Ascertaining the 'Guarantee of Guarantees': Recent Developments Regarding the Infringement Procedure in the EU's Rule of Law Crisis

Matthias Schmidt and Piotr Bogdanowicz

Contents

1 Introduction 208
2 The Rule of Law Crisis in Court: The Commission Infringement Cases Against Poland 210
2.1 The 'Independence of the Supreme Court Case': C-619/18 210
2.1.1 Combined Interim Relief and Expedited Procedure 212
2.1.2 Opinion 218
2.1.3 Judgment 221
2.2 The 'Case on the Independence of the Ordinary Courts': C-192/18 226
2.2.1 Opinion 227
2.2.2 Judgment 229
3 Context of the Judgments: The Commission Communications of April and July 2019 . . 230
4 Conclusions 234
References (Primary Sources, Links and Jurisprudence Omitted) 235

Abstract This chapter builds on an assessment of infringement proceedings in the EU rule of law crisis that we previously published in the Common Market Law Review. We offer a close reading of two recent prominent infringement cases by the European Commission against Poland (cases C-619/18 and C-192/18). Noteworthy advancements in EU law made with them are in particular a clarification on the parallel use of Articles 7 TEU and 258 TFEU, the use of both interim relief and an expedited procedure prior to the judgment, and, as regards the merits, further substance for the functioning of Articles 19 TEU and 47 of the EU Charter of Fundamental Rights regarding the operationalisation of the rule of law in EU law.

M. Schmidt
Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany
e-mail: mschmidt@mpil.de

P. Bogdanowicz (✉)
University of Warsaw, Faculty of Law and Administration, Warsaw, Poland
e-mail: p.bogdanowicz@wpia.uw.edu.pl

© The Author(s) 2021

A. von Bogdandy et al. (eds.), *Defending Checks and Balances in EU Member States*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 298,
https://doi.org/10.1007/978-3-662-62317-6_9

We offer a critical assessment of the Court's findings and contextualise in light of two Commission communications on the rule of law published in 2019.

1 Introduction

When the European Commission published, in March 2014, a communication to introduce a new 'Rule of Law Framework' to complement Article 7 TEU,[1] it created quite a stir, from academic analyses[2] to a legal opinion by the Council's legal service.[3] But no observer, academic or other else, could have imagined the developments over the coming years that have intensified to such a degree that the Commission's First Vice President (now Executive Vice President) Frans Timmermans told the public in April 2019 it was time for the Union's Member States to decide if they wanted to 'bite the bullet' for it.[4] In other words, time had come to act.

It has become common ground in legal practice and academia, as made again evident through this edited volume,[5] that the general development surrounding the 'Rule of Law Framework' condenses in a rule of law crisis exhibited in particular in Hungary and Poland. Among numerous academic debates that followed, two have drawn our particular attention: the debates about which concept could be used to grasp the crisis and which procedure should be used to counteract its most dramatic consequences.

In an article published in 2018 in the *Common Market Law Review*, we took the position that infringement proceedings are an effective option for the Commission in the ongoing rule of law crisis. Building on previous, and what we consider groundbreaking, suggestions,[6] we indicated how the Commission and the Court of Justice could continue on a path already initiated, and pursue systemic deficiencies in the rule of law with the infringement procedure under Article 258 TFEU, notwithstanding the procedure under Article 7 TEU.[7]

---

[1]European Commission, Communication from the Commission to the European Parliament and the Council: A new EU Framework to Strengthen the Rule of Law, COM(2014) 158 final/2 of 19.03.2014.

[2]Cf. in particular, Giegerich (2015), pp. 499–542; Taborowski (2019), pp. 103–140; for the perspective of practitioners see notably Crabit and Bel (2016), pp. 197–206.

[3]Council of the European Union, Opinion of the Legal Service—Commission's Communication for a New Mechanism to Strengthen the Rule of Law, of 27 May 2014, Document no. 10296/14.

[4]'Timmermans invites EU members to 'bite the bullet' on rule of law', Report by EurActiv of 3 April 2019, available at: https://www.euractiv.com/section/justice-home-affairs/news/timmermans-invites-eu-members-to-bite-the-bullet-on-rule-of-law/.

[5]See previously also, for a wider context, Editorial Comments: 2019 shaping up as a challenging year for the Union, not least as a community of values (2019), pp. 3–22; as well as the contributions in Schroeder (2016) and Jakab and Kochenov (2017).

[6]Notably Scheppele (2016), pp. 105–132.

[7]Schmidt and Bogdanowicz (2018), pp. 1061–1100.

While the procedure under Article 7 TEU has remained rather static in the Council despite its launch against Poland and Hungary,[8] infringement proceedings have undergone several remarkable developments.

This justifies a continued focus on infringement proceedings in this article, whereas recent and noteworthy case law justifies the focus on Poland.

This case law has answered several questions raised in academia while the ongoing developments they assess pose new ones. They are accompanied by a large body of other ongoing proceedings in that Member State. Among them are not only infringement proceedings but also a variety of preliminary references from Polish courts, focussing on the independence of the ordinary judiciary and notably of the Supreme Court, referred by the Supreme Court,[9] by the Supreme Administrative Court[10] as well as several lower ordinary courts.[11]

As regards infringement proceedings, the European Commission has brought three actions under Article 258 TFEU before the Court of Justice, two of which have already been decided: one focussing on the lowering of the retirement age of judges of the Supreme Court,[12] and the other one focussing more generally on the ordinary judiciary.[13] A third one, with a specific focus on the new 'Disciplinary Chamber' at the Polish Supreme Court, that is likely to impact the entire judiciary, is pending.[14]

Rather than recapitulating considerations on the doctrinal framework or preceding jurisprudence, for which we refer explicitly to earlier publications,[15] this contribution offers a close-reading of and comments on Case C-619/18 regarding the 'independence of the Supreme Court' and Case C-192/18 on the retirement age differentiation between men and women in the Polish judiciary (Sect. 2). We will focus in particular on the substantive yardstick, for which the Commission, in its action, pleaded to rely on Article 19(1) TEU read together with Article 47 of the EU Charter of Fundamental Rights (hereafter: Charter). We will then contextualise these developments in court in light of recent action by the Commission out of court with

[8]One notable exception is the action brought by Hungary against the decision by the European Parliament to commence an Art. 7(1) procedure against Hungary, see CJEU, Case C-650/18, *Hungary v. European Parliament*, pending.

[9]See e.g. CJEU, Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)*, Judgment of 19 November 2019, ECLI:EU:C:2019:982 or CJEU, Case C-487/19, *W.Ż*, pending.

[10]CJEU, Case C-824/18, *A.B. and others*, pending.

[11]See e.g. CJEU, Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and others*.

[12]CJEU, Case C-619/18 *Commission v. Poland (Indépendance de la Cour suprême)*, Judgment of 24 June 2019, ECLI:EU:C:2019:531.

[13]CJEU, Case C-192/18 *Commission v Poland (Indépendance des juridictions de droit commun)*, Judgment of 5 November 2019, ECLI:EU:C:2019:924.

[14]CJEU, Case C-791/19, *Commission v Poland*, Action of 25 October 2019, O.J. (EU) C 413/36 of 9 December 2019.

[15]See, specifically on the infringement procedure Schmidt and Bogdanowicz (2018); on the concept of systemic deficiency von Bogdandy and Ioannidis (2014) and von Bogdandy (2019); on a preliminary stock-taking regarding the crisis von Bogdandy et al. (2018).

reference to its two communications on the rule of law of April and its first-ever public stakeholder consultation on this matter, of July 2019 (Sect. 3). The purpose of this text is therefore to provide a concise overview on either case and to sketch the most recent state of affairs regarding the *Rechtspolitik* surrounding the infringement procedure in the rule of law crisis.

2 The Rule of Law Crisis in Court: The Commission Infringement Cases Against Poland

In this section, we focus on the two recent infringement proceedings pertaining to the rule of law in Poland, i.e. cases C-619/18 and C-192/18. Both cases concern the independence of the judiciary. One has to remember, however, that the crisis in Poland, while affecting its judiciary in particular, is broader, and several actions by constitutional authorities are highly doubtful already under the national constitutional yardstick. This concerns the Polish Parliament, the President and the government, and in substance namely the freedom of the media, the civil service, and the respect for fundamental rights.[16]

2.1 The 'Independence of the Supreme Court Case': C-619/18

Case C-619/18 was filed by the Commission on 2 October 2018[17] after a letter of formal notice of 2 July 2018 with a 1-month deadline for reply by the Polish authorities and a reasoned opinion of 14 August 2018, with the same deadline. Both deadlines were short, demonstrating the determination of the Commission to see the matter through.[18] The subsequent judicial proceedings, which were provided by the Court with the above title, offer—even to the reader familiar with the

[16]Wyrzykowski (2019), pp. 417–418. For a longer analysis, cf. Sadurski (2019). On our observations regarding the concept of 'systemic deficiency' as underpinning this development, see Schmidt and Bogdanowicz (2018), pp. 1080 et seq.

[17]O.J. C 427/30 of 26.11.2018.

[18]This determination appears not lessened by the fact that, in the proceedings concerning the 'Disciplinary Chamber' at the Polish Supreme Court, CJEU, Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)*, *supra* note 9, the Commission gave the Polish authorities the 'usual' 2 months, both at the stage of the letter of formal notice and the reasoning opinion, cf. Commission press release, 'Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control', IP/19/1957 of 3 April 2019.

background—an impressive procedural complexity. In total, three decisions, by the Court's Vice President of October 2018,[19] then the Court's President of November 2018[20] and then the Grand Chamber of December 2018,[21] preceded opinion[22] and final judgment.[23] They were followed by a rectification order[24] concerning the Polish version.

The case was brought by the Commission in light of amendments to the law on the Supreme Court, enacted in 2017 and with effect of 3 April 2018, and one further amendment of 10 May 2018, all concerning the mandatory retirement age of its judges. It had stood, since 2002, at 70 for all judges, with the possibility of extension by the First President of the Supreme Court upon request and provision of a medical certificate by the judge in question. It was lowered on 20 December 2017, the day the Commission commenced in relation to it and other matters the Article 7 TEU procedure against Poland, to 65, applying to all sitting judges. The possibility of asking for an extension for 3 years remained, but authorisation was transferred to the full discretion of the President of the Republic, who had to consult the National Council of the Judiciary (NCJ). Neither the President's decision nor the NCJ's opinion had to be motivated.[25] A second extension was possible. The amended law also provided for two cut-off dates limiting the possibility of requests which ranged, depending on the age of the judge, from 3 months to 12 months. A second amendment of May 2018 clarified certain procedural provisions.[26]

The Commission had voiced concerns primarily because of the effect of the lowering of the retirement age, which, it held, amounted to 'a profound and immediate change in that court's composition'.[27] On 3 July 2018, the day after the Commission had sent its formal notice in the case to Poland,[28] a day that was used by

[19]CJEU, Case C-619/18, *Commission v. Poland*, Order of the Vice President of the Court of 19 October 2019, ECLI:EU:C:2018:852.

[20]CJEU, Case C-619/18, *Commission v. Poland*, Order of the President of the Court of 15 November 2018, ECLI:EU:C:2018:910.

[21]CJEU, Case C-619/18, *Commission v. Poland*, Order of the Court of 17 December 2018 [Text rectified by order of 2 July 2019], ECLI:EU:C:2018:1021.

[22]CJEU, Case C-619/18, *Commission v. Poland*, Opinion of Advocate General Tanchev of 11 April 2019, ECLI:EU:C:2019:325.

[23]CJEU, Case C-619/18, *Commission v. Poland*, *supra* note 12.

[24]CJEU, Case C-619/18 REC, Rectification d'arrêt of 11 July 2019, not published in the digital reports.

[25]Consequently, as dramatically put by Wojciech Sadurski: 'The new law on the [Supreme Court] created severe moral dilemmas for the older judges who faced a choice: either make a request to the president for an 'extension' beyond a newly lowered retirement age or accept the inevitable and step down.' See Sadurski (2019), p. 107.

[26]CJEU, Case C-619/18, *Commission v. Poland*, cf. paras. 6–14, *supra* note 12.

[27]Id., para. 63.

[28]See Commission Press Release of 2 July 2018, 'Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court', IP/18/434.

the Court as a reference point,[29] the law affected 27 judges out of 72 who were to be retired under the new rules, including then the Supreme Court's First President, Małgorzata Gersdorf. She and 14 others, i.e. 15 in total, were forced to retire on different formal grounds, having not or not properly submitted a request to stay on. Of the 12 others, another 7 received negative opinions by the NCJ, which the President did not overturn. Thus, 22 judges in total were forced to retire.

The Commission was further concerned because the extension procedure foreseen to possibly remedy the impact of the lowering of the retirement age was not subject to sufficient safeguards, in its opinion. It noted that the Polish President had full discretion to decline a request by a judge and that the NCJ, which provided the basis for an assessment, had in itself undergone a fundamental change by a separate law outside the scope of the proceedings, due to which its judges' members were no longer elected by their peers but instead by the lower house of the Polish parliament, the Sejm. With respect to the integrity of the members of the NCJ after that amendment, the Commission noted drily 'that doubt may be cast on their independence',[30] meaning it now considered the NCJ by-and-large defunct and politicised, so as to rubber-stamp the will of the legislature.

The complaint of the Commission in the main proceedings is rather concise and two-pronged, of which one line of argument can be subdivided into two further parts. It rests solely on primary law. The Commission had submitted that, (a) by lowering the retirement age of judges of the Polish Supreme Court from 70 to 65 for all sitting judges and applying it to judges appointed to the Supreme Court before 3 April 2018 and (b) by granting the Polish President discretion to extend the active mandate of Supreme Court judges upon request and to review the application for renewal, Poland had violated its obligations under Article 19(1) TEU in conjunction with Article 47 of the Charter.

Poland, supported by Hungary, disputed these findings in their entirety. Poland claimed in particular that 'the organisation of the national justice system constitutes a competence reserved exclusively to the Member States, so that the EU cannot arrogate competences in that domain' and that the provisions invoked by the Commission were not applicable since the case was not governed by EU law.[31]

2.1.1 Combined Interim Relief and Expedited Procedure

2.1.1.1 Procedural Novelties

Rather than to provide a chronological summary of either of the three orders prior to the opinion, it makes sense to point out, first, that two of them, the order by the Court's Vice President of October, Silva de Lapuerta,[32] and the order by the Grand

[29] CJEU, Case C-619/18, Order of the Court, para. 14 et seq. *supra* note 21.

[30] CJEU, Case C-619/18, *Commission v. Poland*, para. 100, *supra* note 12.

[31] Id., paras. 38 et seq.

[32] CJEU, Case C-619/18, Order of the Vice President, *supra* note 19.

Chamber of December 2018[33] concern the Commission's application for interim measures, whereas the order published 'in-between', i.e. in November 2018 by the Court's President, Koen Lenaerts,[34] concerns the separate Commission application for an expedited procedure.

The Polish Supreme Court case is therefore a novelty in EU law in several aspects, not only as regards its fundamental legal and political questions, but also its procedural structure. First, because of the combination of interim measures and expedited procedure, for which the Court's President, in his order, cites no precedent,[35] although allowing both to be combined.[36] Secondly, the procedure is noteworthy because there are two orders, not only one, as regards the interim measures, of which one serves as interim injunction until a decision on the interim measures themselves is taken, an 'injunction for an injunction' so to say. Thirdly, because both applications were successful for the Commission, which, given their rare use and a diminished success rate,[37] is remarkable as such.

With the applications for interim relief and the expedited procedure, the case differs from the second one discussed below. The reason for the Commission's decision to file for both measures is found in the facts surrounding the legal amendments on the Supreme Court. As the Court's Vice President reiterated, the Polish President had increased the total number of positions at the Supreme Court from 93 to 120 in March 2018, and 44 new vacancies had been advertised over the summer of 2018.[38] The Commission obviously saw this as a particular danger of being confronted with a *fait accompli*; and the Court agreed.

2.1.1.2 The Application for Interim Relief and the Court's Two Subsequent Orders

The Commission set in motion both interim measures and the expedited procedure with separate applications, all filed on the same day as the application in the main proceedings.

We will devote some space to the application for interim relief, because of its novel use, and because we had called, in our article of 2018, for increased recourse to

[33]CJEU, Case C-619/18, Order of the Court, *supra* note 21.

[34]CJEU, Case C-619/18, Order of the President, *supra* note 20.

[35]Id., paras 26–27.

[36]For further discussion on this point, cf. Castillo de la Torre (2007), pp. 273–353, pp. 808 et seq.; Jaeger (2013), pp. 3–28, p. 26.

[37]Between 2014 and 2018, the last period for which data is available, 17 applications for interim measures were filed, of which 8 in 2018 alone, and none in 2015. In total, 10 were granted, 7 were not granted. In 2014 and 2016, 2 out of 3 and 3 out of 5, respectively, were not granted. In 2018, 6 out of 8 were successful. See Court of Justice, Annual Report 2018, Judicial Activity, Luxembourg, February 2019, p. 139.

[38]CJEU, Case C-619/18, Order of the Vice President, para. 22, *supra* note 19.

the procedure.[39] The Supreme Court case now offers a very good opportunity to assess how Commission and Court are developing this procedural tool.

The Commission's application for interim measures, made pursuant to Article 279 TFEU in conjunction with Article 160(3) of the Rules of Procedure, contained four requests: (a) to order Poland to suspend the national legal amendments in question and to refrain from taking any action to implement them, (b) to assure that all sitting judges of the Supreme Court could continue to exercise their office under the conditions as they stood on 3 April 2018, the day the amendments came into effect, (c) to refrain from any appointment of judges under the new rules on posts becoming vacant because of them, in particular as regards measures to replace the President of the Supreme Court, and finally (d) to keep the Commission appraised of all measures taken in compliance in regular intervals.[40] Sanctions under Article 279 TFEU, such as those that had recently created considerable interest in academia, were not subject of the proceedings.[41]

The Vice President of the Court, based on Article 160 (7) of the Court's Rules of Procedure, decided that the matter was so urgent that it could not even wait until the Grand Chamber had decided on the interim measures but that, more still, interim orders had to be issued until that decision prior to a judgment, i.e. that the above-mentioned 'injunction for an injunction' was necessary.

In relation to the later order of the Grand Chamber, it is evident that the first order remains briefer and necessarily more superficial, which is why we focus on the reasoning of the second order. Nonetheless, there is one point of importance, on the use of the *fumus boni iuris*.

As is the case in many national legal systems, the Court decides on the request for interim relief by means of an ancillary procedure, based on a summary examination, i.e. briefer and less in-depth than in the final judgment. However, the CJEU has varied national blueprints with its own test, which is somewhat distinct and based on three considerations: first, whether 'such an order is justified prima facie in fact and in law' (*fumus boni juris*), secondly, whether the order is required 'to avoid serious and irreparable damage to the applicants' interests' (*urgency*) and thirdly, whether the applicants' interests outweigh the interests of the defendant (*balance of interest*).[42] The assessment of the *fumus boni iuris* appears equivalent to the 'summary assessment' in certain Member States.

[39]Schmidt and Bogdanowicz (2018), pp. 1078–1080.

[40]CJEU, Case C-619/18, Order of the Vice President, para. 1, *supra* note 19.

[41]See, on them and the corresponding case, Wennerås (2019), pp. 541–558.

[42]Castillo de la Torre (2007), p. 283. In the concrete case, the Court formulated, at para. 30 of CJEU, Case C-619/18, Order of the Court, *supra* note 21: 'the fumus boni juris requirement is met where at least one of the pleas in law relied on by the applicant for interim measures in support of the main action appears, prima facie, not unfounded.'

With her (the first) order of 19 October, Vice President Silva de Lapuerta adopted this test, but in a considerably condensed form.[43] Her reasoning on the *fumus boni iuris* is particularly noteworthy. She concludes that:

> without it being possible to rule, at the current state of the proceedings, on the question of the merits of these arguments, *let alone on the existence of a fumus boni juris as such*, the [relevant] question must be analysed in detail.[44]

This means that the Vice President granted the request without seriously examining the *fumus boni iuris*, rather refusing to do so in light of the complexity of the case. This approach ought to be contextualised, since it continues a development long observed in academia,[45] by which the Court has almost inversed its initial, very restrictive, approach, having originally required a 'manifest soundness' of an application in interim proceedings to accede to it.[46] Since the Vice President of the Court turns that original test on its head, the application of the Commission is also, with no surprise, granted.

In its second order of December 2018, on the requested interim measures, that follows the result of the first, the Grand Chamber confirmed its willingness to inverse assumptions on the *fumus boni iuris*.[47]

The Grand Chamber extends the initial reasoning of the Vice President in a motivation comprising no less than 118 paragraphs of its order, otherwise sufficient for a full-blown judgment.

In order to assess the *fumus boni iuris*, on which it consecrates a full 29 paragraphs, the Court carefully avoids to deal with the main plea of the Commission, the infringement of Article 19 TEU read together with Article 47 of the Charter. It emphasises instead that this raises 'difficult legal issues',[48] to be reserved for the judgment. This is in line with the general rule in national jurisdictions that the interim measure does not serve to decide already on the merits.

In order to assess the complex situation in Poland *prima facie* nonetheless, the Court uses a three-step test that can be deemed a smart solution.

The Court, after an extensive recapitulation of the parties' arguments, first recalls the importance, relevant jurisprudence, and content of Article 19 TEU and Article 47 of the Charter for Member States, except that the case it knowingly cites in particular, the *LM* case, hardly deals with 'every Member State', as the Court

---

[43] CJEU, Case C-619/18, Order of the Vice President, paras. 15–26, *supra* note 19.

[44] Id., para. 16 (emphasis added, our translation).

[45] Castillo de la Torre (2007), p. 284 et seq.; equally Glawe (2012), pp. 676–683, pp. 681–682.

[46] Cf. CJEU, Joined Cases 43/59 and others, *Eva von Lachmüller and others v. Commission*, Order of the President of the Court of 20 October 1959, para. 11, ECLI:EU:C:1959:24. On this case and the evolution of the fumus boni iuris as part of interim measures, see in detail also Sladič (2008), p. 174 et seq., 178.

[47] CJEU, Case C-619/18, Order of the Court, para. 30, *supra* note 21.

[48] Id., para. 45.

formulates, but no other than the defendant in the present one.[49] It therefore manages to remain abstract and at the same time leave no doubt as to the concrete addressee.

Concentrating on the importance also of 'maintaining the independence of those bodies', i.e. courts and tribunals, the Court, in a second step, recalls that it is 'common ground' that the functioning of the Supreme Court is particularly essential for the Polish judiciary, and that, already for this reason, it is part of the judiciary in the sense of Article 19 (1) TEU.[50] This finding very much predetermines a later confirmation in the judgment, while avoiding to explicitly look at its merits. This assessment does not amount to a reasoning based on general principles or an extensive substantive assessment, but a reduced reiteration of key case law waiting to be further extended and deepened.

The Court then, in a third step, assesses different arguments brought forward by Poland that might rebut the Commission's claim, including that the Commission was barred from invoking objections already made. The Court concludes that none of them convince it *prima facie*, nor that Poland can successfully claim the novelty of the Commission's arguments.[51]

The Court is to be credited for having dwelled on the consequences of this case law ahead of its later judgment, while a strict summary assessment may not have required it.

The Court of Justice then turns to the urgency of the application, which it condenses into the formula whether there is serious damage to be expected from the situation at hand and whether that damage is likely to be irreparable.[52] The Court affirms that this is the case since any endangering of the Supreme Court, as an apex court, is 'likely to have an irreversible effect on the EU legal order'.[53]

As a last step, it agrees that the weighing of interest is in favour of the Commission. In this context it is particularly noteworthy that the Court highlighted, as phrased by Maciej Taborowski, a 'deep interference in national law and with the autonomy of the national law-maker'.[54] The Court rebuts the argument submitted by Poland that the effect of the interim measure suspending the application of the provisions of national legislation would be the creation of a legal lacuna as regards the definition of the retirement age for judges of the Supreme Court. The Court rather underlines that 'granting such interim measures entails an obligation for that Member State immediately to suspend the application of the provisions of national legislation at issue, *including those whose effect is to repeal or replace the previous provisions* governing the retirement age for judges of the Sąd Najwyższy (Supreme Court), so that those previous provisions become applicable again pending delivery

[49] Id., paras. 40–42.
[50] Id., paras. 41–43.
[51] Id., paras. 47 et seq.
[52] Id., para. 70.
[53] Id., para. 71.
[54] Taborowski (2019), p. 250.

of the final judgment.'[55] In other words, provisions that were already repealed have to be brought back into force in such a case.

2.1.1.3 The Application to Expedite the Procedure

Distinct from the Commission's application for interim measures, but equally present in the case at hand, is the possibility for the Commission to request that the main procedure be expedited. The Court decided on this second application of the Commission with its second order of November 2018, based on Article 133 of the Court's Rules of Procedure.

The expedited procedure does not use the same test as the application for interim measures, even though the criteria used by the Court to grant it also rest on an 'intrinsic urgency' test, which bears some resemblance. Decisive here is not the risk for permanent damage, should no interim measure be taken, but the possibility to reduce the risk emanating from the main procedure by speeding it up. Thus, there has to be a particular and intrinsic urgency to the case in the main proceedings.[56]

In contrast to the two orders for interim measures, Court President Lenaerts, who decided on this annex application in the main case, considered also the substantive yardstick found in the Commission's application, but he looked in particular at Article 47 of the Charter and did not relate his findings to Article 19(1)(2) TEU.[57] His decision to grant the request based on urgency rests on two main considerations. He first considered the importance of a functioning apex court, such as the Supreme Court, to guarantee individuals access to an independent court, a right under Article 47 of the Charter, which, he continues, 'forms part of the essence' of the fair trial right under the same norm, and which equally serves to safeguard as a 'guarantee' of 'cardinal importance' to safeguard the Union's values under Article 2 TEU, including the rule of law.[58] That line of argument, we note, is thoughtful and daring at the same time. The Commission had framed its argument much broader and relied on a more objective notion. It had argued that the 'systemic concerns on which those complaints are based' 'hinder the proper functioning of the EU legal order'.[59] While we fully agree with this observation and welcome the use of the concept of systemic deficiency, it was seemingly too early at this stage of the procedure for the Court's President to entertain such a broad concept. Next, Lenaerts considers the amendments in Poland as a possible infringement of a Member State's obligations to guarantee a proper functioning of the preliminary reference procedure, which he elevates to 'the keystone of the EU judicial system',[60] a term later recalled in the

[55]CJEU, Case C-619/18, Order of the Court, para. 95, *supra* note 21.

[56]Barbier de la Serre (2006), p. 804.

[57]CJEU, Case C-619/18, Order of the President, para. 20, *supra* note 20.

[58]Id., paras.19–21.

[59]Id., para. 15.

[60]Id.

judgment.[61] The term is borrowed from the opinion in *Achmea*,[62] but it is the first time that the Court itself used it.

2.1.2 Opinion

The opinion of Advocate General Evgeni Tanchev followed on 11 April 2019.

The main procedural point for Tanchev, before coming to the substance, is the relation of Article 258 TFEU to Article 7 TEU,[63] which the literature had long disagreed on. Tanchev now clarifies that the wording of the treaties, notably in its Lisbon version, does not argue for an exclusion of the infringement action in the area of Article 7 TEU, since today's Article 258 TFEU aims at an infringement of a norm in both treaties, compared to the former Article 226 TEC. Further, he observes a teleological difference, whereas 'Article 7 TEU is essentially a 'political' procedure' while 'Article 258 TFEU constitutes a direct 'legal' route before the Court for ensuring the enforcement of EU law by the Member States'.[64] Article 7 TEU does therefore not act as lex specialis to the infringement action.[65] Rather, and without Article 269 TFEU being an objection, he fittingly concludes that 'the autonomous, indeed complementary, nature of these procedures' mean 'that they may apply in parallel'.[66] This clarification is a major advancement for the interaction of the two procedures in primary law, it was much needed and it is to be expressly welcomed.

The clarification of this very important doctrinal and procedural connection between two core norms of the EU's constitutional supervision system results in the possibility for Tanchev to deal with two substantive points. He first turns to the substantive yardstick of the infringement, for which the Commission, setting the frame under the principle *ne ultra petita*, had aimed at primary law, and had proposed a combined reading of Article 19(1)(2) TEU with Article 47 of the Charter. The opinion now gave a chance to turn to this yardstick more extensively. The importance of both norms, and notably of Article 19(1)(2) TEU as an 'operationalisation' of the rule of law as an EU value enshrined in Article 2 TEU, had arisen against the backdrop of a more complex development, notably through repeated use by the Commission and important case law of the Court of Justice.[67]

[61] CJEU, Case C-619/18, *Commission v. Poland*, para. 45, *supra* note 12.

[62] CJEU, Case C-284/16, *Achmea*, Opinion of Advocate General Wathelet of 19 September 2017, ECLI:EU:C:2017:699, para. 84.

[63] CJEU, Case C-619/18, Opinion of Advocate General Tanchev, paras 48-51, *supra* note 22.

[64] Id., para. 50.

[65] Id., para. 49.

[66] Id., para. 50.

[67] See, in detail, Schmidt and Bogdanowicz (2018), pp. 1092 et seq. and the case-law cited, in particular CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses (ASJP)*, Judgment of 27 February 2018, ECLI:EU:C:2018:117.

Tanchev dealt a severe blow to the Commission's legal point of view of a combined reading, siding explicitly with the defendant and finding that the Commission could invoke neither Article 19(1) TEU in combination with Article 47 of the Charter, nor the latter by itself, for lack of an implementation of EU law, as required by Article 51 of the Charter.[68] In particular, he held that any

> contrary finding would be apt to undermine the current system of review of the compatibility of national measures with the Charter and open the door for Treaty provisions such as Article 19(1) TEU to be used as a 'subterfuge' to circumvent the limits of the scope of application of the Charter as set out in Article 51(1) thereof.[69]

Moreover, he notes, the Commission could not rely on the Court's assessment of Art. 47 in the *Achmea* case, because, he stated, 'the Court mentioned Article 47 of the Charter and related case-law only to confirm findings made on the basis of Article 19(1) TEU.'[70]

In a similar manner, the Advocate General also ruled out that the Commission could invoke the *ASJP* case[71] as a precedent for its combined reading of both norms. He found that the passages cited by the Commission from that case proved only that the Court relied on Article 47 of the Charter to support the substantive scope of Article 19(1) TEU.[72] In the passages cited by the Advocate General,[73] the Court declares that a previous reading of Art. 19(1) TEU is 'now reaffirmed by Article 47 of the Charter' or that it is 'confirmed by the second subparagraph of Article 47 of the Charter'.

In our view, the precedent in *ASJP* should be read as the Court's opening—through Article 19(1)(2) TEU—of the possibility to apply Article 47 of the Charter in a combined standard required by these two provisions. Where Article 19(1)(2) TEU applies, the substantive yardstick of Article 47 of the Charter can apply as well, without contravening Article 51 of the Charter. In his second opinion in the case discussed below, Tanchev would later underscore that he regards a meaningful separation of the jurisdictions of the Court of Justice, the ECtHR as well as national constitutional courts, as demonstrated by a limited applicability of certain EU norms, i.e. here a 'delimited scope' of Article 19 TEU, to be as important under the rule of law 'as the protection of fundamental rights'.[74] We fully agree with the Advocate General that a meaningful distinction of jurisdictions is important. To commit to a

---

[68] CJEU, Case C-619/18, Opinion of Advocate General Tanchev, para. 52 et seq., *supra* note 22.

[69] Id., para. 57 et seq.

[70] Id., para. 55 in fine.

[71] See *supra* note 67.

[72] CJEU, Case C-619/18, Opinion of Advocate General Tanchev, para. 55 at footnote 33, *supra* note 22.

[73] CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses (ASJP)*, paras. 35, 41, 42, *supra* note 67. We note that, in para. 42, the Court does not again refer explicitly to both norms but continues its reasoning of the previous paragraph.

[74] CJEU, Case C-192/18, *Commission v. Poland*, Opinion of Advocate General Tanchev of 20 June 2019, ECLI:EU:C:2019:529, para. 114.

combined standard of both norms, Article 19 (1) TEU and Article 47 of the Charter, does not mean a hidden attempt to level the obstacle of Article 51 of the Charter. The goal then is not a clandestine extended application of the Charter but a comprehensive objective standard. Further, neither the Court nor the Advocate General eventually disregarded Article 47 entirely, as we will show below. It may have made for a smoother assessment to not bar Article 47 and then requiring to take it into account after all.

We also note that, in at least two cases, the Court appears to support a joint reading. In the *Berlioz* case, the Court had stated that '[t]he obligation imposed on the Member States in the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, *corresponds to that right* [scil.: Article 47 of the Charter].'[75] Advocate General Wathelet, in his opinion in that case, had even required a mandatory reading in conjunction, stating that 'Article 47 of the Charter cannot be treated independently of the second paragraph of Article 19 TEU'.[76]

Returning to the opinion in the Supreme Court case, Advocate General Tanchev, having thus narrowed the substantive yardstick for assessment to the 'second subparagraph of Article 19 (1) TEU', assesses two points on the merits: the requirement of judicial irremovability from office and the principle of judicial independence, both in light of the new retirement age at the Polish Supreme Court.

For the concept of judicial independence, the Advocate General reiterates the *ASJP* formula,[77] despite his previous narrow reading of that case.

To ascertain the meaning of irremovability, Advocate General Tanchev cites the opinion of Advocate General Ruiz-Zarabo Colomer in the *De Coster* case. This is a very useful addition, since the opinion appears to have been previously overlooked in the debate at hand. Accordingly, irremovability 'is the basis and the reflection of judicial independence and means that judges cannot be dismissed, suspended, moved or retired except on grounds, and subject to the safeguards, provided by law'.[78] Hence, the distinction for Tanchev is that *irremovability* from office *protects the judicial position as such* once acceded to it, while *judicial independence*, in the specific setting of EU primary law, *protects the proper and unhindered exercise* of said position. That juxtaposition, we observe, finds support in the same passage of the above *De Coster* opinion.

---

[75]CJEU, Case C-682/15, *Berlioz Investment Fund*, Judgment of 16 May 2017, ECLI:EU:C:2017:373, para. 44.

[76]CJEU, Case C-682/15, *Berlioz Investment Fund*, Opinion of Advocate General Wathelet of 10 January 2017, ECLI:EU:C:2017:2, para. 38.

[77]CJEU, Case C-619/18, Opinion of Advocate General Tanchev, para. 86 and case law cited, *supra* note 22.

[78]Id., para. 55, citing Case C-17/00, *De Coster*, Opinion of Advocate General Ruiz-Zarabo Colomer of 28 June 2001, para. 93.

Tanchev further elaborates the principle of irremovability based on ECtHR case law and various non-binding guidelines by the Council of Europe, including the Venice Commission. He equally cites the CCJE and UN documents,[79] a noteworthy reception of soft law and international law sources, that he would continue in similar fashion in the subsequent case. From them, Tanchev deduces that

> judges should have a guaranteed tenure until a mandatory retirement age or the expiry of their term of office, and can be subject to suspension or removal from office in individual cases only for reasons of incapacity or behaviour rendering them unfit for office. Early retirement should be possible only at the request of the judge concerned or on medical grounds, and any changes to the obligatory retirement age must not have retroactive effect.[80]

The Advocate General finds that, as the Commission has shown, these requirements are not met.[81] Tanchev further finds the principle of irremovability of judges infringed because the termination of office was premature. Relying on precedent case law, he concludes that Poland cannot invoke economic motives to justify the decision.[82]

As regards the second principle in question, judicial independence, Tanchev's position is equally clear:

The Polish legal provisions in question

> expose the Supreme Court and its judges to external intervention and pressure from the President of the Republic in the initial extension and renewal of their mandate which impairs the objective independence of that court and influences the judges' independent judgment and decisions. This is so, especially given that the requirement to apply to the President of the Republic for the extension of retirement age is accompanied by a reduction in the retirement age.[83]

As regards the possibility for extension requests to the Polish President, Tanchev finds that this offers no judicial review and does not rely on binding criteria.[84]

Relying on these findings, the Advocate General therefore suggests to the Court to find that there has been a violation of Article 19(1) TEU.

2.1.3 Judgment

In its judgment of June 2019, the Court's Grand Chamber sides, in the operative part, fully with the Advocate General, even though its reasoning differs in parts.

The Court finds that Poland violated its obligations under Article 19(1)(2) TEU by enacting a law that retroactively lowers the retirement age for judges at the Supreme Court and, secondly, by granting the Polish President discretion to extend

[79] Id., para. 72 and references cited at footnote 52 and 53.

[80] Id., para. 72.

[81] Id., para. 73.

[82] Id., para. 72–82.

[83] Id., para. 89.

[84] Id., paras. 90 et seq.

the mandate of its judges beyond the newly fixed retirement age. The applicability of the infringement procedure to the case is not discussed.

Very close to Tanchev's reasoning, the Court rejects Poland's argument that the subsequent amendments of November 2018 to the original law can impact the Court's own competence or indeed the requirement to assess the law in question, recalling clearly that the relevant point in time is the date of the reasoned opinion, even if later retroactive amendments came into effect.[85]

It then deals, as the Advocate General did, with the yardstick for the substantive assessment, Article 19(1) (2) and Article 47 of the Charter. From the outset however, it departs very notably from the Advocate General's point of view; at the same time, it avoids a clear positioning.

The Court uses its power to reformulate the application in a manner that takes away the main point of difference between the Commission's application and the Advocate General's opinion. It finds: 'At the hearing, the Commission stated that, by its action, it is seeking, in essence, a declaration that the second subparagraph of Article 19(1) TEU*, read in the light of Article 47 of the Charter*, has been infringed.'[86] This is clearly not what the Commission had submitted in writing, it had demanded an assessment 'under the *combined provisions* of Article 19(1) (2) TEU and Article 47 of the Charter'.[87]

The Court however does not find that Article 47 of the Charter must *not* be considered. Rather, and now implicitly returning to the reformulated application, it holds: 'that the second subparagraph of Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, *within the meaning in particular of Article 47 of the Charter*, in the fields covered by EU law' and that it is assessing the scope of Art. 19(1) TEU 'as confirmed by the second paragraph of Article 47 of the Charter'.[88]

The Court therefore mediates between two positions. Like the Advocate General, it narrows the yardstick, but remains more extensive than Tanchev. From this basis, the Court proceeds to assess the merits.

Before going into the assessment of the application, the Court, in contrast to the Advocate General, adds a section on 'applicability and the scope of the second subparagraph of Article 19(1) TEU'.[89] Given that the scope of assessment had already been established, the Court could have omitted that section without immediate loss to its reasoning. That it decides otherwise is very telling because the Court

[85]CJEU, Case C-619/18 *Commission v. Poland*, paras. 27-33 of the judgment, in particular para. 31, and case law cited, *supra* note 12.

[86]Id., para. 32.

[87]Id., para. 25 of the judgment, emphasis added, *supra* note 12. The French version, lacking the 'in particular' reads 'lu à la lumière de l'article 47 de la Charte.' The German version is yet more explicit, using the verb 'interpret': 'ausgelegt im Licht von Art. 47 der Charta'.

[88]Id., para. 57.

[89]Id., paras. 34 et seq.

uses the following paragraphs for general findings on the normative framework of the case.

Only after these initial normative findings does the Court go into an assessment of Article 19(1) TEU, combining both key findings of its previous judgments in *ASJP* and *LM* into one, central statement:

> Article 19 TEU, [. . .] gives concrete expression to the value of the rule of law affirmed in Article 2 TEU [and] entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice.[90]

It coincides with that finding that the Court had included Article 2 TEU as applicable law at the beginning of the judgment.[91] The Court emphasizes that Article 19(1) TEU demands full compliance irrespective of various counterarguments, such as the possible presence of an excessive deficit procedure and 'irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter'.[92] The compliance requirement also does not amount to a transfer of competences from Member States to the Union.[93] The Court then also answers how it intends to read Article 19(1)(2) TEU 'in the light of' Article 47 of the Charter. Accordingly, this combined interpretation requires Member States to provide 'effective judicial protection', and that in turn entails ensuring judicial independence,[94] a finding with which the Court can commence its concrete assessment in the case at hand.

The Court distinguishes two pleas of the Commission and examines them separately.

In its first plea in law, the Commission in essence alleged that the application of the lowering of the retirement age to all sitting judges of the Polish Supreme Court, with two cut-off dates depending on their age, and in addition an increase in the number of judges, leading both to a large number of vacancies, amounted to an impression that the measures were used to 'covertly' change the composition of 'judicial bodies',[95] a term by which the Commission meant the Polish Supreme Court.

Poland, in turn, defended itself by stating that early retirement of judges, with all salaries and immunities kept, did not amount to dismissal, this being the solely prohibited measure in question here under Art. 19(1) TEU and further, that it had only re-established a previously existing, earlier, retirement age, under which several of the sitting judges had served, who were therefore not affected by the current

[90] Id., para. 47.

[91] Id., para. 2.

[92] Id., para. 50 and case law cited.

[93] Id., paras. 49–52.

[94] Id., paras. 54–56.

[95] Id., para. 64.

measures. Further, Poland also claimed that the measures aimed at 'improving the age balance among senior members'.[96] This is an argument with which the Court was familiar, since it was raised, in similar fashion, by Hungary regarding its judiciary in 2012.[97] Hungary, in its support, claimed that the Commission had not proven an impact of the measures in question on the Supreme Court's capacity.[98]

Dealing further with the arguments for the first plea, it is noteworthy that the Court addresses them solely under the principle of independence, to which it attaches the notion of impartiality,[99] whereas the Advocate General had previously addressed either concept separately. The Court also separates the notion of independence (tacitly the operative core of Article 19(1)(2) TEU) into 'two aspects', one, 'which is external in nature' and the other being 'internal in nature'.[100] The latter, internal one, concerns the behaviour and set-up of a bench in relation to concrete proceedings, i.e. 'that an equal distance is maintained from the parties to the proceedings and their respective interests'.[101] It subsequently only assesses the external aspect, the 'freedom of the judges from all external intervention or pressure'[102] for which it adds, for the concrete case:

> the requirement of independence means that the rules governing the disciplinary regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions.[103]

In light of this high bar, the Court sets as a test four elements to find whether the Polish law is compatible with the external aspect of judicial independence, and, consequently, EU law: first, 'a legitimate objective' that is, secondly, 'proportionate in the light of that objective' and, thirdly, 'must not raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors' nor, the fourth point, its 'neutrality with respect to the interests before it'.[104]

It is somewhat surprising that the Court never openly finds that this test has not been met. Instead, it speaks of 'doubts', first as regards the retirement as such, secondly, related to the newly introduced possibility to have a mandate extended, thirdly, as regards the combined effect of the measures and lastly, the extent of that combined effect on the Supreme Court.[105] In other places, the Court is more explicit. In particular when it comes to additional material provided by Poland, such as an

[96] Id., para. 80.

[97] Cf. CJEU, Case C-286/12, *Commission v. Hungary*, Judgment of 6 November 2012, ECLI:EU:C:2012:687, para. 25.

[98] CJEU, Case C-619/18 *Commission v. Poland*, paras. 65–70, *supra* note 12.

[99] Id., paras. 73–74.

[100] Id., paras. 71–73.

[101] Id., para. 73.

[102] Id., paras. 74–76.

[103] Id., para. 77.

[104] Id., para. 79.

[105] Id., paras. 82–86.

explanatory memorandum for the Venice Commission, it noted that this could raise serious doubts as to whether the reform of the retirement age of serving judges of the Supreme Court was made in pursuance of legitimate objectives, and not '*with the aim of side-lining a certain group of judges of that court*'.[106] Weighed against the arguments of the defendant the Court first does not accept that some of the judges had originally served under terms meaning a retirement at 65. The Court equally rejected further Polish arguments, such as that the retirement of judges had to be regarded as a right rather than an obligation,[107] as well as the assumption that, in light of the economic situation, the amendments were to mainstream and standardise the retirement age of its judges. The Court is finally almost amused, it seems, by the fourth argument, that the amendments were intended to improve the age balance at the court and to allow positive discrimination.[108] Consequently, the Court approves of the first plea in full.[109]

The second plea of the Commission addressed the discretion granted to the Polish President to extend the term of retired judges for 3 years, and to repeat that extension once upon request.

The Court, rather concise in its reasoning, finds that the President's manner of appointment clearly did not satisfy the requirements it had set and that the NCJ did not meet standards to aptly justify its decisions, which therefore could not rule out the 'imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests before them.'[110] Interestingly, the Court requires that a body such as the NCJ be itself independent of the legislative and executive authorities and of the authority to which it is required to deliver its opinion.[111] Hence, for the first time in history, the Court specifies the terms for the functioning of a body that is not itself a court but established for the purpose of safeguarding judicial independence. It would return to that problem later.[112]

To conclude its reasoning, the Court reiterates, as the Advocate General had done before, that Member States could not, if not in their own right, point to another Member State to justify their own infringement of EU law, an important argument given Poland's frequent references to legal systems in other Member States, including, but not limited to, Germany and France.[113] As a last point, it notes drily that its own members were appointed for a fixed year term on accord of all Member States

---

[106]Id., para. 82.

[107]Id., paras. 89–90.

[108]Id., paras. 94–95.

[109]Id., para. 97.

[110]Id., paras. 116–118, para. 118 for the citation.

[111]Id., para. 116.

[112]See CJEU, Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)*, paras. 136 et seq., notably 143–145, *supra* note 9.

[113]See e.g. Chancellery of the Polish Prime Minister, White Paper on the Reform of the Polish Judiciary, 7 March 2018.

and of the panel provided for under Article 255 TFEU, to counter the argument by Poland as to its own composition.[114]

2.2 *The 'Case on the Independence of the Ordinary Courts': C-192/18*

The second important infringement action, *Case C-192/18*, is the 'Case on the Independence of the Ordinary Courts', for which Advocate General Tanchev issued his opinion on 20 June 2019 and the Court handed down its judgment on 5 November 2019. The case offers several interesting findings and complements the case on the independence of the Supreme Court.

The title of the case, again assigned by the Court, is somewhat too narrow as it does not concern only the ordinary courts, but a retirement differentiation according to the sex of the person that concerned, other than ordinary court judges, *mutatis mutandis* equally public prosecutors and Supreme Court judges. This differentiation, according to which men retire in general at the age of 65, whereas women were set to retire at the age of 60, with a possible extension of employment at the discretion of the minister of Justice, had been introduced on 12 July 2017. The Commission was faced with not only having to address the amendment concerning the lowering of the retirement age, but also that new differentiation. It brought a letter of formal notice only 2 weeks later, on 28 July 2017, a record-worthy speediness given its internal procedures and stakeholders involved. The date of that initial decision of the Commission coincided with the last (fourth) 'Rule of Law Recommendation' addressed to Poland and the threat to trigger Article 7 TEU.[115] A reasoned opinion followed on 12 September 2017. Since the case was not subject to an expedited procedure, the Court took considerably longer to decide on it, and concluded the case only in 2019, long after the Commission had taken non-judicial steps also regarding that matter with the launch of Article 7 (1) TEU on 20 December 2017.[116]

The Commission addressed the age differentiation in the Polish law by two pleas, first under the combined primary and secondary law equal treatment provisions (Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54/EC). With the second plea, the Commission again invoked the view that Poland, by the same token, had violated the 'combined provisions' of Article 19(1) TEU and Article 47 of the Charter. For the yardstick, the Commission had limited its action during the

[114]CJEU, Case C-619/18 *Commission v. Poland*, para. 121, *supra* note 12.

[115]Cf. Commission Press Release of 26 July 2017, 'European Commission acts to preserve the rule of law in Poland', IP/17/2161.

[116]Cf. European Commission, Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland—Proposal for a Council Decision: On the determination of a clear risk of a serious breach by the Republic of Poland of the Rule of Law, COM (2017) 835 final of 20 December 2017, see in particular mn. 5, point (2), mn. 114 et seq.

hearing to Article 19(1)(2) TEU, *read in the light of Article 47 of the Charter*. The Court understood this to mean a focus only on Article 19 (1) TEU, and did not consider Article 47 further,[117] in contrast to the previous case, where exactly that reasoning had been upheld.[118] The Court is yet to explain this difference.

2.2.1 Opinion

Advocate General Tanchev, also assigned to this case, proposed that the Court should declare that Poland has breached its obligations under Article 157 TFEU, along with Article 5(a) and Article 9(1)(f) of Directive 2006/54/EC, as well as under Article 19(1)(2) TEU. He only briefly considered and rejected the motion by Poland to declare the case hypothetical due to subsequent amendments to the laws in question, for this case of April 2018, in particular because of the fundamental need for clarification by the Court.[119]

As before, and already as discussed above in part, Tanchev remained of the opinion that Art. 47 of the Charter again was not to be considered. He referred for that purpose to his considerations in the above-mentioned case[120] including a polite reservation possibly against previous mediation attempts by the Court: 'I therefore take the view that prudence should be exercised in making direct recourse to Article 47 of the Charter in illuminating the protection with respect to the rule of law provided by Article 2 TEU.'[121]

But he evidently felt the need to return to this point in more detail. As a rule, the Advocate General regards an extensive application of Article 47 of the Charter, even from an objective viewpoint, as non-compliant with the principle of conferral. 'Contrary to the European Court of Human Rights, the Court does not have a specific mandate to penalise all fundamental rights violations committed by the Member States.'[122] But that limitation, he continues, does not mean that the Court cannot consider 'common legal sources',[123] in the assessment of Article 19 (1) TEU. Fundamental rights, notwithstanding their non-applicability to the individual under the Charter in the case at hand in light of its Article 51, are part of these sources, as indicated in particular by Article 6 (3) TEU.[124] They are inherent in the 'content of the guarantee of the rule of law'.[125] Following this logic, as the Advocate General continues, there is necessarily 'a tension inherent in Article 6(1) TEU, in the sense

[117]CJEU, Case C-192/18, *Commission v. Poland*, paras. 85–86, *supra* note 13.

[118]Id., paras. 54, 57.

[119]CJEU, Case C-192/18, Opinion of Advocate General Tanchev, paras. 64 to 65, *supra* note 74.

[120]Id., para. 67 et seq. and case-law cited.

[121]Id., para. 99.

[122]Id., para. 70.

[123]Id., para. 71.

[124]Id., para. 96.

[125]Id., para. 96.

that the Charter is, in effect, recognised as a source of fundamental rights guaranteed by the EU legal order, while the same provision also states, [. . .] that the 'provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties."[126]

Tanchev's solution for that tension is a novel concept in the Court's terminology: a '*constitutional passerelle*' ('*passerelle constitutionnelle*' in the French version, somewhat weak '*verfassungsrechtliche Verbindung*' in the German version, '*konstytucyjny pomost*' in the Polish version). Reminiscent of the 'passerelle clause' but of an evidently different meaning, the Advocate General uses this concept to point out a necessary connection between both norms, requiring an interpretation 'in harmony'.[127]

As regards the two complaints by the Commission, the Advocate General first assesses and confirms that there has been an unequal treatment between men and women, and in particular also that remunerations in question were to be regarded as pay in the sense of Directive 2006/54/EC on equal opportunities and treatment.[128]

It is the second complaint, and the above considerations, that are of considerably more interest here. The Advocate General examines the fulfilment of both principles, irremovability and independence, according to several subprinciples that he takes from varying sources, including by international organisations.[129] The point of view essential for ascertaining, for each point, whether there has been an interference, is in particular that of general public that is subject to the judiciary, or 'whether the public might legitimately perceive the arrangements in issue to taint the impartiality of proceedings.'[130] The Court would later adopt this viewpoint.

The assessment also condenses into a statement on the material scope of Art. 19 (1) TEU:

> The material scope of Article 19(1), second subparagraph, TEU is confined, in the context of irremovability and independence of judges, to correcting problems with respect to structural infirmity in a given Member State; which is here the case given that the laws challenged by the Commission impact across entire tiers of the judiciary. These might best be termed systemic or generalised deficiencies, which 'compromise the essence' of the irremovability and independence of judges.[131]

This formula adds further substance ('impact across entire tiers of the judiciary') to the concept of 'systemic or generalised deficiencies', which the Court had previously already dwelled on in *LM*, but left in its details to Member State courts.[132] Accordingly, there can be particularly severe, 'structural infirmities' in a Member

[126]Id., para. 98.

[127]Id., para. 97.

[128]Id., paras. 74 et seq.

[129]Id., para. 102 et seq.

[130]Id., para. 112.

[131]Id., para. 115.

[132]CJEU, Case C-216/18 PPU, *Minister for Justice and Equality (LM)*, Judgment of 25 July 2018, ECLI:EU:C:2018:586, notably paras. 67–68.

State, which can take the form of 'systemic or generalised deficiencies' and there is a concept of 'essence' of a principle in EU constitutional law, which can be infringed by these phenomena.[133] The Advocate General may still have to further illustrate what difference, if any, he sees between the adjectives 'systemic or generalised' and how the new notion of 'structural infirmity' comes into play.

2.2.2 Judgment

The Court sided with the Advocate General and declared that Poland had breached its obligations under Article 157 TFEU, along with Article 5(a) and Article 9(1)(f) of Directive 2006/54/EC, as well as under Article 19(1)(2) TEU.

As regards the substance of the first plea, the main point of dispute between the Commission and Poland was the scope of application of the Directive or a different legal basis, which would have supposedly granted more leeway to the defendant.[134] The Court dismissed Poland's arguments as fundamentally flawed.[135]

As regards the second plea, the Court spent some time on the 'applicability and the scope of the second subparagraph of Article 19(1) TEU'.[136]

Having repeated its findings on the different aspects of the guarantee of judicial independence, the Court engages in a concrete assessment and clarifies, first, that the main point for objection is not per se the lowering of the retirement age nor in fact the involvement of the Minister of Justice. For both, the Court indicates some leeway for the Member States. Rather, it is the concrete amount of discretion granted to the Minister of Justice and, in return to the Advocate General's reasoning, the impact on concerned individuals in 'that they cannot give rise to reasonable doubts, [...] as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them' that lead the Court to find its yardstick infringed.[137] Among other things, the Court noted that the new system might actually have been intended to enable the Minister for Justice, acting at his discretion, to remove, once the newly set normal retirement age was reached, certain groups of judges serving in the ordinary Polish courts while retaining others of those judges at their post.[138] This reference to the context of the 'reform' of the judiciary spikes Poland's guns by contradicting the claim that nothing special is happening in Poland, at least nothing that would differ Poland from other EU Member States.

[133] On the usefulness of the concept of systemic deficiency see recently von Bogdandy and Spieker (2019), p. 425.

[134] Namely Poland has argued that the pension schemes at issue are covered by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24). CJEU, Case C-192/18 *Commission v. Poland*, para. 52, *supra* note 13.

[135] Id., paras. 66, 73 and 84.

[136] Id., paras. 98–107.

[137] Id., para. 126.

[138] Id., para. 12.

3 Context of the Judgments: The Commission Communications of April and July 2019

The two cases, of which we have offered summaries and close readings above, have not yet settled the rule of law crisis, here in its manifestation in Poland. But they have catapulted the doctrinal understanding of the Court forward on essential points that far exceed the crisis. This is something which many observers, us included, had been advocating for. Both cases have furthered the understanding of the protection of Member States under the infringement action, now fully established in parallel to Article 7 TEU. And they have contributing to the understanding of the overlapping and interaction of Article 19(1)(2) TEU, Article 47 of the Charter, and in particular their relation to Article 2 TEU, now termed a 'constitutional passerelle'.

Both cases, as we said in the beginning, do not stand in isolation. On 19 November 2019, barely two weeks after having decided in the infringement proceedings related to Poland's ordinary judiciary, the Court decided the case of a preliminary reference by the Polish Supreme Court, again concerning the new amendments and flanking the cases portrayed here.[139] The Court, while leaving the final assessment to the referring court, also determined a yardstick for the Polish courts to ascertain whether the new 'Disciplinary Chamber' set up within the Supreme Court, could be deemed independent.[140] It will, in the near future, have to return to this point within the scope set specifically also by the Commission.[141]

We leave this case, since it did not arise from Commission infringement actions, to separate assessment and would rather like to use the remaining space to draw the reader's attention to further Commission measures flanking its own initiatives. They are relevant here because they illustrate, from a perspective that does not solely focus on the Court, that the Commission pursues an integral strategy in dealing with the rule of law crisis, both before and outside the Court of Justice and that it has overcome an ad-hoc use of the infringement procedure in favour of a strategic approach.

Such material is found in particular in two communications of the Commission of April and July 2019. With the first communication,[142] the Commission provides readers with an overarching, analytical, and college-approved document, in which a 'rule of law crisis' is explicitly acknowledged for the first time since the beginning of that crisis. The communication also serves the Commission to take stock of its own actions and suggests that its different steps—such as the reasoned opinion under Art.

---

[139] CJEU, Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)*, *supra* note 9.

[140] Id., paras. 131–153, *supra* note 18.

[141] CJEU, Case C-791/19, *Commission v Poland*, Action of 25 October 2019, O.J. (EU) C 413/36 of 9.12.2019.

[142] Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union: State of play and possible next steps, COM(2019) 163 final of 3.4.2019.

7 TEU, its infringement actions, as well as various other measures—form part of a coherent legal regime, a 'rule of law toolbox'.[143] In the literature, we observe, a more doctrinal concept that is explored elsewhere, that of a nascent 'constitutional supervision' serves a similar purpose of combining these different measures into a logical whole.[144]

The Commission also introduces the concept of 'rule of law-related infringement actions',[145] reminiscent of the earlier concept of 'values-related infringement actions', for which the Commission submitted to the Council background information in particular on Hungary in late 2018.[146] To us, it is evident that the cases analysed above constitute prime examples of this category of infringement proceedings.

At the end of the communication of April 2019, the Commission issued, in a remarkable move, a call for stakeholders and interested parties of various backgrounds to provide it with contributions on 'three pillars for future action – promotion, prevention and response'. It received around 60 replies to this call, including non-papers from several Member States' governments and in part other public bodies, from Poland and Hungary included, which have been made publicly available.[147] While it is difficult to summarise them here, a recurrent topic, alongside the Commission's suggested structure, is the way forward by means of supplementing additional measures. Some suggestions have dwelled in particular on infringement proceedings. Sweden and France e.g. both suggested to boost the reactivity of the Court within the procedure by further developing notably the expedited procedure and interim measures.[148] Other interesting suggestions abound. Germany reiterated, alongside Belgium, its desire to install a proposed 'periodic peer review' mechanism

---

[143] Id., p. 3 et seq.

[144] Briefly Schmidt and Bogdanowicz (2018), p. 1071; for earlier mentioning, Zuleeg (2000), pp. 2846–2851, p. 2850 (for the Art. 7 TEU procedure) and Giegerich (2015), p. 520. Cf. further: Matthias Schmidt, Verfassungsaufsicht in der Europäischen Union, forthcoming.

[145] European Commission, State of play Communication, p. 3 et seq., *supra* note 142.

[146] Council of the European Union, 'Commission non-paper providing factual information on the values-related infringement proceedings in relation to Hungary', Document No. 14022/18 of 8 November 2018, made publicly available via: https://www.asktheeu.org/en/request/6115/response/19716/attach/6/st14022.en18.pdf.

[147] Cf. https://ec.europa.eu/info/publications/stakeholder-contributions_en.

[148] Swedish input to the European Commission Communication on Further strengthening of the Rule of Law within the Union (COM(2019) 163 final), p. 2 (no page nos.); Communication de la Commission du 3 avril 2019 sur l'État de droit. Non-papier de la France, p. 6.

for the rule of law in the Council,[149] and France suggested to 'codify' (i.e. possibly transfer into primary law) the Rule of Law Framework of the Commission.[150]

The Commission reacted by a second communication of July 2019, in which it introduces the idea of a 'blueprint for action'[151] and structures the different procedures of what it had previously identified as a toolbox into a multi-procedural and multi-actor scheme, consisting of a preventive and a reactive arm, and announcing both its own actions as well as seeking the support of other actors. The preventive arm, and a novelty, to be set apart notably from procedures in the Council, is the idea of a 'rule of law review cycle',[152] that is in part reminiscent of the background analysis already carried out during the Rule of Law Framework. The reactive arm is in particular an explicitly more 'strategic use' of the infringement procedure.[153] How this might look is still to be developed but in previous communications, such as in 2016, the Commission has provided some material.[154]

As regards the substance of such more strategic action, the Commission appears focussed notably on the Union's budget and financial interests, which is why here it may be engaged, as it was in the summer of 2017 when it first brought up the yardstick of Article 19(1) TEU in conjunction with Article 47 of the Charter, in another attempt to further operationalise Union values. In its Toolbox Communication, the Commission states that '[t]he Commission will further build on the recent case law of the Court, for example in relation to the independence of national courts *and to the effective protection of financial interests of the Union*'.[155] This links to the Commission's regulation proposal in relation to generalised deficiencies in the rule

[149]Input of the Federal Government regarding the Communication from the Commission to the European Parliament, the European Council and the Council 'Further strengthening the Rule of Law within the Union – State of play and possible next steps' of 3 April 2019, p. 3 (no page nos.), 'Communication of the European Commission of the 3rd of April 2019 "Further strengthening the Rule of Law within the Union – State of play and possible steps" – Belgian elements', p. 2 (no page nos.). See also 'Discours du Ministre D. Reynders lors de la 5ème Conférence belgo-allemand [sic] (Debeko), axée cette année sur les thèmes de la digitalisation, l'énergie et le transport', of 18 March 2019, p. 5, available at: https://diplomatie.belgium.be/sites/default/files/downloads/discours_debeko_20190318.pdf; 'Opening speech by Minister of State for Europe Michael Roth at the Peer-Review-Workshop on Rule of Law', of 7 November 2018, available at: https://www.auswaertiges-amt.de/en/newsroom/news/-/2158210.

[150]Communication de la Commission du 3 avril 2019 sur l'État de droit. Non-papier de la France, p. 6.

[151]European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the rule of law within the Union: A blueprint for action of 17 July 2019, COM(2019) 343 final.

[152]Id., p. 9 et seq.

[153]Id., p. 14 and 16.

[154]Communication from the Commission, C/2016/8600, OJ C 18 of 19 January 2017, p. 14.

[155]European Commission, State of play Communication, p. 13, emphasis added, *supra* note 142.

of law and the protection of the EU budget, as well as a new 'Commission Anti-Fraud Strategy' (CAFS).[156]

In its 'Blueprint Communication', the Commission moreover included, as an 'obiter dictum', a sentence that may be the start of a distinct policy development or, not unlike before as regards Article 19 (1) TEU and Article 47 of the Charter, another operationalisation attempt of an underlying value:

> There is also an evolving jurisprudence of the Court highlighting how systematic problems related to the rule of law may have a specific impact in the area of Union finances.[157]

The Commission relies here on Article 325 TFEU,[158] under which the Union has developed its comprehensive policy for the protection of financial interests. This provision is already creating scholarly interest. It has e.g. recently been suggested that Article 310 (6), read together with Article 325 TFEU, could provide a legal basis for further Commission action.[159] If so, this also could be the start of further action before the Court in appropriate cases.

The preventive arm of the new blueprint, the 'rule of law review cycle', including an announced 'Annual Rule of Law Report', also surely deserves further elaboration. The Commission ought to make concrete, in particular, how such a report feeds into decisions before the Council or the Court, in order to have added value. In short, any report must provide sharp and notably original analysis and clear recommendations, to which the Commission should feel encouraged.[160] For such purposes, a 'Rule of Law Report', must also clearly set apart systemic deficiencies, creating spill-over effects on European level, from discrepancies or reform processes of judicial systems in Member States of varying kind and severity but to be left to their own

[156]Id. It is to be noted, though, that the CAFS in its current form, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Auditors: 'Commission Anti-Fraud Strategy: enhanced action to protect the EU budget', COM(2019) 196 final of 29.04.2019, lacks such a link.

[157]European Commission, Blueprint Communication, p. 13*,* *supra* note 151.

[158]Id., p. 13, at footnote 46.

[159]Brauneck (2019), in particular pp. 57–59.

[160]Looking for guidance outside the European Union, we suggest that the United States Department of State's annual 'Country Reports on Human Rights Practices', even though created with a different angle, might offer an example. They are available under: https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/ for almost all countries worldwide and regular used by U.S. decision-makers.

resolve. Germany,[161] France[162] and Spain[163] provide recent examples of such non-systemic controversies.[164]

4 Conclusions

This article has offered a close reading of two recent Court of Justice judgments regarding the EU's rule of law crisis in its manifestation in particular in Poland.

In the previous section, the purpose of looking at two recent Commission communications rather than other recent case law was to contextualise the use of the infringement procedure by the Commission, and to 'feel its pulse' where it may take the procedure in the near future. The material here proves that Commission and Court are now fully engaged in effectively using the infringement procedure for the defence of the rule of law, being, as aptly put by *Emmanuel Crabit* and *Anna Perego*, the 'guarantee of guarantees'[165] in EU constitutional law. This is also what we had advocated for previously.

In particular the case concerning the independence of the Polish Supreme Court can be considered a landmark decision. The case presented the Court with the opportunity to decide, for the first time within the context of an infringement action under Article 258 TFEU, on the compatibility of national measures concerning the organisation of its judicial system with the standards set down in EU law to ensure the respect for the rule of law in the Union's legal order. For the very first time, the Court has found a Member State to have failed in its obligations under Art. 19(1)

[161] See CJEU, Joined Cases C-508/18 and C-82/19 PPU, *OG and PI (Public Prosecutor's Office of Lübeck),* Judgment of 27 May 2019, ECLI:EU:C:2019:456, concerning in essence a pre-constitutional and dormant interference power of the Ministers of Justice of the Federation and the Länder with their respective prosecution services, for a comment see Graf von Luckner (2019). For the reaction of the German federal legislature, see now in particular the draft act on the amendment of the Act on International Mutual Assistance in Criminal Matters, Bundesrat-Drucksache 195/20 of 24 April 2020, p. 15. *Mutatis mutandis* for Lithuania see Case C-509/18, *PF (Procureur général de Lituanie),* Judgment of 27 May 2019, ECLI:EU:C:2019:457.

[162] See Loi n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice, not yet in effect, and the French government's information website: https://www.gouvernement.fr/action/reforme-de-la-justice; for the fierce domestic debate on this reform see e.g. Jean-Baptise Jacquin, 'Menace de blocage à l'heure de la rentrée judiciaire', Le Monde of 14 January 2019.

[163] GRECO evaluation regarding, among other things, the Spanish Council for the Judiciary, see the press report 'El Consejo de Europa avala las reformas emprendidas por España contra la corrupción en la justicia y el ámbito parlamentario', available at https://elderecho.com/consejo-europa-avala-las-reformas-emprendidas-espana-la-corrupcion-la-justicia-ambito-parlamentario.

[164] This article could not take into account the extensive novelties and analyses provided by the European Commission in its 2020 Rule of Law Reports for all Member States, now available under https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-countrychapters_en.

[165] Crabit and Perego (2019), p. 7.

(2) TEU. Contrary to submissions of the Polish and Hungarian government, the Court has confirmed that it has the competence to address issues of the internal organisation of a Member State’s judiciary. While the cases can only close a chapter in the development of the crisis, that chapter can at least end with a more positive outlook than before.

Acknowledgments We would like to thank Armin von Bogdandy for his advice and Juliane Dieroff for comments. The usual disclaimer applies.

References (Primary Sources, Links and Jurisprudence Omitted)

Brauneck J (2019) Gefährdung des EU-Haushalts durch rechtsstaatliche Mängel in den Mitgliedstaaten? Europarecht 53:37–61
Castillo de la Torre F (2007) interim measures in community courts: recent trends. Common Market Law Rev 44:273–353, 808 ff
Crabit E, Bel N (2016) The EU rule of law framework. In: Schroeder W (ed) Strengthening the rule of law in Europe: from a common concept to mechanisms of implementation. Hart, Oxford, pp 197–206
Crabit E, Perego A (2019) L’État de droit: une politique de l’Union européenne. Revue du Droit de l’Union européenne 20:7–14
de la Serre EB (2006) Accelerated and expedited procedures before the EC Courts: a review of its practice. Common Market Law Rev 43:783–815
Editorial Comments (2019) Common Market Law Rev 56:3–22
Giegerich T (2015) Verfassungshomogenität, Verfassungsautonomie und Verfassungsaufsicht in der EU: Zum ‘neuen Rechtsstaatsmechanismus’ der Europäischen Kommission. In: Calliess C (ed) Herausforderungen an Staat und Verfassung: Völkerrecht – Europarecht – Menschenrechte: Liber Amicorum für Torsten Stein zum 70. Geburtstag. Nomos, Baden-Baden, pp 499–542
Glawe RAP (2012) Das System des einstweiligen Rechtsschutzes in der Praxis von EuGH und EuG. Wirtschaftsrechtliche Blätter 676–683:681–682
Graf von Luckner J (2019) German Prosecutors are insufficiently independent to issue European arrest warrants. European Law Blog 11.06.2019. https://europeanlawblog.eu/2019/06/11/german-prosecutors-are-insufficiently-independent-to-issue-european-arrest-warrants/
Jaeger M (2013) Eilverfahren vor dem Gericht der Europäischen Union. Europarecht 48:3–28, 26
Jakab A, Kochenov D (eds) (2017) The enforcement of EU law and values: ensuring member states’ compliance. Oxford University Press, Oxford
Sadurski W (2019) Poland’s constitutional breakdown. Oxford University Press, Oxford
Scheppele KL (2016) Enforcing the basic principles of EU law through systemic infringement actions. In: Carlos C, Kochenov D (eds) Reinforcing rule of law oversight in the European Union. Cambridge University Press, Cambridge, pp 105–132
Schmidt M, Bogdanowicz P (2018) The infringement procedure in the rule of law crisis: how to make effective use of Article 258 TFEU. Common Market Law Rev 55:1061–1100
Schroeder W (ed) (2016) Strengthening the rule of law in Europe: from a common concept to mechanisms of implementation. Hart, Oxford
Sladič J (2008) Einstweiliger Rechtsschutz im Gemeinschaftsprozessrecht: Eine Untersuchung des EG/EU-Prozessrechts. Nomos, Baden-Baden
Taborowski M (2019) Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej. Studium przebudzenia systemu ponadnarodowego. Wolters Kluwer, Warsaw, pp 103–140

von Bogdandy A (2019) Principles and challenges of a European doctrine of systemic deficiencies. In: MPIL research paper series 14

von Bogdandy A, Ioannidis M (2014) Systemic deficiency in the rule of law: what it is, what has been done, what can be done. Common Market Law Rev 51:59–96

von Bogdandy A, Spieker LD (2019) Countering the judicial silencing of critics: Article 2 TEU values, reverse solange, and the responsibilities of national judges. Eur Const Law Rev 15:391–426

von Bogdandy A, Bogdanowicz P, Canor I, Taborowski M, Schmidt M (2018) Guest editorial: a potential constitutional moment for the European rule of law – the importance of red lines. Common Market Law Rev 55:983–996

Wennerås P (2019) Saving a forest and the rule of law: Commission v. Poland Case C-441/17 R, Commission v. Poland, Order of the Court (Grand Chamber) of 20 November 2017, EU: C:2017:877. Common Market Law Rev 56:541–558

Wyrzykowski M (2019) Experiencing the unimaginable: the collapse of the rule of law in Poland. Hague J Rule of Law 11:417–418

Zuleeg M (2000) Die föderativen Grundsätze der Europäischen Union. Neue Juristische Wochenschrift 55:2846–2851

Matthias Schmidt is a research fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

Piotr Bogdanowicz is an associate professor at the Faculty of Law and Administration of the University of Warsaw.

Open Access This chapter is licensed under the terms of the Creative Commons Attribution 4.0 International License (http://creativecommons.org/licenses/by/4.0/), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.