *Inspecţia Judiciară*
[125] ibid. para. 332

Chapter 5

Horizontal Policing: Monitoring other Member States' Courts

Having looked at the internal dynamics, that is those which concern the self-defense of judicial actors within a specific Member State, we now turn to a dynamic, which sees the *ASJP* case-law applied to a situation in which several MS judicial systems are involved. The CJEU was seized by the Irish High Court only shortly after *ASJP*, in *LM*.[126] This dynamic, which can broadly speaking be placed under the existing literature on the concept of *Horizontal Solange,*[127] is exemplified by this case. It centers around the courts from one MS questioning the independence of courts or even the whole judiciary of another MS. The interplay of the concepts of mutual trust, the independence of the judiciary, and the right to effective judicial protection, in light of the European Arrest Warrant (EAW), have proven fertile ground for questions concerning the assessment of one MS legal system, by the court of another.[128]

In *LM*, the Irish High Court was confronted with a situation in which a Polish citizen was arrested in Ireland, on the basis of a European Arrest Warrant (EAW). Normally, such a situation would lead to the surrender of the individual to Poland. However, in the present case, the accused individual raised concerns as to the independence of the Polish judiciary and thus, the possibility of his rights to a fair under Art. 6 ECHR being violated.[129] The Irish Court took up the accused's arguments questioning the independence of the Polish judiciary.[130] The Irish court then makes the connection to the *Aranyosi and Căldăraru*[131] case-law, which established a two-pronged test for the non-execution of an EAW.[132] Essentially, the referring court assumes the power to assess the state of the judiciary in another MS and asks the CJEU if a systemic assessment is enough to refuse the execution of an EAW, or if it needs to make an individual assessment.[133] Further, the referring court asks for clarification regarding the criteria on which

[126] C-216/18 PPU *LM* [2018] ECLI:EU:C:2018:586
[127] Iris Canor, "Solange Horizontal – Der Schutz Der EU-Grundrechte Zwischen Mitgliedstaaten," *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht*, ZaöRV, 73 (2013): 249–94; Op. Cit. Canor (2021)
[128] Petra Bárd and Wouter van Ballegooij, "Judicial Independence as a Precondition for Mutual Trust? The CJEU in Minister for Justice and Equality v. LM," *New Journal of European Criminal Law* 9, no. 3 (September 1, 2018), pg. 353–65;
[129] Op. Cit. *LM*, para. 16-18
[130] Ibid. para. 20-22
[131] Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* (*Aranyosi and Căldăraru*) [2016] ECLI:EU:C:2016:198
[132] Op. Cit. *LM*, para. 23-24
[133] Ibid. para. 25(1) & 33-34

such an assessment should be carried out.[134] The CJEU explained the connection between Art. 2 TEU, Art. 47 CFR, and Art. 19(1) TEU, to the concept of mutual trust.[135] The Court would reiterate, that mutual trust forms the basis of mutual recognition and through that is essential for the working of the EU legal order.[136]

The Court concluded, given the importance of the concepts of mutual trust and recognition for the functioning of the EU legal order, that MS courts should not control the observation of fundamental rights by another MS, *"save in exceptional cases"*.[137] The present case seems to be an *exceptional case*. The CJEU created a two-pronged test to be used in these exceptional cases, which it based on its previous *Aranyosi and Căldăraru* decision.[138] The first step of the test, should be an assessment of the systemic deficiencies in the MS at issue.[139] In the paragraphs prior, the CJEU outlines the standards to be used for the assessment of the judiciary.[140] If such systemic deficiencies are found, the second step, is an individualized assessment of the risk to the applicant's case directly.[141] The second step cannot be skipped, unless the offending MS is subject to sanctions under Art. 7(3).[142] Special consideration is to be payed to the level of risk of a possible infringement of effective judicial protection, at the level of jurisdiction, which will hear the case.[143] Further, the Court held that the executing judicial authority may request the necessary information from the issuing authority, in order to carry out this test.[144]

Following the revolutionary nature of *ASJP* it was hoped, that the CJEU would consider a more daring approach. However, by introducing the second step to the test, the Court rendered the systemic assessment of the judiciary of one MS by the courts of another MS rather meaningless. Such a specific and individual assessment places too much of a burden on the assessing court, and is simply not feasible in the EU Judicial Area.[145] Usually, it is the higher courts which are captured first and those courts can shape the judiciary and legal system from above. Thus, a

[134] Ibid. para. 25(2) & 33-34
[135] Ibid. para. 35
[136] Ibid. para. 35-36 and the case law cited therein
[137] Ibid. para. 37
[138] Op. Cit. *Aranyosi and Căldăraru*
[139] Op. Cit. *LM*, para. 61
[140] Ibid. para. 62-67
[141] Ibid. para. 68
[142] Ibid. para. 69-70 & 72-73
[143] Ibid. para. 74
[144] Ibid. para. 76
[145] Op. Cit. Frąckowiak-Adamska, pg. 450-452

real danger exists for a situation to arise where the lower court issuing the EAW does not fail the second prong of the *LM*-test, but where the court responsible for a possible appeal would fail this test. This would fundamentally undermine the principle of effective judicial protection as it would render it impossible to seek any meaningful judicial remedies following a ruling of the first court. It is not unreasonable to assume that an individual's protection through the principle of effective judicial protection is impacted by the fact that there are courts of a different jurisdictional level affected. Further, the very nature of *systemic* deficiencies, seems to suggest that they have an impact, no matter if directly measurable or not, on the whole MS legal system.

Following *LM*, several other MS courts, have questioned the compliance with EU law obligations, of another MS in light of the EAW scheme in cases jointly referred to as the *Prosecutor Cases*.[146] The common thread of these cases, is that they addressed the question of refusing an EAW, not on the basis of a threat to the individual after the extradition, but rather on the issuing authority's independence itself. Thus, it seems that the courts have learned from *LM*'s result and have re-adjusted their strategy. An analysis focused on the individual's right to effective judicial protection is surely useful as a last resort defense. However, it is limited as illustrated by the CJEU's restrictive reading of it in *LM*. Especially when seeking to counter systemic issues, which are generally harder to pin down in individual-based analysis. A more systemic approach, which considers the independence of the issuing authority, in combination with a rather broad reading of issuing authority and of a rather restrictive interpretation of what can be considered independent, would seem more apt at tackling these kinds of issues.

First, the referring courts sought clarification on what constitutes an issuing authority. They especially had doubts if an issuing authority must be a court or whether public prosecutors can also issue EAWs (as is the case in Lithuania or Germany for example).[147] Here, the Court held that:

[146] Joined Cases C-508/18 and C-82/19 PPU *Minister for Justice and Equality v OG and PI (Public Prosecutor of Lübeck & Zwickau)* [2019] ECLI:EU:C:2019:456 ;
C-509/18 *Minister for Justice and Equality v PF (Prosecutor General of Lithuania)* [2019] ECLI:EU:C:2019:457*;*
Joined Cases C-566/19 PPU and C-626/19 PPU *JR and YC (Public Prosecutors' Offices, Lyons and Tours)* [2019] ECLI:EU:C:2019:1077;
C-625/19 PPU *Openbaar Ministerie (Public Prosecutor Sweden)* [2019] ECLI:EU:C:2019:1078;
C-627/19 PPU *Openbaar Ministerie (Public Prosecutor Brussels)* [2019] ECLI:EU:C:2019:1079 ;
C-510/19 *Openbaar Ministerie (Faux en écritures)* [2019] ECLI:EU:C:2020:953
[147] Op. Cit. *Public Prosecutor of Lübeck & Zwickau*; Op. Cit. *Prosecutor General of Lithuania*

> *"(…) the concept of a 'judicial authority', (…), is capable of including authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State"*[148]

Further, the referring courts sought clarification as to the necessary level of independence and if, once an issuing authority is found to not be sufficiently independent to be considered as such, its EAW request can be rejected. Interestingly, instead of applying a more limited *LM* type reading, the Court created a rather strict threshold of independence. The CJEU held that:

> *"Thus, the 'issuing judicial authority', (…), must be capable of exercising its responsibilities (…),* ***without being exposed to the risk*** *that its* ***decision-making power be subject to external directions or instructions****, in particular from the executive, such that it is* ***beyond doubt*** *that the decision (…) lies with that authority."*[149] (emphasis mine)

By choosing a risk-based concept, the CJEU considerably raised the independence requirement. The test dictates, that the issuing authority must be free of any formal possibility to be influenced or instructed. The independence from the executive is of principal concern.[150] What is most interesting in this new approach by the CJEU, is the fact that the stringent application of this issuing authority analysis, applied to the *LM* Case, would seem to suggest a different outcome. If the first step of the *LM*-test comes to the conclusion, that systemic deficiencies exist in the issuing MS' judicial system, then it would seem that the strict independence criteria from the *Prosecutor Cases*, would most likely preclude the issuing authority from being considered as such.[151] Thus, we can conclude that the *Public Prosecutor* Cases have created a raised standard of independence for issuing authorities under the EAW scheme. This standard applies to anyone acting as an issuing authority. While these cases do not directly fit into the post-*ASJP* case-law, in that they do not all deal with questions directly recalling Art. 2 TEU, Art. 19 TEU, and Art. 47 CFR, they represent a useful indication of the propensity of some MS courts to make use of this dynamic. Further, there was some hope that the tighter standard applied to issuing authorities in the *Public Prosecutor* Cases, would inform an evolved reading of *LM,* if a similar question where to reach the court again.[152]

[148] Op. Cit. *Public Prosecutor of Lübeck & Zwickau*, para. 51
[149] Ibid. Para. 73
[150] Op. Cit. Kochenov & Pech (Forthcoming), pg. 80
[151] . Böse, 'The European Arrest Warrant and the Independence of Public Prosecutors: *OG & PI, PF, JR & YC*' (2020) 57 *CMLRev* 1259, pg. 1279; Op. Cit. Kochenov & Pech (Forthcoming), pg. 82
[152] Op. Cit. Kochenov & Pech (Forthcoming), pg. 82

It took until 2020 for another case raising the same questions as *LM*, to reach the CJEU. In *L&P*, the Amsterdam District Court, took up the Irish Court's arguments from *LM* and attempted a second foray into the still rather untested waters of assessing another MS's legal systems compliance with the fundamental values of the EU. The key difference is, that the Dutch court tied the question more clearly to the independence of the court issuing the EAW, as well as the possible changes happening after issuing but prior to extradition.[153] The referring court sought to capitalize on the growing case-law concerning the status of the Polish judiciary, which it argues amount to enough evidence to skip the second step of the *LM*-test.[154]

Unfortunately, the CJEU did not fundamentally change its approach from *LM.* The CJEU drew a clear distinction between the *Public Prosecutor* cases and *LM.* The *Public Prosecutor*-test is focused on the existence of formal measures in law, which represent a risk to the independence of the issuing authority at hand.[155] The *LM*-test, on the other hand, is concerned with systemic and generalized deficiencies. However, why the CJEU applies a strict independence test for one type of cases, while maintaining a much more limited two-prong test in others is not clear. This distinction seems arbitrary when considering that cases failing the systemic step of the *LM*-test would fail the *Prosecutors* independence test, while not possibly not failing the second step of the *LM*-test. Further, putting the blinders on and being overly focused on individual cases has so far only helped those, which are attempting to circumvent the obligations arising out of Art. 2 TEU. While *L&P* seems to not have brought the hoped for aligning of the two competing standards for independence necessary under the EAW scheme, the dynamic illustrated in this section offers fertile ground for exciting new developments in the protection of the rule of law in the EU.

The CJEU is right to stress the importance of the concepts of mutual trust and mutual recognition, which underpin the EU legal order. However, the conclusion must not be to shy away from action. Rather, the CJEU should more clearly define the relationship between the two tests. Finally, the CJEU should look at what the Commission has learned in its systemic deficiency cases, as well as its *concrete expression* logic, and be more pragmatic when it comes to questions of systemic issues. Finally, these horizontal cases represent a way in which this

[153] Joined Cases C-354/20 PPU and C-412/20 PPU *L&P* [2021] ECLI:EU:C:2020:1033, para. 21 & 33
[154] Ibid. para. 18 & 14 (case-law cited therein)
[155] Op. Cit. *L&P*, para. 48

new case-law will necessarily add to the construction of a pan-European judicial dialogue between different MS constitutional systems. This in turn could do a great deal for the construction of a more clearly defined and broadly accepted common approach to the rule of law in the EU.

Chapter 6

Conclusion

Reflecting on the previously analyzed dynamics, we can see that the developments following *ASJP* are significant, in that they help to more clearly define the rule of law in the EU. However, what was truly revolutionary was the *operationalization* of Art. 2 TEU, through Art. 19 TEU and Art. 47 CFR, which has enabled the *mobilization* of those concepts by MS courts. Reminiscent of the profound effects, which EU law supremacy and direct effect have had on national systems, MS courts have taken up an active and at times pioneering role in the protection of the rule of law in the EU. We can see that the rule of law in the EU is not only dependent on a vertical relationship of enforcement by the Commission or the Council, but that the defense of the rule of law in the EU must already start at the MS level. In that sense, this paper can be seen as part of a growing literature analyzing the constitutionalization of EU law and the Europeanization of national constitutional law.

One of the most important developments in this arena has surely been the emergence of a sort of judicial self-defense dynamic. Taking a bottom up approach for the protection of the rule of law, MS courts have sought to challenge national provisions concerning the organization of the judiciary, the independent status of other courts within their legal system, as well as their own independence. As previously analyzed, challenging national provisions concerning the organization of the judiciary, on the basis of their compliance with EU law obligations on effective judicial protection and the rule of law, is fundamental for most of these cases.

The case-law on the operationalization of Art. 2 TEU, especially through Art. 19(1) TEU, allows for systemic and abstract assessments, even outside of the limited applicability of Art. 51 CFR. Thus, it empowers MS courts to take up their role as *EU* courts and to perform a sort of EU law constitutional review of national provisions. This establishes a diffuse and bottom-up network of *EU* courts, which are empowered and even obliged to police national measure and if necessary, refer the question to the CJEU for guidance, or even provide the necessary judicial remedy themselves. This represents an interesting development in the EU conception of the rule of law, in that it does not fully conform to a German centralized system, with the highest court engaging in this review, nor does it conform to a fully diffuse style review, as it still keeps the last word on the interpretation of the concept with the CJEU. Further, the

engagement of such a broad range of courts from different MS legal systems, has the potential to create a common European ground, upon which a dialogue between different constitutional systems, both European and national, can develop. This constitutional pluralism angle of the formation of an EU rule of law, developing out of the combination and interaction of national level and EU level constitutions, is one of the key takeaways from these dynamics. The EU rule of law is emerging out of EU law-based concepts such as effective judicial protection, but it is taking shape and developing in the context of national constitutional iterations of the concept and against the background of issues raised in the MS themselves. Finally, these dynamics are not only present in cases where national provisions are contrary to EU law obligations, rather the EU rule of law is also used to strengthen arguments and positions in MS internal constitutional disputes, possibly having an effect on the shape and form of national rule of law concepts as well.

Especially courts in MS where there are considerable concerns regarding the independence of the judiciary have seized the opportunity to engage in judicial self-defense. In that respect, courts from Poland, as well as Romania have been most receptive to these developments, having referred 16 and 8 cases respectively. However, courts from a total of 15 Member States have made use of the *ASJP* case-law, in order to refer challenges concerning the rule of law. This indicates, that this case-law of the court is not only being received and engaged with by courts under acute threat, but rather, we can point to a growing and broad acceptance across the EU.

These developments should be welcomed in that they empower national courts and judiciaries under threat to engage in self-defense. However, the near limitless scope of Art. 19 TEU, raises some concerns. As previously highlighted, there exists a difference between instances of judicial self-defense, and a court making use of this case-law to seek additional power. Cases where a court is merely trying to increase its own power, risk turning this case-law into a trump card to be abused by MS courts in internal politicking. There even exists the possible risk that these dynamics, if abused, could in turn become a risk for the rule of law, if it allows courts to bypass the national separation of powers. The *Erfurt* and *Hessen* cases from Germany, which appear similar to *Maler*, in that they see courts assessing their own independence, can serve as an example for how this case-law could be used for cases, which neither rise to the level of a systemic threat, nor are concerned with the effective judicial protection of the applicant. In *Hessen*, the Administrative Court Wiesbaden's main argument was that the Ministry of

Justice's position of power, especially in relation to the communication facilities (telephone, fax, Internet, etc.) and staffing of IT facilities of the judiciary, could risk political influence being exerted over the judiciary.[156] This case was declared inadmissible, on grounds that the question of general independence of the judiciary was not sufficiently tied to the case at hand. The *Erfurt* case takes up the same arguments as brought by the Wiesbaden court, however, the connection between the questions concerning the independence of the judiciary and the facts of the case is much more direct. Nevertheless, the CJEU has again ruled that the questions concerning the independence of the court at hand had no link to the applicant's case.

These cases represent a possible starting point for the limitation of the applicability of the case-law, in order to ensure that it does not lose effectiveness by becoming abused. Thus, the CJEU would do well to further develop this case law and to specify certain limitations to Art. 19(1) TEU, as well to the differences between cases concerning different levels of risk to the independence of a court or the judiciary. In cases where no systemic threat is present, special attention should be payed to the danger posed by the challenged national measures for the case at hand. Further, the CJEU would do well to practice more self-reflection and develop both sides of the coin. A situation where the CJEU defines and applies the rule of law more often and strictly to MS, but itself ignores reasonable questions as to the EU's compliance with the rule of law, would only weaken the effectiveness and legitimacy of the concept in the long run.[157] The ongoing situation concerning the *illegal* removal of a sitting AG from the CJEU, can be seen as a prime example of the EU proclaiming the importance of the rule of law for the MS, while ignoring its consequences for the EU legal order itself.[158]

A final concern regarding the broader dynamic of judicial self-defense is best illustrated by the small number of total cases referred by Hungarian courts. Self-defense only works when one still has agency and power. By 2018, the Hungarian judiciary was largely captured, and thus Hungarian courts were not actively engaging with these new developments. Thus, it is clear that the *ASJP* case-law and the dynamics of judicial self-defense made possible by it, are not the end of the rule of law debate. Rather, they can be an invaluable tool for MS courts, in order to avoid future backsliding and to possible halt and reverse some ongoing developments.

[156] Op. Cit. *Hessen*, para. 26-29
[157] Op. Cit. Kochenov (2020)
[158] Dimitry Kochenov and Graham Butler, "The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution," Jean Monnet Working Paper (New York University, 2020).

However, the rather unchanged nature on the ground in Poland and Hungary, should give us pause as to possible other functions this case-law may fulfil. The rule of law in the EU should not become a tool through which dialogue is stifled and the reality ignored.[159] This will be a complicated but vitally important task for the CJEU in the future.

Finally, horizontal policing represents another exciting avenue for MS court engagement, which could address some of the shortcomings concerned with judicial self-defense within a MS legal system. Unfortunately, in *L&P* the CJEU has maintained its unworkable standard from *L.M.* Nevertheless, it will be interesting to see how the CJEU will respond to the growing pressure from MS courts. The CJEU's almost stubborn insistence on the upholding of mutual trust, even in cases where the itself has found considerable and systemic violations concerning the independence of the judiciary, is not refined or authoritative enough to withstanding continuous scrutiny and pressure.

This thesis builds on the idea of MS courts as strategic actors, in order to introduce the dynamics surrounding the rule of law and highlight how they have taken shape in the context of the preliminary reference procedure. Both horizontal policing, as well as judicial self-defense have led to a more proactive and possibly even militant EU judiciary, empowered across various levels, to defend its independence. In the dynamics analyzed, the constitutionalization of a diffuse and multi-level EU judiciary features strongly.

Given the novel nature of this case-law, and the fact that the dynamics identified in this thesis are still being developed by both the CJEU, as well as by MS courts, it seems appropriate to conclude this thesis with considerations concerning the future impact of these dynamics, as well as possible further research. Besides the obvious defensive character of these dynamics, they also may fundamentally reshape the rule of law debate. The CJEU needs to have the opportunity to engage with questions surrounding the rule of law to further develop it. As highlighted in the section detailing the *Repubblika* case, these dynamics, and most interestingly a case raised through an *action popularis*, showcases how certain questions may fundamentally influence the concept of the rule of law on the EU level. The CJEU is carefully engaging with the difficult question of how Art. 2 TEU, and through the EU rule of law, interact with national constitutional identity arguments. Until recently it has seemed that invoking constitutional

[159] Op. Cit. Kochenov (2020), pg. 5-6 & 17

identity could function as a "get out of jail" card for some MS. However, with the introduction of the non-regression principle, even if the concept as articulated in *Repubblika* still has some flaws,[160] could be seen as a first step in resolving this fundamentally important tension. The non-regression principle developed in *Repubblika*, showcases how certain questions, raised out of specific national constitutional contexts, may fundamentally influence the concept of the rule of law on the EU level. *Repubblika* also raises the question of which constitutional dynamics inside the MS may give rise to cases on the rule of law reaching the CJEU.

Actively and consciously engaging with their identity as *ordinary EU* courts may also have the effect of furthering the establishment of a common European judicial identity.[161] The value of the rule of law and especially the independence of the judiciary may come to form the core of a common self-understanding of judges. Thus, these dynamics could have the important *side-effect* of fundamentally shaping or even re-shaping the understanding of MS courts and judges of the role and value of EU law. The possibly far-reaching consequences this may have on the future development of EU law and its role in furthering integration, should provide a rich basis for further research.

Finally, an invigorated EU judiciary is better positioned to more clearly define the concept of the rule of law, which may in turn lead to a broader and more complete application of the rule of law to the whole EU legal order. Confident and empowered MS courts should use this case-law and the rule of law, to reverse its application and hold EU institutions themselves accountable to it. The dichotomy of an increasingly well-defined and operationalized concept of the rule of law being applied to the MS, while the EU may be free to violate that very same value, by for example removing a sitting AG prior to her term finishing,[162] will increasingly become untenable. Thus, even those apprehensive of an overbearing and increasingly powerful CJEU may do well to consider that the case-law of the Court offers ample opportunity to

[160] Op. Cit. Kochenov & Dimitrovs (2021)
[161] Anne-Marie Slaughter, "Judicial Globalization," *Virginia Journal of International Law* 40 (2000 1999), pg. 1103;
Maartje de Visser, "Judicial Networks," in *National Legal Systems and Globalization*, by Pierre Larouche and Péter Cserne, National Legal Systems and Globalization (Springer, 2013), pg. 345-368;
Monica Claes and Maartje de Visser, "Courts United? On European Judicial Networks," in *Lawyering Europe. European Law as a Transnational Social Field*, by Antoine Vauchez and Bruno de Witte (Hart Publishing, 2013)
[162] Op. Cit. Kochenov & Butler (2021)

develop policing powers in various directions. The *Eurobolt* Case[163] and the cases brought by AG Sharpston,[164] may offer a starting point for criticizing the CJEU on this basis. A uniformly applied concept, which helps to protect the rule of law on all levels of the EU legal order, will be the only sustainable long-term solution. This could help the EU legal order become a truly constitutionalized legal order, adept at defending its common foundational values in all spheres. One can only hope that the CJEU is not blinded by the ongoing rule of law crises in some MS and makes use of the opportunity this represents.

[163] C-644/17 *Eurobolt* [2021] ECLI:EU:C:2019:555
[164] C-423/20 P(R) *Council of the European Union v Eleanor Sharpston* [2020] ECLI:EU:C:2020:700;
C-424/20 P(R) *Council of the European Union v Eleanor Sharpston* [2020] ECLI:EU:C:2020:705;
T-550/20 *Eleanor Sharpston v Council of the European Union and Conference of the Representatives of the Governments of the Member States* [2020] ECLI:EU:T:2020:475

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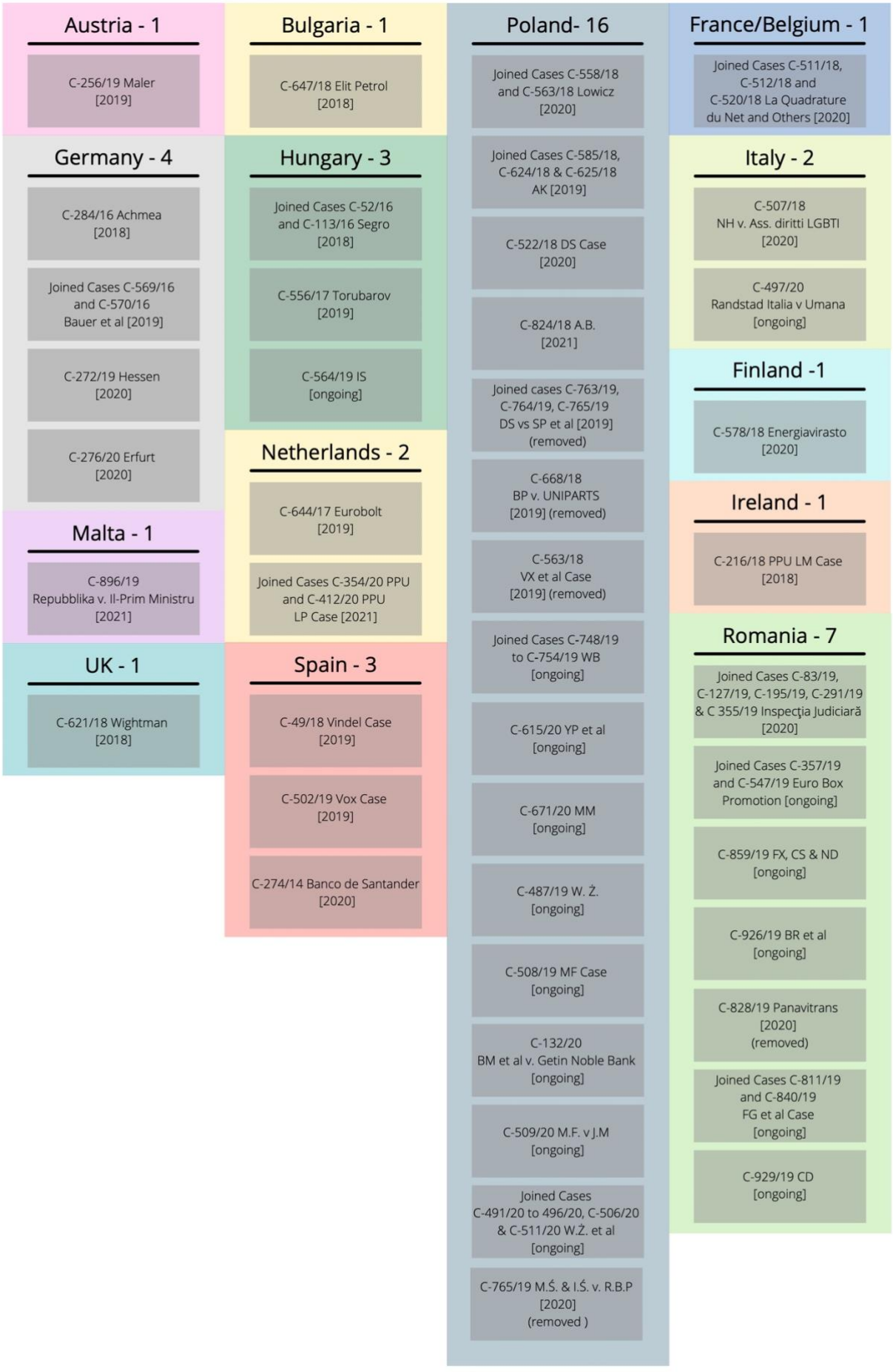
Appendix

The data for this thesis was collected using the www.curia.europa.eu website of the CJEU. By using the search function, preliminary references, judgements, and AG opinions where identified, which made reference either to Art. 2 TEU in combination with another Treaty provision such as Art. 19 TEU or Art. 47 CFR, or which were directly related to the *ASJP* Case.

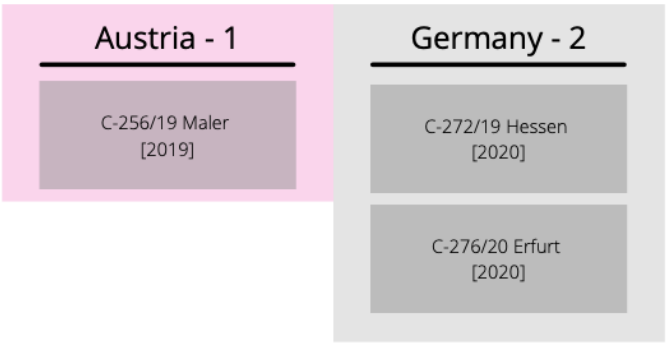
A total of 13 different Member States have made use of these dynamics in order to refer 67 preliminary references, which were consolidated into 43 cases, have been identified.

Cases which were referred after 31.01.2021 are not part of this analysis, however ongoing references, which saw an Order of the Court, an AG Opinion, or a Judgement, following this deadline, were still considered.

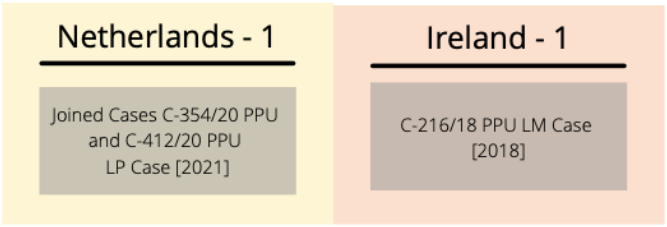
Overview of all Cases



Own Independence



Horizontal Policing



Reviewing Constitutional Legislation

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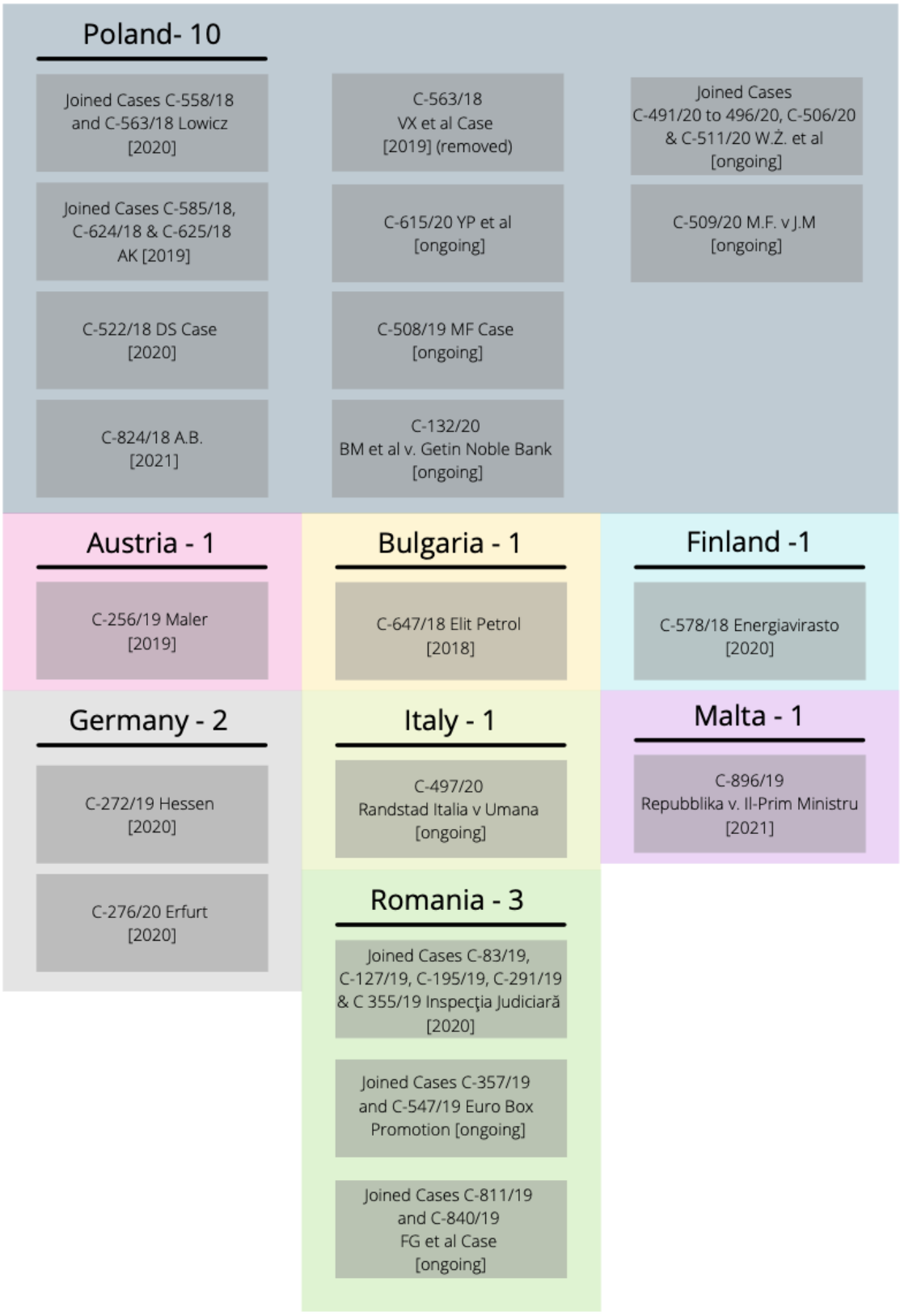

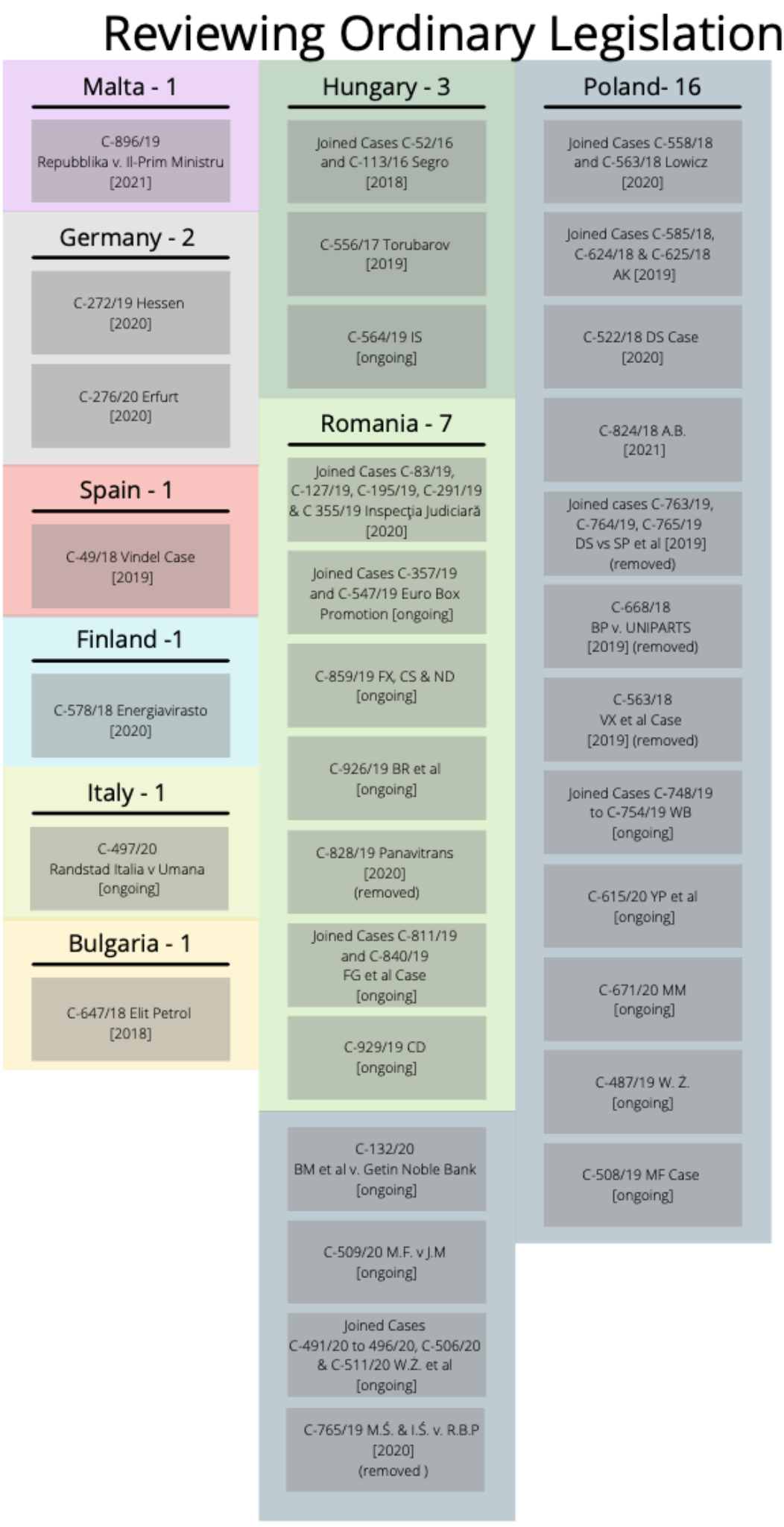

Independence of other actor in MS