

How to Save a Supreme Court in a Rule of Law Crisis: the Polish Experience

ECJ (Grand Chamber) 24 June 2019, Case C-619/18,
European Commission v Republic of Poland

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INTRODUCTION

This case note analyses the judgment issued by the Court of Justice of the European Union (Grand Chamber) on 24 June 2019 in Case C-619/18, *European Commission v Republic of Poland (Independence of the Supreme Court)*.¹ The judgment represents the first ruling ever in which the Court, following up on a complaint brought by the Commission, has held that a member state infringed the principle of judicial independence under Article 19(1)(2) TEU, and in particular the principle of the irremovability of judges.

That ground-breaking case was also the first in which the Commission applied the *Associação Sindical dos Juizes Portugueses (ASJP)* judgment² to the procedure

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¹ECJ 24 June 2019, Case C-619/18, *European Commission v Republic of Poland*, Judgment of the Court (Grand Chamber), EU:C:2019:531.

²ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, hereinafter, the *ASJP* judgment. See M. Bonelli and M. Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: the Court 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses', 14 *EuConst* (2018) p. 622; as well as L. Pech and S. Platon, 'Court of Justice Judicial independence under threat: The Court of Justice to the rescue in the ASJP case', 55(6) *CMLR* (2018) p. 1827.

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under Article 258 TFEU. The action of the Commission was based on the assumption, taken from the *ASJP* judgment, that the principle of effective judicial protection, as enshrined in Article 19(1)(2) TEU, is sufficient to establish the competence of the Court in proceedings under Article 258 TFEU, and has a wider scope of application than Article 47 of the Charter. By bringing such an action, the Commission showed that it had learnt from its 'failure' in Case C-286/12, *Commission v Hungary*, which concerned a Hungarian scheme requiring the compulsory retirement of judges upon reaching the age of 62.³ From a formal point of view, the Commission won the Hungarian case. However, the judgment did nothing to rectify the systemic situation concerning the independence of Hungarian courts.⁴ This was because, in its complaint, the Commission limited the scope of its objection to age-based discrimination on the basis of Directive 2000/78.⁵

Accordingly, we will first attempt to demonstrate why it is so important that the Court followed the *ASJP* judgment and confirmed the applicability of Article 19(1)(2) TEU to this case. In this context, we will also discuss the interplay between Article 19(1)(2) TEU and Article 47 of the Charter. In our view, while the judgment confirms that the substantive content of Article 19 TEU and Article 47 of the Charter seems identical in principle, the Court nonetheless missed an opportunity to determine whether the applicability Article 19 TEU also formally triggers the applicability of the Charter, and of Article 47 in particular.

The judgment touches upon the issue of how justice is organised in the member states – a competence of those states. We will then explain why the position of the Court by which this competence is to be exercised, in due respect of the principle of effective judicial protection, does not imply that the EU is itself in any way claiming the right to exercise that competence or arrogating it. We will show that the Court in this respect applied its firmly-established case law on the intervention of EU law in areas of competence of the member states.

We will also focus further on the Polish context of the judgment. It is worth recalling that Poland is not only the first member state to be found by the Court to have failed to fulfil its obligations in an infringement action under Article 19(1)(2)

³ECJ 6 November 2012, Case C-286/12, *Commission v Hungary*, EU:C:2018:117.

⁴See e.g. A. Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU', 94 *Public Administration* (2016); K.L. Scheppele, 'Constitutional Coups', in M. Adams et al. (eds.), *EU Law in Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press 2017), and Z. Szenté, 'Challenging the Basic Values – The Problems of the Rule of Law in Hungary and the Failure of the European Union to Tackle Them', in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2016).

⁵Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

TEU, but also the first member state to be made subject to the Commission's Rule of Law Framework⁶ and the first member state to undergo Article 7(1) TEU proceedings. This illustrates the scale of the rule of law crisis in Poland. One of the dimensions of the crisis is that, under the cover of reform of the justice system, the Polish government aimed to remove certain Supreme Court judges from office and replace them with judges appointed on the basis of new rules. Therefore, we will look at the Court's position on the true purpose of judicial 'reform' in Poland. We also discuss the status of the National Council of the Judiciary (NCJ), a constitutional body responsible for nominating judges in Poland,⁷ in light of Article 19(1)(2) TEU. These issues can also be considered from a more general point of view. As far as the status of the NCJ is concerned, it is particularly noteworthy that, for the first time in history, the Court has specified terms for the functioning of a body that is not a court but which was established for the purpose of safeguarding judicial independence and which takes part in the judicial appointment process in a given member state.

The above is preceded by a brief review of the subject matter of the proceedings against Poland, as well as summaries of the Advocate General's Opinion and the Court's judgment.

BACKGROUND

The Commission approached the Court about the Polish Law on the Supreme Court of 8 December 2017, which had come into force on 3 April 2018. This law lowered the mandatory retirement age of Supreme Court judges in Poland from 70 to 65. After the law entered into force, judges on that court could only continue to carry out their duties if they submitted a declaration six to twelve months before reaching the age of 65 expressing their intention to continue in their post, accompanied by a certificate confirming that their health did not prevent them from carrying out the duties of a judge. The extension was furthermore conditional on the President of Poland consenting to them continuing to carry out the duties of a Supreme Court judge.⁸ Before giving that consent, the President was obliged to seek the opinion of the NCJ. In drafting its opinion, the NCJ needed to consider whether continuation was in 'the interest of the system of justice or an important social interest, in particular, the rational use of the staff of the Supreme Court, or the needs arising from the workload of individual

⁶Communication from the Commission to the European Parliament and the Council of 11 March 2014, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final.

⁷Pursuant to Art. 186 sec. 1 of the Constitution of the Republic of Poland, the NCJ has also the obligation to 'be the guardian of the independence of courts and the impartiality of judges'.

⁸Art. 37 § 1 of the Law on the Supreme Court.

chambers of the Supreme Court'.⁹ The law also applied to sitting Supreme Court judges who had already reached the age of 65 by the time it entered into force.¹⁰ Consequently, nearly 40% of the sitting Supreme Court judges were affected by the reduction in mandatory retirement age set out in the Law on the Supreme Court. This included the Supreme Court's First President, whose term of office was supposed to come to an end on 30 April 2020 (in accordance with the Polish Constitution, which states that the First President of the Supreme Court is appointed for a six-year term of office). Wojciech Sadurski called it 'one of the most striking instances of changing the Constitution by statute'.¹¹

The Commission brought an action before the Court based on two complaints. In its first complaint, the Commission alleged that Poland had infringed Article 19(1)(2) TEU read in conjunction with Article 47 of the Charter¹² because, in breach of the principle of judicial independence and the principle of the irremovability of judges, in particular, the new Law on the Supreme Court lowered the mandatory retirement age for Supreme Court judges who had been appointed to their posts before 3 April 2018, i.e. the date on which the law entered into force. In its second complaint, the Commission claimed that with the new Law, Poland had infringed Article 19(1)(2) TEU read in conjunction with Article 47 of the Charter by conferring on the Polish President the discretionary power to extend the term of Supreme Court judges beyond the new mandatory retirement age fixed in that law – by up to two additional three-year terms.

In separately submitted documents, the Commission further requested the Court to grant interim measures¹³ and to decide the case under an expedited

⁹Art. 37 § 1b of the Law on the Supreme Court

¹⁰Art. 111 § 1 of the Law on the Supreme Court.

¹¹W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) p. 107.

¹²It has subsequently narrowed the scope of its complaint to Art. 19(1)(2) TEU 'in light of' Art. 47 of the Charter.

¹³Based on Art. 279 TFEU and Art. 160 § 2 and 7 of the Rules of Procedure of the Court. The Commission applied for an order compelling the suspension of application of the regulations in Art. 37 § 1-4 as well as Art. 111 § 1 and 1a of the Law on the Supreme Court, Art. 5 of the Law Amending the Law on the Organisation of the Common Courts, the Law on the Supreme Court and Certain Other Laws, jointly with and in addition to all other measures adopted in application of those provisions; the adoption of all necessary measures to ensure that the Supreme Court judges affected by those provisions could carry out their duties in the same posts while benefiting from the same staff regulations, rights, and employment conditions as those under which they were employed before 3 April 2018, i.e. the date of entry into force of the Law on the Supreme Court; that no measures be adopted to appoint Supreme Court judges to take the place of those affected by the provisions being challenged in this procedure nor any measures aimed at appointing a new First President of that court or designating a person responsible for leading that court in lieu of its First President until the appointment of a new First President; and that the details

procedure.¹⁴ By order of 19 October 2018, the Vice-President of the Court provisionally granted that request, pending the adoption of an order terminating the proceedings for interim measures.¹⁵ The final order was issued by the Court on 17 December 2018.¹⁶ The Court granted the Commission's application for interim measures until delivery of the final judgment in the case. The scope of this contribution does not allow an analysis of the decision on the interim measures. It is, however, noteworthy that the Court's order interfered with the autonomy of the national legislature.¹⁷ In a nutshell, the Court ordered Poland to reinstate the former law repealed by the national legislature.¹⁸ Those circumstances gave rise to the further question of whether an order formulated in this way could only be enforced by adopting an act of law reinstating the judges¹⁹ or whether the judges could be reinstated directly on the basis the Court of Justice's order. It appears that the Court opted for the latter solution.²⁰

Also, in an order handed down on 15 November 2018, the Court held that the case would be determined under the expedited procedure, as a result of which the

of all the measures adopted in order to comply fully with that order be communicated to the Commission no later than one month after being served with the order of the Court granting the interim measures sought, and then regularly on a monthly basis.

¹⁴Based on Art. 133 § 1 of the Rules of Procedure of the Court.

¹⁵ECJ 19 October 2018, Case C-619/18 R, *European Commission v Republic of Poland*, Order of the Court.

¹⁶ECJ 17 December 2018, Case C-619/18 R, *European Commission v Republic of Poland*, Order of the Court.

¹⁷See, in more detail, M. Taborowski, *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej. Studium przebudzenia systemu narodowego* (Wolters Kluwer 2019) p. 249-252.

¹⁸See ECJ 17 December 2018, Case C-619/18 R, *European Commission v Republic of Poland*, Order of the Court, para. 95: 'Indeed, 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 Supreme Court, so that those previous provisions become applicable again pending delivery of the final judgment'. The Court appears to resort increasingly to this 'legal theory of reviving former laws'. Cf. ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, *AK, CP, DO v Supreme Court*, Judgment of the Court, para. 166.

¹⁹On 21 November 2018, the Polish Parliament passed an Act Amending the Law on the Supreme Court. The amendment reinstated the previous retirement age for judges who had performed their duties prior to the entry into force of the new law, thus reinstating the judges to Supreme Court, while introducing a legal fiction of the uninterrupted performance of duties by those judges.

²⁰ECJ 17 December 2018, Case C-619/18 R, *European Commission v Republic of Poland*, Order of the Court, para. 95. Also, the First President of the Polish Supreme Court ordered the retired judges back to work solely on the basis of the order of the ECJ. See for more details, (www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/EditForm/2018.10.22%20-%20First%20President%20-%20Summon%20of%20judges%20-%20EN.pdf), visited 22 June 2020.

proceedings were completed in just eight months, i.e. more than twice as fast as cases that had to proceed without the benefit of the expedited procedure.²¹

OPINION OF THE ADVOCATE GENERAL AND THE JUDGMENT
OF THE COURT

Advocate General E. Tanchev proposed that the Court declare that with the adoption of the new law on the Supreme Court, Poland had failed to fulfil its obligations under Article 19(1)(2) TEU on both points raised by the Commission.²² It is worth noting that, contrary to the stance adopted by the Commission, the Advocate General submitted that the scope of application of Article 19(1)(2) TEU and Article 47 of the Charter should be assessed separately, meaning that for Article 47 to be applicable, it was necessary to demonstrate the existence of a link between the contested provisions of the Law on the Supreme Court and the implementation of EU law within the meaning of Article 51(1) of the Charter. Ultimately, the Advocate General concluded that the Commission had failed to present arguments regarding the application of Article 47 of the Charter independently of Article 19(1)(2) TEU or to specify how these provisions amounted to the implementation of EU law within the meaning of Article 51(1) of the Charter. Therefore, the Advocate General deemed the allegation of infringement of Article 47 to be inadmissible.²³

The Court agreed with the Advocate General, ruling that Poland had failed to fulfil its obligations under Article 19(1)(2) TEU by providing that the lower mandatory retirement age of Supreme Court judges would apply to judges appointed before 3 April 2018, and by granting the President of Poland the discretionary power to extend the term of Supreme Court judges beyond the newly-fixed mandatory retirement age.

Initially, the Court rejected Poland's argument that the proceedings were devoid of purpose because all the national provisions challenged by the Commission had been repealed by the adoption of the Law Amending the Law on the Supreme Court of 21 November 2018, which entered into force on 1 January 2019. In this respect, the Court recalled its settled case law by which

²¹Cf 'Annual Report 2018. Judicial Activity', p. 140, available at curia.europa.eu/jcms/upload/docs/application/pdf/2019-05/_ra_2018_pl_web.pdf, visited 22 June 2020. In addition, it should be noted that the one-month deadlines set for Poland by the Commission in the pre-litigation procedure were shorter than the two months usually given to reply to a letter of formal notice and, subsequently, to the reasoned opinion.

²²Opinion of AG Tanchev, delivered on 11 April 2019 in the Court, Case C-619/18, *European Commission v Republic of Poland*, ECLI:EU:C:2019:325.

²³*Ibid.*, para. 67.

the occurrence of a failure to fulfil obligations must be examined at the end of the period laid down in the reasoned opinion and that, in principle, the Court cannot take subsequent changes into account. In the case at hand, the provisions of the Law on the Supreme Court were still in force when the time limit set by the Commission in its reasoned opinion lapsed.²⁴

Subsequently, the Court disagreed with Poland's submission that the Court did not have the competence to address issues involving the organisation of justice in a member state.²⁵ Even though the concrete power to regulate that area remains with the member states, national authorities still ought to comply with their obligations under EU law while exercising those competences.²⁶ That does not mean that the Courts' ruling allows the EU to gain the general competence to impose binding legal rules on the member states in the area of effective judicial protection.²⁷ It only means that the Court can verify whether member states have provided remedies sufficiently capable of ensuring effective legal protection in the fields covered by EU law within the meaning of Article 19(1) TEU.

The Court also rejected the argument that the 'UK/Poland Protocol on the application of the Charter' was of any significance to the case at hand. The Court observed that the Protocol does not concern Article 19(1) TEU, nor does it exclude the application of the Charter to Poland.²⁸

Notably, the Court referred in detail to the scope of application of Article 19(1)(2) TEU. The Court explained that to trigger the application of Article 19(1), it is enough that a national court has the competence to rule on questions concerning the application or interpretation of EU law.²⁹ The Court dismissed the idea

²⁴*European Commission v Republic of Poland*, Judgment of the Court (Grand Chamber), *supra* n. 1, paras. 30 and 31.

²⁵In fact, this is a fixed element of the Polish government's argumentation on matters concerning the independence of the judiciary. The Polish government raised this type of argument not only in the commented case, but also in infringement proceedings involving common courts (ECJ 5 November 2019, Case C-192/18, *European Commission v Republic of Poland*, Judgment of the Court, EU:C:2019:924, para. 93), the preliminary ruling proceedings regarding the Disciplinary Chamber of the Supreme Court (*AK, CP, DO v Supreme Court*, *supra* n. 18, para. 73), the preliminary ruling proceedings concerning the regulation of disciplinary proceedings of Polish judges (ECJ 26 March 2020, Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokuratura Okręgowa w Płocku*, Judgment of the Court, EU:C:2020:234, para. 31) and the infringement proceedings concerning the Disciplinary Chamber of the Supreme Court (ECJ 8 April 2020, Case C-791/19 R, *European Commission v Republic of Poland*, Order of the Court, EU:C:2020:277, para. 26).

²⁶*European Commission v Republic of Poland*, Judgment of the Court (Grand Chamber), *supra* n. 1, para. 52.

²⁷*Ibid.*, para. 52 *in fine*.

²⁸*Ibid.*, para. 53.

²⁹*Ibid.*, para. 51.

(expressed by Poland and Hungary) that the fact that the national salary reduction measures at issue in the *ASJP* case were adopted in connection with the implementation of an EU assistance programme was of any significance to the inclusion of the case in the scope of application of EU law.

The Court then recalled that under Article 19(1)(2) TEU, each member state must ensure that the requirements of effective judicial protection are met by bodies which, as ‘courts or tribunals’ within the meaning of EU law, are part of the judicial system in fields covered by EU law. In the case at hand, it was not in dispute that the Supreme Court is such a court.³⁰ In the Court’s opinion, if a body like the Supreme Court is to ensure such protection, it must maintain its independence – as confirmed by Article 47(2) of the Charter.³¹

As regards the first complaint of the Commission, the Court recalled that the principle of irremovability requires that judges be able to remain in their posts until they have reached the mandatory retirement age or until the expiry of their mandate, if that mandate is for a fixed term. The Court further noted that this principle is not wholly absolute and that exceptions are possible – subject to the principle of proportionality – provided that they are warranted by legitimate and compelling grounds.³² However, the Court rejected Poland’s submission that the goal behind lowering the retirement age of Supreme Court judges was to bring it in line with the generally applicable retirement age threshold for workers in Poland, while at the same time optimising the age structure of the Court’s staff.³³ In particular, it noted that the explanatory memorandum to the draft of the Law on the Supreme Court raised serious doubts as to whether the reform of the retirement age of judges serving on the Supreme Court was implemented in pursuit of legitimate objectives and not ‘with the aim of side-lining a certain group of judges of that court’.³⁴

As to the second complaint, the Court held that the discretionary power conferred on the President of Poland to grant or deny an extension of active service to a Supreme Court judge beyond the regular age of retirement was not in itself sufficient grounds to conclude that the principle of judicial independence has been undermined. Nevertheless, in the Court’s opinion, the substantive conditions and the detailed procedural rules governing the adoption of such decisions by the President of Poland were formulated in a way that could give rise to reasonable doubt in the minds of individuals as to the independence of those judges from external factors, and their neutrality concerning the interests before them.³⁵

³⁰Ibid., paras. 55 and 56.

³¹Ibid., para. 57.

³²Ibid., para. 76.

³³Ibid., paras. 80-96.

³⁴Ibid., para. 82.

³⁵Ibid., paras. 111-113.

The Court noted, in particular, that the decisions of the President were discretionary since they had not been governed by objective and verifiable criteria and because the reasons for making them did not need to be stated. Besides, the decisions could not be challenged in court proceedings.³⁶ As regards the NCJ, the Court found that the opinions delivered by it would not provide the President with objective information concerning the exercise of the power conferred upon him, due to the simple fact that such opinions included insufficient justification or no justification at all (in the absence of any rule obliging the NCJ to state reasons for them).³⁷

Lastly, the Court refuted Poland's argument referring to the legal regimes of the other member states and the procedure for appointing judges to the Court of Justice of the EU.³⁸ The Court held that potential defects in the laws of the other member states cannot be invoked to justify an infringement of Article 19(1)(2) TEU by Poland. The procedure for appointing the Court of Justice's judges, on the other hand, cannot modify the scope of the obligations imposed on the member states under Article 19(1)(2) TEU.

COMMENTS

Confirmation by the Court of the scope of application of Article 19(1)(2) TEU resulting from the ASJP judgment

First, one should welcome the Court's clear explanation stating that the fact that the national salary reduction measures in the *ASJP* case were adopted in the context of an assistance programme was of no relevance to including the case within the scope of EU law.³⁹ As the Court explained, the Portuguese case fell within the scope of Article 19(1)(2) TEU solely because the relevant national body in that case – i.e. the *Tribunal de Contas* (the Portuguese Court of Auditors) – had the capacity, as a court, to rule on issues of the application or interpretation of EU law, i.e. within the judicial system in the fields covered by this law.⁴⁰ In light of the Court's prior case law (which was also mentioned by the Polish government⁴¹) that could have been seen as doubtful. In particular, in the *Florescu* case,⁴² the Court ruled that the memorandum of understanding concluded between the

³⁶Ibid., para. 114.

³⁷Ibid., para. 117.

³⁸Ibid., paras. 119-122.

³⁹Ibid., para. 51.

⁴⁰Ibid., para. 51; see also the *ASJP* judgment, *supra* n. 2, para. 40.

⁴¹Ibid., para. 40.

⁴²ECJ 13 June 2017, Case C-258/14, *Eugenia Florescu et al. v Casa Județeană de Pensii Sibiu et al.*, Judgment of the Court, EU:C:2017:448.

EU and Romania under Article 3a of Regulation 332/2002⁴³ – in which the terms and conditions for that state to receive financial assistance were determined – constituted an act of EU law, the implementation of which caused the case to fall under the scope of EU law and the Charter. In the *ASJP* judgment, the Court also referred twice to the connection between the reduction in salaries and the implementation of an EU assistance programme.⁴⁴ However, in that case, it attached no significance to that circumstance when it assessed whether the case fell within the scope of EU law. The judgment in Case C-619/18, *European Commission v Republic of Poland* clarifies that in the *ASJP* case, the Court opted for a different approach than in the *Florescu* case based on an alternative reading of Article 19(1)(2) TEU.⁴⁵

This new approach ties in with the role of national courts in the EU system of judicial protection. The novelty of the *ASJP* judgment in comparison to the Court's earlier case law⁴⁶ was that in assessing the standard of judicial independence, the Court referred to the principle of effective judicial protection set out in Article 19(1)(2) TEU without referring to any other element of EU law. The fact that a national body was ruling on cases in which EU law perhaps applied and could be interpreted provided, on its own, sufficient grounds for the Court's jurisdiction. Undoubtedly, the Court's approach here opened the way for the Commission to bring an action against Poland concerning the independence of the Supreme Court.⁴⁷

⁴³Council Regulation (EC) No. 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for member states' balances of payments (OJ L 53, p. 1).

⁴⁴*ASJP* judgment, *supra* n. 2, paras. 27 and 47.

⁴⁵See also ECJ 7 February 2019, Case C-49/18, *Carlos Escibano Vindel v Ministerio de Justicia*, Judgment of the Court, ECLI:EU:C:2019:106 in which the Court clearly followed this approach (para. 63).

⁴⁶See e.g. ECJ 7 June 2007, Case C-156/04, *Commission v Greece*, EU:C:2007:316, paras 74-77. The Court stated that a provision of national law may not deprive individuals of the effective judicial protection intended by EU law by inducing them, for the purposes of avoiding criminal proceedings, to refrain from seeking the legal remedies provided for as a matter of course by national law. Such a ruling was possible because the national provisions in question were issued within the scope of Directive 83/182/EEC on tax exemptions within the Community for certain means of transport temporarily imported into one EU country from another. Consequently, the Commission could conduct infringement proceedings against the member state and claim that the principle of effective judicial protection had been infringed.

⁴⁷The Commission had not brought any action beforehand based exclusively on an infringement of a general principle of EU law or a fundamental right: L. Prete, *Infringement Proceedings in EU Law* (Alphen an den Rijn 2016) p. 71-72. In fact, the novel interpretation of the scope of application of Art. 19 TEU also opened the door to direct claims by national judges before national courts based solely on Art. 19(1)(2) TEU (e.g. when disciplinary proceedings are initiated against them). See e.g. cases pending before the Court: C-487/19 *W.Ż.* and C-508/19 *Prokurator Generalny*.

The key to understanding the consequences of the *ASJP* judgment lies in Article 19(1)(2) TEU, which codifies the principle of effective judicial protection at the level of the Treaty, and which, as the Court held, must be interpreted separately from the principle of effective judicial protection understood either as a general principle of EU law or as a principle enshrined in Article 47 of the Charter. In the *ASJP* judgment, the Court draws a clear dividing line between the scope of Article 19(1)(2) TEU, which applies to fields ‘covered by EU law’, and the scope of the Charter in light of Article 51(1) thereof, which applies wherever member states implement EU law (as in the case of the general principles of EU law).⁴⁸ The Court reiterated this ruling in its judgment in Case C-619/18, *European Commission v Republic of Poland*.⁴⁹

Consequently, the organisation of justice in member states, which is a competence of those states, has to be exercised in due respect of the principle of effective judicial protection. This does not mean that the EU is claiming that it can exercise that competence itself; nor is it arrogating it.⁵⁰ Member states are still entitled to determine a judge’s level of remuneration⁵¹ and retirement age,⁵² the rules governing the possibility for judges to continue holding their positions,⁵³ the procedure for appointing judges to their posts,⁵⁴ the disciplinary regulations that apply to judges,⁵⁵ and the scope of competence of administrative courts when reviewing administrative decisions.⁵⁶ However, as the *ASJP* judgment showed, and as Case C-619/18, *European Commission v Republic of Poland* has effectively confirmed, within the European legal area, founded on respect for the values enshrined in Article 2 TEU, the national courts vested by a member state with the application of EU law are required to satisfy the guarantees set out by the principle of effective judicial protection.⁵⁷ The member states’ observance of this

⁴⁸*ASJP* judgment, *supra* n. 2, para. 29.

⁴⁹ECJ C-619/18, *European Commission v Republic of Poland*, Judgment of the Court, para. 50.

⁵⁰*Ibid.*, para. 52.

⁵¹*ASJP* judgment, *supra* n. 2.

⁵²ECJ C-619/18, *European Commission v Republic of Poland*, Judgment of the Court.

⁵³ECJ C-192/18, *European Commission v Republic of Poland*, Judgment of the Court.

⁵⁴*AK, CP, DO v Supreme Court*, *supra* n. 18.

⁵⁵*Miasto Łowicz and Prokuratura Okręgowa w Płocku*, *supra* n. 25.

⁵⁶ECJ 29 July 2019, Case C-556/17, *Torubarov*, EU:C:2019:626.

⁵⁷That reminds us of the thought introduced by AG M. Poiares Maduro with regard to the general observance of fundamental rights by a member state presented in the opinion of 31 January 2008, Case C-380/05, *Centro Europa 7*, paras. 20-21. The AG held that the Court’s jurisdiction to examine whether member states provide the necessary level of protection in relation to fundamental rights in order to fulfil their obligations as members of the Union should flow logically from the nature of the process of European integration. In order to fulfil obligations to effectively apply EU law, member states should thus – in advance and in general (i.e. not confined only to cases with an EU element) – ensure an adequate level of protection of fundamental rights (Maduro) and of the

requirement, in line with Article 19(1)(2) TEU, in light of Article 47 of the Charter, may be reviewed by the Court, e.g. in the procedure under Article 258 TFEU.

This method, by which EU law intervenes in an area of competence of the member states, is firmly established in the case law of the Court. Unsurprisingly, when justifying the position in Case C-619/18, the Court invoked its rulings in the context of the competence of the member states to regulate the extradition of EU citizens to third countries. There, the competence must be exercised 'in accordance' with EU law that falls within the scope of EU citizenship (Article 18 and Article 21 TFEU),⁵⁸ or that deals with the powers of member states within the scope of criminal law, upon which EU law (in particular concerning EU primary law) 'sets certain limits'.⁵⁹ To date, such limits have appeared, in particular, in cases involving potential threats to the effectiveness of the EU freedoms and EU citizenship.⁶⁰ In this context, Case C-619/18, *European Commission v Republic of Poland* is a novelty in EU law and infringement proceedings because it pointed out that such limits may also follow from the principle of effective judicial protection.

The interplay between Article 19(1)(2) TEU and Article 47 of the Charter

Recent case law sheds additional light on the relationship between the two legal provisions upon which the principle of effective judicial protection is currently based in the European legal structure: Article 19(1)(2) TEU and Article 47 of the Charter.

In bringing its action in Case C-619/18 *European Commission v Republic of Poland*, the Commission referred to 'Article 19(1)(2) TEU combined with

legal status of national courts according to the principle of effective judicial protection (*ASJP* judgment). Only then can the EU legal order operate effectively within the national legal order.

⁵⁸ECJ 13 November 2018, Case C-247/17, *Raugevicius*, EU:C:2018:898, para. 45.

⁵⁹ECJ 26 December 2019, Joined Cases C-202/18 and C-238/18, *Rimšēvičs and ECB v Latvia*, EU:C:2019:139, para. 57. Consequently, the Court held that the national rules of criminal procedure may not preclude the jurisdiction conferred on the Court by Art. 14(2)(2) of the Statute of the ESCB and of the ECB, wherever that provision is applicable.

⁶⁰See e.g. ECJ 29 April 2004, Case C-224/02, *Pusa*, EU:C:2004:273 (concerning the calculation of the amount free from seizure in execution); ECJ 1 April 2008, Case C-267/06, *Tadao Maruko*, EU:C:2008:179 (concerning regulations concerning civil status and the benefits following from that status); ECJ 12 May 2011, Case C-391/09, *Runevič-Vardyn and Wardyn*, EU:C:2011:291 (concerning the spelling of names of natural persons); ECJ 22 December 2010, Case C-208/09 *Ilonka Sayn-Wittgenstein*, EU:C:2010:806 (concerning the ban on using surnames that contain noble titles); ECJ 21 November 2018, Case C-29/17, *Novartis Farma*, EU:C:2018:931 (concerning the organisation of the systems of social security, health insurance, the organisation and management of health services).

Article 47 of the Charter⁶¹ (emphasis added). At the hearing, the Commission stated that it sought, in essence, a declaration that Article 19(1)(2) TEU, read *in light of* Article 47 of the Charter (emphasis added), had been infringed⁶² by submitting that ‘the concept of effective legal protection referred to in Article 19(1)(2) TEU must be interpreted *having regard to* the content of Article 47 of the Charter’.⁶³ Meanwhile, the Advocate General thought that the Commission failed to present sufficient arguments to support the application of Article 47 of the Charter independently of Article 19(1)(2) TEU or to explain how these regulations amounted to the implementation of EU law within the meaning of Article 51(1) of the Charter. Although the Court was not as explicit as the Advocate General, it focused its considerations almost exclusively on the content of Article 19(1)(2) TEU, referring only rarely to Article 47 of the Charter.⁶⁴ It would seem that such an approach is based primarily on the Court’s decision to the effect that Article 19(1)(2) TEU provides sufficient grounds to assess whether a national regulation might infringe the principle of judicial independence.⁶⁵ This was already apparent in the *ASJP* judgment, in which the request for a preliminary ruling concerned the ‘principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter’.⁶⁶ The Court rephrased that question, submitting that ‘By its question, the referring court seeks, in essence, to ascertain whether Article 19(1)(2) TEU must be interpreted as meaning that the principle of judicial independence precludes [...]’.⁶⁷ The position of the Court in Case C-619/18, *European Commission v Republic of Poland* deserves some consideration for several reasons.

First, the judgment confirms that the substantive content of Article 19(1)(2) TEU and Article 47 of the Charter is, in principle, identical. In Case C-619/18, *European Commission v Republic of Poland* the Court did, to some extent, combine Article 19(1)(2) TEU with Article 47 of the Charter and explained that maintaining the independence of the Supreme Court is essential to the ability of that body to offer effective judicial protection resulting from Article 19(1)(2) TEU, ‘as confirmed by the second paragraph of Article 47 of the Charter’.⁶⁸ The wording used by the Court to confirm that the content of Article 19(1)(2) TEU was essentially

⁶¹ECJ C-619/18, *European Commission v Republic of Poland*, Judgment of the Court, para. 25.

⁶²Ibid., para. 32.

⁶³Ibid.

⁶⁴See particularly para. 54.

⁶⁵Similarly, Pech and Platon, *supra* n. 2, p. 1833-1836 as well as D. Kochenov and P. Bárd, *The Last Soldier Standing? Courts vs Politicians and the Rule of Law Crisis in the New Member States of the EU*, European Yearbook of Constitutional Law 2019, p. 243-287.

⁶⁶*ASJP* judgment, *supra* n. 2, para. 18.

⁶⁷Ibid., para. 27.

⁶⁸ECJ C-619/18, *European Commission v Republic of Poland*, Judgment of the Court, para. 57.

identical to the content of Article 47 of the Charter means that both regulations offer the same guarantees, even if the protection offered by these guarantees is initiated through different rules. To some extent, that was also envisaged by the Court in a recent judgment in the joined cases on the Disciplinary Chamber of the Supreme Court, in which the Court analysed the national provisions against the yardstick of Article 47 of the Charter, and then stated that it did not appear that it would be necessary to conduct a separate analysis based on Article 19(1) TEU, given that this would merely reinforce the conclusion arrived at on the grounds of Article 47 of the Charter.⁶⁹ It would also seem that both provisions can be regarded as directly effective from the perspective of the individual.⁷⁰

Second, after Case C-619/18, *European Commission v Republic of Poland*, it remains an open question as to whether Article 19(1)(2) TEU can serve as a 'triggering rule'⁷¹ for Article 47 of the Charter (within the meaning of Art. 51 of the Charter). This would imply that it is not necessary to assess the scope of application of Article 47 of the Charter independent of Article 19(1)(2) TEU in cases in which Article 19(1)(2) applies. All in all, in the aforementioned joined cases on the Disciplinary Chamber of the Supreme Court, the Court conducted a separate assessment of each provision and found both to be applicable.⁷² It bears repeating that, contrary to Article 19(1)(2) TEU, which merely requires that a national body can rule on cases to which EU law could apply and be interpreted, for Article 47 of the Charter to be applicable, an additional EU element must be present. Consequently, if there is no possibility to apply Article 47 of the Charter, Article 19(1)(2) TEU can still come into play. However, in our view, wherever Article 19(1)(2) TEU applies, Article 47 of the Charter should be applicable as well. In light of the critical opinion of the Advocate General, it might have been expected that the Court would address that question directly in its judgment; it did not. Taking into account the fact that both provisions offer the same guarantees, this probably did not appear to be too compelling a problem.

⁶⁹*AK, CP, DO v Supreme Court*, *supra* n. 18, para. 169. See M. Leloup, 'An Uncertain First Step in the Field of Judicial Self-government. ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, A.K., CP and DO', 16 *EuConst* (2020) p. 20. In his view, the position of the Court points out that the Court believes that the content of both provisions is similar or even identical, and that only their material scope is different.

⁷⁰For Art. 47 of the Charter see *AK, CP, DO v Supreme Court*, *supra* n. 18, para. 162 and for Art. 19 TEU see the *ASJP* judgment, *supra* n. 2.

⁷¹On the concept of 'triggering rule' for the application of the Charter, see D. Sarmiento, 'Who's afraid of the Charter? The Court of Justice, National Courts and the new Framework of Fundamental Rights Protection in Europe', 50(5) *CMLR* (2013) p. 1267.

⁷²*AK, CP, DO v Supreme Court*, *supra* n. 18, paras 81, 84 and 166.

Last but not least, in light of Case C-619/18, *European Commission v Republic of Poland*, it is clear that the application of Article 19(1)(2) TEU is not confined to structural breaches that compromise only the essence of judicial independence, as opposed to Article 47 of the Charter, which supposedly applies to breaches other than structural. This is the position adopted by Advocate General Tanchev in several opinions delivered in cases on the independence of national courts.⁷³ The judgment in Case C-619/18, *European Commission v Republic of Poland* does not make the capacity to assess a breach of judicial independence in light of Article 19(1)(2) TEU conditional upon the structural nature of that breach. In that regard, there would also seem to be no crucial difference between that provision and Article 47 of the Charter.

The actual purpose of the judicial ‘reforms’

The discussed judgment qualifies ‘irremovability’ as a component of the necessary freedom of judges from interference or pressure of any kind due to external factors. It, therefore, contributes, in light of the Court’s case law,⁷⁴ to the external aspect of the requirement of judicial independence. Meanwhile, the requirement of independence itself (including the guarantee of irremovability of judges) forms part of the ‘essence’ of the right to effective judicial protection and the fundamental right to a fair trial. This right is of cardinal importance as a guarantee that all the rights that individuals can derive from EU law will be protected, and that the values common to the member states set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.⁷⁵

In this context, one should note the strong words used by the Court concerning the actual purpose of the reform of the Supreme Court. The Court did not stop once it had observed that Poland missed the opportunity to justify the regulations lowering the retirement age of judges with a ‘legitimate objective’,⁷⁶ but went on to note that the explanatory memorandum to the draft new Law on the Supreme Court included ‘information that is such as to raise serious doubts as to whether the reform of the mandatory retirement age of serving judges of the

⁷³Case C-619/18, *European Commission v Republic of Poland*, Opinion of the AG, para. 63, fn 41; Opinion of AG Tanchev delivered on 20 June 2019, Case C-192/18, *European Commission v Republic of Poland*, EU:C:2019:529, paras. 114-116; Opinion of AG Tanchev delivered on 27 June 2019, the joined cases C-585/18, C-624/18 and C-625/18, EU:C:2019:551, paras 145-152 and Opinion of AG Tanchev delivered on 24 September 2019, Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokuratura Okręgowa w Płocku*, EU:C:2019:551, para. 125.

⁷⁴ECJ Case C-619/18, *European Commission v Republic of Poland*, Judgment of the Court, para. 71.

⁷⁵*Ibid.*, para. 58.

⁷⁶*Ibid.*, para. 96.

Supreme Court was made in pursuance of such objectives, and not *with the aim of side-lining a certain group of judges of that court*⁷⁷ (emphasis added). The Court, in this context, referred to the wording of the opinion of the Venice Commission⁷⁸ and the explanatory memorandum to the Law on the Supreme Court,⁷⁹ pursuant to which the reform aimed at the ‘de-communisation’⁸⁰ of the Supreme Court was implemented, i.e. judges suspected of having a communist affiliation.

The Court expressed similar doubts concerning the possibility for the Polish president to grant a six-year extension of the period of a judge’s term of active service, while at the same time lowering the mandatory retirement age of judges by five years. The Court decided that combining those two measures further reinforced the impression that the actual aim was to exclude a pre-determined group of Supreme Court judges from service.⁸¹ This shows once again that the Court’s approach to the appraisal of legislative changes in respect of judicial independence is comprehensive, consisting of an assessment of the combined effect of measures introduced by a member state as opposed to an evaluation of each measure separately.⁸² In other words, even if various measures, taken in isolation, are not capable of calling judicial independence into question, the Court, inevitably, must also assess whether the impact of those measures might, in concert, lead to a different conclusion.

The arguments of the Polish government justifying the analysed legislation thus had several shortcomings.⁸³ The Court pointed primarily to the actual purpose of the new Act, which differed from its declared purpose. Another argument, i.e. that it was necessary to optimise the age structure of the Supreme Court staff

⁷⁷*European Commission v Republic of Poland*, supra n. 1, para. 82.

⁷⁸See <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e)>.

⁷⁹See <orka.sejm.gov.pl/Druki8ka.nsf/0/5AB89A44A6408C3CC12581D800339FED/%24File/2003.pdf>, visited 22 June 2020.

⁸⁰The term should be read as a systemic break with the communist past, carried out by dealing with it on a political, historical and legal level that will include a prohibition on the performance of public functions (e.g. deputies to Parliament, judges, officers of public institutions) by employees or collaborators of security services. See also the Commission’s 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 of 20 December 2017, COM/2017/0835 final, para. 119.

⁸¹*European Commission v Republic of Poland*, supra n. 1, paras. 84-85. What the Court could not add in its judgment is that this ‘pre-determined’ group consisted mainly of judges who took a critical view of the governmental judicial ‘reforms’.

⁸²This can be seen not only in the analysed case but also in subsequent cases, e.g. the judgment in *European Commission v Republic of Poland*, supra n. 1 (paras. 126-129) and in *Joined Cases AK, CP, DO v Supreme Court*, supra n. 18 (paras. 142-152).

⁸³See also R. Uitz, ‘The Perils of Defending the Rule of Law through Dialogue’, 15(1) *EuConst* (2019) p 12 (Editorial). She notes as follows: ‘One must assume that, in the summer of 2018, the Polish government was well aware that the forced early retirement of Supreme Court judges was a blatant violation of EU law’.

to, in fact, ‘rejuvenate’ it, can only be deemed unfortunate in light of the new law allowing judges – in theory, at any rate – to continue active service until the age of 71. This implies that the amended law does not differ all that much from the old one. The only novelty was the introduction of the additional mechanism of the power of the executive to assess judges.

Meanwhile, Poland’s argument on the need to standardise the mandatory retirement age of judges to the threshold generally applicable in Poland was flawed, primarily because no such standardisation ever took place. Under the general regime, there is merely the possibility of, but no obligation to retire at the age of 60 (for women) or 65 (for men), whereas the new rules applicable to judges forced them to leave active service.⁸⁴ The difference in this respect is *prima facie* evident.

The Court noted an additional distinction between the case at hand and the *ASJP* case. In the latter, the adopted legislative measures (entailing salary reductions) were limited in time and applied to all employees of public institutions. In the case at hand, the new rules applied only to the Supreme Court – not to all courts – and to specific judges whose judicial functions were ended prematurely and definitively,⁸⁵ thus significantly influencing the composition of the Supreme Court.⁸⁶ Again, this led to the conclusion that the new rules could be perceived as having been adopted with the aim of side-lining a certain group of judges and not to standardise the retirement age for a broader group of employees in the judicial branch (or public officers in general) which, in light of the *ASJP* case, should (in principle) be more readily accepted as a legitimate objective from the perspective of judicial independence.

The status of the National Council of the Judiciary in light of Article 19(1) TEU

The Commission did not directly include the provisions on the NCJ in its infringement complaint under Article 258 TFEU. Still, in its treatment of the second complaint of the Commission on the discretionary power of the Polish President to extend the term of active service of Supreme Court judges, the Court ruled that a body like the NCJ must satisfy certain requirements if its opinions are to contribute to reinforcing the objectivity of the procedure by which the President grants extensions.⁸⁷ In particular, the Court held that the body itself must be independent of the legislative and executive authorities and the authority

⁸⁴*Ibid.*, paras. 89–90.

⁸⁵*Ibid.*, para. 93.

⁸⁶*Ibid.*, para. 86.

⁸⁷The President’s decision in this respect should also be based on objective and relevant criteria, reasoned, and subject to judicial review (see *European Commission v Republic of Poland*, Judgment of the Court (Grand Chamber), *supra* n. 1, para. 114).

to which it delivers its opinions. The opinion itself must be based on criteria that are both objective and relevant, and it must be properly reasoned.⁸⁸ Hence, for the first time in history, the Court has specified the terms for the functioning of a body that, not being a court, had been established to safeguard judicial independence for the sake of a decision of an executive body (the President) on the career of a national judge (here: the extension of the period of judicial activity of a Supreme Court judge).

It is worth noting that in a more recent judgment on the new Disciplinary Chamber of the Supreme Court, the Court reiterated the position that a body like the NCJ must be sufficiently independent of the legislative and executive authorities and the authority to which it submits its motions for the appointment of judges (here: judges in the new Disciplinary chamber of the Polish Supreme Court).⁸⁹ Consequently, the Court has started to construct a certain minimum standard for judicial councils in the EU. This should not, of course, be taken to imply that every member state needs a body like the NCJ. However, if such a body does exist and it participates in the judicial appointment process, as in Poland, it needs to have sufficient independence from the legislature and the executive, as well as from the authority to which it submits its motions for the appointment of judges. Also, its opinions (resolutions) must be based on objective, relevant and properly reasoned criteria.

In the judgment on the Disciplinary Chamber of the Supreme Court, the Court also pointed to five factors that may prove significant in assessing whether the Polish NCJ is independent of the legislative and executive authorities.⁹⁰ In the context of the case discussed here, the last of these factors, which focuses on the existence of effective judicial review, deserves particular attention because, in practice, the Polish legal system precluded the possibility of judicial review of resolutions of the NCJ in the nomination procedure for positions at the Supreme

⁸⁸*Ibid.*, paras 115-116. Interestingly, the Court mentions in this context the need for judicial review of the NCJ opinions, although it observes that in the analysed procedure the decision of the President is not subject to judicial review – *see* para. 114. The Court did not subsequently refer to this requirement, *inter alia*, in the context of the NCJ (para. 116). It ends its examination of the requirements with respect to the NCJ by ascertaining the lack of proper reasoning for the NCJ's decision.

⁸⁹*AK, CP, DO v Supreme Court*, *supra* n. 18, para. 138. In essence, in its preliminary reference the Supreme Court asked the Court whether the new Disciplinary Chamber could be considered independent, in particular considering that its judges had been appointed by the newly composed NCJ. *See*, for more on the subject, M. Leloup, 'An Uncertain First Step in the Field of Judicial Self-government. ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, A.K., CP and DO', 16 *EuConst* (2020) p. 11-13.

⁹⁰*AK, CP, DO v Supreme Court*, *supra* n. 18, paras. 143-145.

Court.⁹¹ The Court found that the lack of judicial review of resolutions of the NCJ plays a certain role in light of EU law standards of judicial independence. By contrast, although in the judgment discussed here the Court held that the NCJ's opinion on the extension of a judge's term of active service had to be based on objective and relevant criteria and properly reasoned,⁹² it did not point out the need to subject it to judicial review.⁹³

This difference can be explained in the following manner. In the judgment on the Disciplinary Chamber of the Supreme Court, the issue was the constitutional prerogative of the Polish President to appoint judges according to Article 179 Polish Constitution, and not his 'regular' decisions to extend the term of active service of judges (which is not his prerogative). According to Article 179, 'Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary'. Therefore, judicial review is only possible concerning the NCJ's resolutions proposing candidates for judicial appointments. The situation was different in the judgment at hand. The opinion of the NCJ on the extension of the term of judicial activity of a given Supreme Court judge was non-binding, and judicial review thereof thus somewhat irrelevant. This was probably why the Commission did not question the inability to challenge opinions of the NCJ at law. It did, however, imply that the President's decision on the extension of the term of active judicial service is not subject to judicial review, which was one of the reasons why the Court considered the President's decision discretionary in light of Article 19(1)(2).⁹⁴

It should also be noted that, in the judgment discussed here, the Court stated that:

⁹¹This was because resolutions of the NCJ are final until challenged by any of the candidates (including a candidate who has been nominated). Furthermore, based on amendments to Polish law, this judicial review of the nomination process for positions at the Supreme Court has been entirely excluded by the legislature.

⁹²*European Commission v Republic of Poland*, *supra* n. 1, para. 116.

⁹³Although it noted that the President's decision to (deny) the extension of the term active service of a judge cannot be challenged at law: *ibid.*, para. 114.

⁹⁴On 14 May 2020, the European Court of Human Rights communicated four applications (ECtHR, Nos. 62765/14, 62769/14, 62772/14 and 11708/18, *Sobczyńska and Others v Poland*) to the Government of Poland. The applications concern the Polish President's refusal to appoint the applicants to vacant judicial posts in various courts in Poland. The applicants argue that they met the legal requirement at that time and complain about the administrative courts' and the Constitutional Court's refusal to examine their appeals, declining jurisdiction in that sphere. For more details, see Press Release issued by the Registrar of the Court 2 June 2020, ECHR 156 (2020), available at <hudoc.echr.coe.int/eng-press?i=003-6710189-8937763>, visited 22 June 2020.

the national rule which the Commission's second complaint concerns does not deal with the process for the appointment of candidates to carry out the duties of a judge, but with the possibility, for serving judges who thus enjoy guarantees essential to carrying out those duties, to continue to carry them out beyond the normal retirement age, and that rule thereby concerns the conditions under which their careers progress and end.⁹⁵

Therefore, the Court may differentiate between the status of a judge and that of a candidate for a judgeship from the perspective of the scope of effective judicial protection, as expressed in Article 19(1)(2) TEU. In particular, this could lead to the finding that an obligatory judicial review of the nomination process for judicial positions is not required under all circumstances. The wording used by the Court in the judgment on the Disciplinary Chamber of the Supreme Court is not entirely clear in that regard.⁹⁶ On the one hand the demand of effective judicial review might be seen as an obligatory element of that procedure in order to guarantee the independence of nominated judges. In such a situation the national court should be vested with the competence to check the resolutions of the NCJ, at the very least, as to whether there was no *ultra vires* or improper exercise of authority, error of law or manifest error of assessment.⁹⁷ That would also mean that candidates for judicial positions would be able to derive certain rights from Article 19 (1)(2) TEU which should be protected by national courts. On the other hand, that part of the judgment on the Disciplinary Chamber of the Supreme Court could be also interpreted as setting effective judicial review of the resolutions of the NCJ presenting candidates for judicial positions only as one of several relevant factors that need to be taken into account to appraise the judicial nomination process in light of Article 19(1)(2) TEU from the perspective of the independence of the nominated judges.⁹⁸ The lack of judicial control of the NCJ's resolutions would then be only regarded as throwing more doubt on the independence of the nominated judges but would not be decisive for their capability to meet the requirements of independence and impartiality. The Court should decide on that problem in a case pending before the Court concerning candidates for judicial positions at the Polish Supreme Administrative Court.⁹⁹

⁹⁵Ibid., para. 109. See also *European Commission v Republic of Poland*, *supra* n. 1, para. 117.

⁹⁶See *AK, CP, DO v Supreme Court*, *supra* n. 18, para. 145.

⁹⁷Ibid.

⁹⁸Many more such questions arise in the aftermath of the judgment in joined cases on the Disciplinary Chamber of the Supreme Court. In particular, what effect the existence of a judicial review of an NCJ resolution has on its independence from the legislative and executive authorities, e.g. whether, in a situation in which other requirements for the independence of the NCJ, as identified by the Court, have been satisfied, the lack of judicial review of an NCJ resolution could be a factor in ruling on the NCJ's lack of independence?

⁹⁹See Case C-824/18, *Krajowa Rada Sądownictwa* (pending).

CONCLUSION

The judgment in Case C-619/18, *European Commission v Republic of Poland* is a landmark decision. The Court ruled for the first time on the compatibility of national measures on the organisation of the judicial system in question with EU law in the context of an infringement action under Article 258 TFEU. The Court grasped this opportunity to find, also for the first time, that a member state had failed in its obligations under Article 19(1)(2) TEU.

To make this possible, the Court needed to adhere to the *ASJP* judgment, which offered a new reading of Article 19(1)(2) TEU. The Court followed this path, emphasising that the member states cannot successfully argue their position by referring solely to the fact that the organisation of justice is the exclusive competence of said states. EU law sets certain limits on the powers of member states, and such limits do also follow from the principle of effective judicial protection.

Consequently, this case has confirmed that the infringement procedure is a supervisory mechanism that is not limited to specific violations of EU law but can also serve to address questions of fundamental constitutional importance for the Union.¹⁰⁰ Notably, it was the first time – but not the last – that the Commission would bring an action against Poland in connection with judicial ‘reforms’. In a more recent judgment delivered on 5 November 2019, the Court held that Poland had failed to fulfil its obligations under Article 19(1)(2) TEU insofar as the power had been conferred on the Minister of Justice to extend the period of active service of the judges based on vague discretionary criteria.¹⁰¹ Yet another case is currently pending on the Disciplinary Chamber of the Supreme Court and disciplinary proceedings against judges.¹⁰²

It is likely that the Commission will build further on this case law and that it will use the infringement proceedings, rather than the (up to now) toothless Article 7 TEU procedure, to address rule of law issues in member states.¹⁰³ In its communication of July 2019, the Commission held that ‘it is determined to bring to the Court of Justice rule of law problems affecting the application

¹⁰⁰M. Schmidt and P. Bogdanowicz, ‘The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU’, 55(4) *CMLR* (2018) p. 1100.

¹⁰¹ECJ 5 Nov. 2019, Case C-192/18, *European Commission v Republic of Poland*, Judgment of the Court.

¹⁰²See Case C-791/19 R, *European Commission v Republic of Poland*, Order of the Court.

¹⁰³Engaging the Art. 7(1) TEU mechanism does not in any event preclude the action under Art. 258 TFEU.

of EU law, when these problems could not be solved through the national checks and balances'.¹⁰⁴ This will help the Commission to continue to fully play the role of guardian of the Treaties and the principle of the rule of law as enshrined in Article 2 TEU.



¹⁰⁴Communication 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.