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Maintaining the Court of Justice of the European Union’s Legitimacy and Upholding the Rule of Law – an Uneven Equation?

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Summary

The dismantling of the rule of law in a number of Member States of the EU continues. Recently, the Court of Justice has become the centre of attention of the rule of law crisis, due to the pending case C-619/18 Commission v Poland, concerning the independence of the judiciary in Poland. The Advocate General found in his Opinion to the case that the Polish law that lowered the retirement age of the Polish Supreme Court judges was in violation of EU law. The Polish case, and other similar cases concerning judicial review, raise questions about the role of the Court of Justice in upholding the rule of law in the EU and the Court’s legitimacy. In this thesis, the legitimacy of the Court of Justice is explored, in relation to the Court’s recent case law on judicial review and the rule of law.

The thesis examines the EU’s general understanding of the rule of law and its relation to judicial review. It finds that the EU relies on a broad definition of the rule of law and that a number of principles can be said to form part of EU rule of law. As for the relationship between judicial review and rule of law, they have been closely intertwined for a long time in the EU legal order. Furthermore, the thesis thoroughly examines the central provisions related to judicial review and finds that Article 47 of the Charter of Fundamental Rights gives substance to the judicial review provision in Article 19 TEU, by containing the right to an effective remedy, a fair hearing and an independent judiciary.

In the Case C-64/16 Portuguese judges, the Court of Justice held that the principle of judicial independence was not dependent upon whether the Charter is applicable, because the principle is part of Article 19 TEU. This established link is analysed in the thesis, and it is concluded that it was a legitimate step of the Court of Justice to take, despite the political timing of the case. In light of this, it is predicted that the Court’s judgment in the mentioned Commission v Poland case will be in line with the Advocate General’s Opinion, due to the recently developed line of cases.
Preface

Skrivandet av den här uppsatsen var den sista delen, den sista etappen, av mina fem år på juristprogrammet i Lund. För det faktum att jag nu är klar och att den här uppsatsen är färdigställd, är jag skyldig en mängd personer ett tack.

Vad gäller den här uppsatsen vill jag särskilt tacka min handledare Xavier Grousset. Tack för att du har väglett mig genom EU-rätten och i ett ämne som ibland (läs: ofta) har fått mig att undra om jag tagit mig vatten över huvudet.

För att jag lyckades komma ut på andra sidan om juristprogrammet är jag skyldig mina vänner ett tack, både de som jag fått här i Lund och de som funnits med långt innan dess. Tack för att ni hjälpt mig genom tro och tvivel. Utan er hade det inte gått.

Jag vill rikta ett stort tack till mina föräldrar. Tack för att ni fullständigt gränslöst tror på mig och mina upptåg, vart de än för mig. Tyvärr kan jag inte lova att det inte blir några fler. Klart är i alla fall att det inte hade blivit några alls utan ert stöd.

Till sist vill jag tacka min farmor, för att du alltid frågade hur det gick med läxorna. Förhoppningsvis är den sista gjord nu.

Sara Wiborg
Lund, juni 2019
# Abbreviations

<table>
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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>AG</td>
<td>Advocate General</td>
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<td>COREPER</td>
<td>Committee of Permanent Representatives (of the Council of the European Union)</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EU</td>
<td>European Union</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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1 Introduction

1.1 Background

The dismantling of rule of law in a number of Member States of the EU appears to be a work in progress. In December 2017, the European Commission, due to concerns regarding the rule of law in Poland, announced the first-ever activation of the Article 7 TEU procedure. The following year, in September 2018, the European Parliament announced the second activation, against Hungary. The next step of the procedure requires either the Council of the European Union or the European Council to take action, which is close to impossible due to the current political landscape. The fact that Barroso, a former Commission President, established the term ‘nuclear option’ to describe Article 7 TEU, seems distant.

Instead, the eyes, and hopes, have turned towards the Court of Justice of the European Union. The Commission has referred a number rule of law related infringement proceedings to the Court, and courts of EU Member States have sent requests for preliminary rulings. A few weeks ago, the Advocate General’s Opinion in one of the cases, concerning the independence of the judiciary in Poland, was published. The Advocate General found that the Polish law that lowered the retirement age of the Polish Supreme Court judges and increased the Polish President’s discretion to extend the judges’ mandate was in violation of EU primary law.

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2 Hereinafter referred to as 'Commission'.
3 European Commission, Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland, COM(2017) 835 final, 20 December 2017.
5 Hereinafter referred to as 'Council'.
7 Hereinafter referred to as 'Court of Justice' or 'Court'.
8 11 April 2019.
9 Opinion of AG Tanchev in Case C-619/18 Commission v Poland, EU:C:2019:325.
This highly sensitive case, and other similar cases, raise questions about the role of the Court of Justice, and its legitimacy. The debate on legitimacy might be as old as the process of European integration\(^\text{10}\), but the state of play puts it in a particularly strong spotlight. In the current situation, is it possible for the Court to stay within its judicial sphere? And if it steps out, is it still legitimate?

### 1.2 Purpose and Research Questions

The starting point of this thesis was a willingness to gain a better understanding of the role that the Court of Justice plays, and what role it should play, in upholding the rule of law in the EU. Since the recent case law from the Court of Justice that is related to rule of law, *Portuguese judges\(^\text{11}\)* and *LM\(^\text{12}\)*, especially concerns judicial review, the purpose of this thesis was to analyse the Court’s understanding of this concept as forming part of the EU rule of law, in order to determine if the Court is a legitimate actor on the rule of law scene. To fulfil the purpose, one primary research question was analysed:

- In light of the Court of Justice’s case law on judicial review, does the Court enjoy legitimacy, with regard to the EU rule of law?

In order to answer the primary research question, three secondary questions were first addressed:

- How is the EU rule of law generally defined?
- How does the Court of Justice understand judicial review as part of the EU rule of law?
- What conclusions concerning judicial review and EU rule of law can be drawn from *LM* and *Portuguese judges*?

In order to examine the legitimisation of the Court of Justice, Koen Lenaerts model for determining the Court’s legitimacy, with internal and external aspects, has been used. The model is outlined and discussed in the following chapter.

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\(^{11}\) Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018], EU:C:2018:117.

\(^{12}\) Case C-216/18 *PPU Minister for Justice and Equality v LM* [2018], EU:C:2018:586.
1.3 Methodology and Material

In order to answer the thesis’ research questions and ultimately fulfil its purpose, the legal dogmatic method has been used. The aim of legal dogmatism is often described as determining what the law is and thereby finding the solution to a legal issue. This is completed by studying the acknowledged sources of law and subsequently describe and systematise the findings. However, the research questions of this thesis have partly a descriptive nature, partly an analysing nature, meaning they required more than de lege lata reasoning. While some scholars have argued that the legal dogmatic method leaves room to critically analyse the law, others believe that the method solely seeks to establish what the law is. For the purpose of clarification, the legal dogmatic method in this thesis is understood as a method that allows for argumentation that goes beyond the determination of what the law is, in other words, de lege ferenda reasoning.

Because the thesis purely is focused on the EU level of the legal spectra, the legal dogmatic method has been complemented with the EU legal method. Jane Reichel has described the method as an approach of how to deal with EU legal sources. The hierarchy of norms in EU law is based on the differentiation between primary law and secondary law. This thesis mainly focuses on the primary law – the two Treaties, TEU and TFEU, the Charter of Fundamental Rights of the European Union, and the general principles that the Court of Justice has established – which means that the equal value of the different sources of primary law in Article 6 TEU assumes particular importance. In addition, the Court of Justice’s jurisprudence is an authoritarian legal source,

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17 Hereinafter referred to as ‘Charter’.
since the Court is the highest body qualified to interpret and apply EU law as stipulated in Article 19(1) TEU.\(^\text{18}\)

In this thesis the case law of the Court of Justice is in focus, not only because of its status in the EU legal order but because of the thesis’ purpose. However, the case law of the Court is extensive, and the scope of the thesis does not leave room to examine all the judgments that concern judicial review and the rule of law. The selection has been made by picking the cases that are frequently discussed in the legal doctrine and that the Court of Justice repeatedly refers to in its own judgments. Cases from the Court’s grand chamber are generally considered more significant than cases from chambers, but this is not always the case, which is why the section of the Court of Justice not has been decisive for the selection.

The use of case law has further been supplemented with legal doctrine. In the hierarchy of legal norms, the doctrine is a source of lower dignity. Nonetheless, scholars contribute to the legal discourse by putting forward logic and coherent arguments.\(^\text{19}\) In legal doctrine, the actions of the legislature and the judiciary are analysed and reviewed, which means that doctrine can provide useful insights that enrich the legal reasoning. This is especially the case when the very purpose of this thesis is to examine the legitimacy of the Court of Justice.\(^\text{20}\) Legal doctrine has hence been used in order to broaden the legal perspective.

In the examination of the central provisions of this thesis, official documents from the Commission, the Council and the European Parliament have been included. These documents are considered soft law in the EU legal method, but have a normative effect in practice.\(^\text{21}\) Because the mentioned EU institutions have important parts to play according to the wording of these articles, for

instance in putting forward proposals, to not include these documents in the research would have caused a flawed analysis.

1.4 Delimitations

This thesis aimed to explore how the rule of law is understood at the EU level, not in the EU Member States. While the rule of law within the EU naturally is derived from the constitutional traditions of its Member States, the purpose of using the term *EU rule of law* was to emphasise that the rule of law concept in the EU may differ from the national understanding of the term in the Member States.\(^{22}\) Moreover, the EU rule of law is usually described as having two sides, one external and one internal. The internal dimension of the rule of law concerns its application *internally*, within the EU, governing the EU, its Member States and its institutions.\(^{23}\) The external dimension, on the contrary, deals with the relationship between the EU and the rest of the world, whether it concerns states wanting to access the EU and the implementation of the Copenhagen criteria of Article 49 TEU or EU’s external policy.\(^{24}\) The external dimension of the EU rule of law raises interesting issues, but this aspect of the rule of law falls outside the purpose of this thesis and is not covered.

Furthermore, case law from the ECtHR was not *explicitly* examined in the thesis. The case law is especially relevant in regard to Article 47 of the Charter, which Article 6 and 13 of the ECHR served as an inspiration for. Article 52(3) of the Charter guarantees that the articles in the Charter with corresponding ECHR provisions have the same or a higher level of protection than their resemblances. It is established that Article 47 of the Charter has a higher level of protection than the corresponding provisions in the ECHR, meaning that the case law of the Court of Justice is sufficient to examine Article 47 of the Charter.\(^{25}\)

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\(^{23}\) Ibid, pp. 5, 16.


relevance to mention that the case law of the ECtHR was taken into account in the Court of Justice’s judgments, which implicates that while the cases of the ECtHR is not mentioned in the thesis, the developments of the ECtHR finds its way into the thesis implicitly.

As for the examination of the legitimacy of the Court of Justice, the concept of legitimacy is exclusively understood as presented in the theoretical outline in the next chapter. Thus, the thesis did not seek to take a holistic approach to legitimacy, as this by far would have exceeded its scope.

1.5 Previous Research

Rule of law and legitimacy of the Court of Justice have been extensively scrutinised in the legal doctrine. During the time after the Treaty of Lisbon entered into force, the rule of law contributions were mainly directed towards examining the different provisions at hand and to try to understand the role of the rule of law in the EU legal order. Laurent Pech’s article in European Constitutional Law Review on the rule of law as a constitutional principle of EU and Wojciech Sadurski’s contribution on Article 7 TEU in Colombia Journal of European Law are both examples of this. As the backsliding from rule of law in the EU Member States evolved, the legal scholars started to focus on different means to enforce the EU values and creative ways of using the tools at disposal, such as Carlos Closa and Dimitry Kochenov’s volume Reinforcing Rule of Law Oversight in the European Union from 2016 with several contributions and suggestions by prominent legal scholars.

From the point of the Portuguese judge judgment, delivered in February 2018, focus has started to lean towards the role of the Court of Justice and reviews of specific cases, for example Michael Krajewski’s article on the mentioned case in

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29 Case C-64/16 Associação Sindical dos juízes Portugueses [2018], EU:C:2018:117.
European Papers\textsuperscript{30}, and Laurent Pech and Sébastien Platon’s examination of the LM\textsuperscript{31} case in Common Market Law Review.\textsuperscript{32} However, to my knowledge, no analyse of the latest case law related to the rule of law from a legitimacy point of view has been published. The contributions on legitimacy are either more general, as Dominique Ritleng’s Independence and Legitimacy in the Institutional System of the European Union\textsuperscript{33}, or have general and specific parts, but none of them are a rule of law one, such as Judging Europe’s Judges by Maurice Adams and Others.\textsuperscript{34} The lack of more in-depth analyses of the rule of law cases is most definitely explained by the fact that the case law is recent in time, and thus contributions with a broader perspective on the cases have not been published at the time of writing. What I hoped to achieve with this thesis was thus an insight into how the recent case law related to the rule of law from the Court of Justice can be understood from a legitimacy perspective.

1.6 Structure

In the second chapter of the thesis, the theoretical framework is developed and examined, serving as a starting point for the continued outline. Subsequently, in the third chapter, the key articles and points on the EU rule of law are presented and analysed. Chapter four contains an explanation of judicial review as a rule of law concept, including a presentation and examination of the central articles and the different components that form part of judicial review. In the fifth chapter, three central cases from the Court of Justice on judicial review as a rule of law component are thoroughly outlined and analysed on a case-by-case basis. The last chapter of the thesis holds the general analysis, where the primary research question is answered and conclusions outlined.

\textsuperscript{31} Case C-216/18 PPU Minister for Justice and Equality v LM [2018], EU:C:2018:586.
2 Theoretical Framework

2.1 Introduction

‘To be exercised, power needs a mode of justification; it cannot command obedience if it does not have at its disposal a principle legitimating it’.35

The debate on the legitimacy of the European Union is as old as the process of European integration itself.36 The fact that the Court of Justice has played a significant part in the process while being a non-majoritarian body, has naturally put it in the spotlight.37 Over the years, the Court has repeatedly been criticised and defended.38 Today, the old debate has renewed itself, as pleadings for placing fetters on courts that are external to the nation state increasingly emerges.39 A contribution to this debate is Judging Europe’s Judges, a volume where a number of scholars discuss the Court of Justice, its current role in the EU, and its legitimacy.40 Two chapters in this volume especially stand out: firstly, Koen Lenaerts’41 piece on the legitimacy of the Court of Justice, where he outlines a number of components for examining the legitimacy of the Court and applies them to a range of cases, and secondly Joseph H. H. Weiler’s42 response, where he presents his critique to the criteria put forward by Lenaerts.43 In the following sections, the two opposing views are presented and commented, resulting in a

40 Ibid.
41 President of the Court of Justice and Professor of European Law at KU Leuven.
42 European Union Jean Monnet Chaired Professor at New York University Law School and former President of the European University Institute.
framework to analyse the legitimacy of the Court that is used throughout the thesis.

2.2 Lenaerts and the External and Internal Legitimacy of the Court of Justice

According to Lenaerts, judicial legitimacy may be examined from two complementary perspectives, externally and internally. Externally, the Court of Justice’s legitimacy is built upon the definition of its role. The first step is to define what the law is, for one to determine whether the court limits itself to interpreting and applying the law. If not, the Court interferes with the political process and lacks legitimacy. As Lenaerts has put it himself, ‘[b]y drawing the borderline between law and politics, courts in fact are drawing the contours of their own legitimacy’.44

Consequently, the Court strives to uphold the principle of separation of powers. The Court’s approach towards the EU legislator is in Lenaerts’ opinion characterised by the Court being deferential to the legislator’s policy choices and enhancing the objectives pursued.45 Thus, the Court of Justice tries to interpret secondary EU legislation in the light of primary law as far as possible without deciding against the legislation as such. However, when an act of secondary EU law consists of a provision that is inconsistent with the objectives pursued by the act, the described ‘reconciliatory interpretation’ is not exercised by the Court. Lenaerts suggested that in those cases, the principle of separation of powers implies in favour of eliminating the inconsistencies in the act.46

In order for the court to be legitimate from an internal point of view, the quality of the judicial process needs to be scrutinised, requiring that the judicial power is allocated in line with the Treaties. The court is thus acting illegitimately if it steps into the political sphere or into the sphere of national courts. Furthermore,

46 Ibid, pp. 59-60.
internal legitimacy focuses on the soundness of the legal reasoning. Lenaerts outlined a number of factors to determine if the court is a rational actor:

- whether their rationale is sufficiently transparent and easy to understand,
- whether the grounds of judgment are strong enough to be convincing and adequately meet the arguments put forward by the parties, and
- whether the court’s rulings are coherent with the existing case law and based on impartial criteria.

Lenaerts responded to the critique that the legal reasoning of the Court is laconic and cryptic by explaining what he calls the stone-by-stone approach. The approach means that the Court builds up its reasoning progressively, by putting one case to another. Judgments should not be ‘examined in a vacuum’ but altogether, one stone to another. Finally, Lenaerts described the role of the Court as follows:

‘As the constitutional court of a more mature legal order, it now tends to be less assertive as to the substantive development of EU law. It sees its role primarily as one of upholding the ‘checks and balances’ built into the EU constitutional legal order of states and peoples, including the protection of fundamental rights’.

### 2.3 Weiler’s Critique

In his critique, Weiler argued that the legitimacy issue is a lot more complex than Lenaerts has put forward. Lenaerts way of harmonising disparate cases and viewing contradictions as perceived by those who did not fully understand the Court is problematic in Weiler’s view since it gives the impression that no contradictory case law existed. Furthermore, Weiler thought that the line that

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49 Ibid, pp. 46-47, 58.
50 Ibid, pp. 57-58.
51 Ibid, p. 58.
52 Ibid, p. 16.
Lenaerts tried to draw between law and politics raised more questions than answers.\footnote{J. H. H. Weiler, (2013) 'Epilogue: Judging the Judge’s – Apology and Critique’ in: Judging Europe’s Judges – the Legitimacy of the Case Law of the European Court of Justice, M. Adams and Others (eds.), p. 237.}

Weiler highlighted the importance of contextualising cases in a way that sheds light on the consequences of the outcome for both parties.\footnote{Ibid, p. 245.} The Court’s ability to detect the true intention of the Council and the European Parliament regarding certain legislation was disputed by Weiler. The political process in the Council with the voting rules requiring a majority (or unanimity, when applicable), often result in a situation where the mandate for a certain provision is missing when the legislation is adopted. The judicial amendments by the Court that are justified by Lenaerts may in Weiler’s opinion result in legislation that lacks a majority in the Council at the time of enactment.\footnote{Ibid, pp. 245-246.}

Moreover, the criteria for determining if the Court acted rationally were opposed by Weiler, who held that ‘[s]oundness of legal reasoning is often like beauty, in the eye of the beholder, not an easy tool for meaningful objective assessment’.\footnote{Ibid, p. 238.} The stone-by-stone approach put forward by Lenaerts was more of a step-by-step approach according to Weiler: ‘whereby the reasoning of the Court, cryptic and uncommunicative in any single case, supposedly expands into a fully reasoned and dialogical narrative when read over a number of cases’.\footnote{Ibid, pp. 247-248.} Weiler summarised that what Lenaerts’ demonstration of cases proved, in his opinion, was ‘how a hugely important line of cases can be built on shifting sands when it comes to legal reasoning’.\footnote{Ibid, p. 251.}

### 2.4 The Author’s Comments

Lenaerts’ model can be described as a framework for examining the Court of Justice and its case law. However, the critique put forward by Weiler has its reasons. Firstly, the legitimacy issue is certainly more complex than a number of
factors lead on, especially when the factors themselves are not clearly defined. Nevertheless, the factors demonstrated by Lenaerts do make it possible to grasp the legitimacy issue to some extent, which in turn opens up the ability to analyse the case law of the Court of Justice. This does not mean to suggest that the criteria would be sufficient to carry out a complete analysis of the Court to get an overall approach of whether it is a legitimate actor or not, but simply that the criteria could work as a useful tool when analysing judgments in a specific area of law.

Moreover, Weiler emphasised the importance of contextualising cases in order to see it from more than one parties’ perspective. This is an important point that Weiler puts forward, but it does not necessarily diminish the model as such. On the contrary, it can serve as an improvement to the criteria, to be taken into account when implementing them. Furthermore, Weiler criticised Lenaerts’ way of trying to detect what the legislating majority wanted in a particular situation. This remark has a lot to it, especially with regard to the constitutional principle of separation of powers. Reading minds is a difficult task, and not a task that the Court of Justice should perform when adjudicating. Instead of trying to justify the Court of Justice’s reasoning as much as possible, it is in the spirit of legitimacy more sufficient to put up a questioning approach towards the Court’s reasoning in these cases.

As for the rationality of legal reasoning, it is naturally in the eye of the beholder, exactly as Weiler points out. All the same, this does not necessarily mean that it is pointless to use the criteria for examining the Court. A conclusion that can be drawn from the introductory section to this chapter is that the legitimacy of the Court of Justice has been discussed since the early days of the EU, meaning that there always have been dissenting opinions on this issue, on how legitimacy should be determined. However, that should not stop the discussion, and not the examination of the Court and its case law, because otherwise progress will never be made.

To conclude, the model put forward by Lenaerts might not be perfect, but with the improvements that Weiler has pointed out, it is sufficient enough to serve as a tool for examining the cases of the Court in a limited range. To be transparent,
difficulties in using the model is discussed and analysed throughout the thesis. After all, a proper understanding of the benefits and disadvantages of Lenaerts’ model and Weiler’s critique is difficult without actually putting it to use.
3 The Rule of Law and the EU

3.1 Introduction

In this chapter, the creation, context and substance of the general rule of law provisions are outlined, in order to provide a grasp of what the general idea of the rule of law is in the EU, and how judicial review naturally is its essence. The chapter is finalised with an analyse of the general rule of law concept in the EU.

3.2 From Les Verts to Article 2 TEU

It has been written about the rule of law that ‘no other political ideal has ever achieved such global recognition’. The reason for the widespread recognition of the principle has in turn been explained by the argument that ‘[s]uch a high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning’. Among the EU Member States, the lack of a definition of the rule of law in the Constitutions has even been described as a common feature of the rule of law.

In Europe, rule of law is often presented as a fundamental part of the legal tradition, regardless of the different terms used to convey the concept in different languages: the English rule of law, the German rechtstaat, the French état de droit and so on. Before being enshrined in the EU primary law, rule of law was introduced to the EU in 1986 by the Court of Justice in Les Verts v Parliament.

‘It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid

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63 See for example the preamble to the ECHR: ‘the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law’ and Council of Europe (Parliamentary Assembly), Resolution 1594 (2007), The Principle of the Rule of Law, 23 November 2007.
a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.  

Thenceforth, multiple references to the rule of law were included in the amendments to the Treaty when devising the 1992 Treaty of Maastricht. For example, the TEU preamble provided that the Member States confirmed their attachment to a number of principles, including the rule of law. In 1997, the rule of law was further included in the TEU by a new provision in the Treaty of Amsterdam, Article 6(1): ‘The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’. This provision was given its present wording in the 2009 Treaty of Lisbon, making it the current Article 2 TEU:

‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’.

It is not clear if the change from describing the rule of law as a principle to referring to it as a value is intended to be of any significance and if that is the case, what the significance is. Von Bogdandy has argued that the stipulated norms in Article 2 TEU should continue to be understood as founding principles because they produce legal consequences and are overarching and constitutive.

Hence, the wording of Article 2 TEU enshrines rule of law not only as a prevailing value but as a founding one. Article 3(1) TEU enhances the rule of law further by stipulating that it is an objective that the EU should pursue.

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66 Article 6(1) TEU of the Treaty of Amsterdam [emphasis added].
67 Article 2 TEU [emphasis added].
69 Article 13 TEU.
However, Article 2 TEU itself is substantively vague\(^70\), which in turn makes it hard to determine the possible obligations arising from the provision. The Council Legal Service has stated that the provision:

‘[D]oes not confer any material competence upon the Union but, similarly to the Charter provisions, its lists certain values that ought to be respected by the institutions of the Union and by its Member States when they act within the limits of the power conferred on the Union in the treaties, without affecting their limits’.\(^71\)

The Court of Justice has emphasised, in its Opinion concerning the accession of the EU to the ECHR, that it views the rule of law, among the other values in Article 2 TEU, as connected with the structured network of principles that links the EU and its Member States, and its Member States with each other.\(^72\) The Court seems to understand the rule of law as inseparable from other essential parts of the EU legal order, such as judicial review.\(^73\)

The general view is that it is not possible for the Commission to initiate an infringement procedure against a Member State solely based on Article 2 TEU, due to the open nature of the provision.\(^74\) Article 258 TFEU requires a breach of an obligation, which refers to a specific and concrete violation of EU law.\(^75\) Article 2 TEU has therefore been described by Kochenov and Pech as a


provision that by itself ‘lacks justiciability’ but that may complement other articles, such as the mechanisms in Article 7 TEU.

3.3 Article 7 TEU

Serious and persistent breaches of the EU values laid down in Article 2 TEU, such as the rule of law, can be enforced by the activation of Article 7 TEU. The provision enables the Council to deprive a Member State of certain rights derived from the Treaties, including the voting rights in the Council.

Article 7 TEU consists of two key parts, the preventive mechanism in paragraph 1 and the sanction mechanism of paragraphs 2 and 3. The sanctioning mechanism was introduced in the TEU by the 1997 Treaty of Amsterdam and allows for EU sanctions in the case of a serious and persistent breach of the former Article 6(1) TEU, corresponding to the current Article 2 TEU. The violation must be established by the European Council, acting by unanimity, and could lead to the suspension of a Member State from voting in the Council. The additional paragraph of Article 7 TEU was initiated in the 2003 Treaty of Nice and enables the EU to act preventively when there is a clear risk of a serious breach of Article 2 TEU. This is done by the Council, acting by a majority of four fifths of its members, determining that there is a clear risk of a serious breach by a Member State of the founding values. The decision by the Council must be preceded by a reasoned proposal put forward by either a third of the Member States, the European Parliament or the Commission. The different paragraphs of Article 7 TEU should not be understood as cumulative. Subsequently, the activation of the first paragraph is not required for the activation of the second.

The wording of Article 7 TEU read together with Article 2 TEU suggest that the scope of the provision is not limited to areas covered by EU law. That is also

77 Ibid.
the opinion of the Commission, which has communicated that the scope of Article 7 TEU is general and horizontal and that the provision is applicable to breaches in areas where the Member States act autonomously. The Commission states that this is logical, due to the fact that the article seeks to secure respect for the conditions of EU membership. If the fundamental values are breached by a Member State, this is likely to undermine the very foundations of the EU, regardless of the area in which the violation occurs falls within the national jurisdiction of the Member State or not.\textsuperscript{79} The opinion of the Council Legal Service is in line with the Commission’s, highlighting that:

\begin{quote}
‘[O]nly this legal basis provides for a Union competence to supervise the application of the rule of law, as a value of the Union, in a context that is not related to a specific material competence or that exceeds its scope’.\textsuperscript{80}
\end{quote}

However, the Court of Justice has limited competence as regards Article 7 TEU. More particularly, in accordance with Article 269 TFEU, the Court only has the mandate to review purely procedural stipulations in Article 7 TEU.\textsuperscript{81} As initially outlined, Article 7 TEU has been activated two times so far. In December 2017, the Commission triggered the preventive mechanism by submitting a reasoned proposal for a decision of the Council. The proposal concerned the rule of law violations in regard to the lack of independence of the judiciary, the separation of powers and legal certainty in Poland.\textsuperscript{82} Hitherto, three hearings have been organised in the General Affairs Council in the framework of Article 7(1) TEU regarding the rule of law in Poland.\textsuperscript{83} The second activation of Article 7(1)TEU was carried out by the European Parliament in September 2018, concerning the real risk of an existence of a serious breach by Hungary of


\textsuperscript{81} See also Case T-337/03 Bertelli Gálvez \textit{v Commission} [2004], EU:T:2004:106.

\textsuperscript{82} European Commission, \textit{Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland}, COM(2017) 835 final, 20 December 2017.

the values in Article 2 TEU, thus not solely related to the rule of law. However, the European Parliament mentioned the independence of the judiciary and the rights of the judges among the troublesome issues in the motion. The proposal has been forwarded to the Council for adoption.84

3.4 Defining the EU Rule of Law

As shown in the previous sections, the central rule of law provisions in the Treaties highlights the importance of rule of law as a founding value of the EU, among other values. However, the provisions themselves do not give much, if any, substance to frame rule of law as such.

Nevertheless, the Commission has presented a number of principles that it regards as ‘noteworthy’ concerning the rule of law, derived from the Court of Justice’s and ECtHR’s case law. They were presented in connection with the Commission’s framework to strengthen the rule of law, a procedure that is intended to be a step prior to Article 7(1) TEU.85 The principles largely correlate with a list that the Venice Commission86 of the Council of Europe previously has published.87 Subsequently, the Commission’s list includes:

- the principle of legality,
- legal certainty,
- prohibition of arbitrariness of the executive powers,
- independent and effective judicial review, including respect for fundamental rights, and

86 Formally known as the European Commission for Democracy through Law.
The Council Legal Service has questioned the legality of the Commission’s framework, arguing that it was not compatible with the principle of conferral. However, the Council Legal Service did not particularly take a position on the presented rule of law definition.  

Among legal scholars, the Commission’s rule of law definition met mixed reactions. It has been described as the first ‘comprehensive conceptualization of the concept by an EU institution’. Several legal scholars emphasised the broadness of the definition while others concluded that consensus now was reached on the core of the rule of law.

### 3.5 Analysis: How is EU Rule of Law Generally Defined?

The examination of the central treaty provisions on the rule of law does not give much substance to EU rule of law but focuses instead on highlighting the importance of rule of law as such. It is described as a founding value and an object that the EU should pursue, but all the same it is a value among many, enshrined in Article 2 TEU. Article 7 TEU appears to be a mechanism that even further stipulates the importance of enforcing the founding values of Article 2 TEU, but it can also be seen as a way of the Member States to emphasise that the enforcement of rule of law is a political issue, not a judicial one; an issue for the Council, not for the Court. This is accentuated by the fact that the Court of

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Justice not has been given the mandate to review Article 7 TEU, apart from the strictly procedural parts of the provision.

Article 2 TEU can thus be said to have a political side and a judicial side. This is interesting in the context of the principle of separation of powers, mentioned by Lenaerts as a central part of external legitimacy. In this case, rule of law is not only established in the TEU by the Member States, which is the natural task of the legislature, but it is also to be interpreted by the Member States in the Council when assessing whether the mechanisms of Article 7 TEU should be triggered or not, a role that normally is reserved for the judiciary. Does the case law of the Court of Justice on the rule of law have the same dignity when the Council presumably should determine if a breach of the rule of law has occurred?

The Commission’s rule of law definition was introduced as part of their initiated pre-Article 7 TEU procedure. It is built upon solid ground, considering that it is based on the previous outline by the Venice Commission, as well as the case law from the Court of Justice and the ECtHR. The definition is broad and substantive, covering a number of components that are self-standing principles in EU law. However, the Commission might be the guardian of the Treaties, but it is not the final interpreter of EU law – that is the Court of Justice. It is clear that the definition was established with the Commission having the political tool of Article 7 TEU in mind. The definition of rule of law in Article 2 TEU should reasonably be interpreted in a coherent manner, regardless if it is relevant in the framework of Article 7 TEU or in the judgments of the Court. However, the Court seems to understand the rule of law in broad terms as well, or at least strongly intertwined with other general principles of EU law.

Hence, as a starting point, we can conclude that rule of law in the EU is understood in broad terms, covering more than the classic rule of law as opposed to rule of men formula. In addition, judicial review appears to be at the core of the EU rule of law. Not only is it mentioned as a part of the Commission’s definition and as a principle that the Court of Justice views as closely linked to the rule of law, but it is also accentuated as part of the EU rule of law in the first ever judgment on rule of law, *Les Verts*. 
4 Judicial Review as a Rule of Law Component

4.1 Introduction

In this chapter, the central provisions and key cases concerning judicial review are put forward. It must be emphasised that the outline is made isolated from Portuguese judges\(^3\), \(LM\)\(^4\) and \(Commission v Poland\)\(^5\), as those cases will be thoroughly examined in the next chapter, with the conclusions from this chapter as a ground for the case analyses. This chapter is concluded with an analysis of judicial review as part of the EU rule of law.

4.2 Judicial Review and Article 19 TEU

The right to judicial review is a general principle of EU law, as held by the Court of Justice numerous times.\(^6\) Such as all other general principles of EU law, it is protected as part of EU primary law in accordance with Article 6(3) TEU. The connection between the principle and the rule of law is enhanced by the fact that the Court in a number of cases has highlighted that because the EU is based on the rule of law, the acts of its institutions are subject to judicial review of their compatibility with particularly the Treaties, the general principles of law and fundamental rights.\(^7\) In \(Rosneft\)\(^8\), the Court held that ‘the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law’.\(^9\)

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\(^3\) Case C-64/16 \(Associação Sindical dos Juízes Portugueses\) [2018], EU:C:2018:117.
\(^4\) Case C-216/18 \(PPU Minister for Justice and Equality v LM\) [2018], EU:C:2018:586.
\(^5\) Opinion of AG Tanchev in Case C-619/18 \(Commission v Poland\), EU:C:2019:325, judgment in progress.
\(^6\) See for example Case C-222/84 \(Johnston\) [1986], EU:C:1986:206, paras 18-19 and Case C-424/99 \(Commission v Austria\) [2001], EU:C:2001:642, para 45.
\(^7\) See for example Case C-50/00 \(Punión de Pequeños Agricultores v Council\) [2002], EU:C:2002:462, para 38; Joined Cases C-402/05 P; Case C-415/05 P \(Kadi and Al Barakaat International Foundation v Council and Commission\) [2008], EU:C:2008:461, para 281 and Case C-550/09 \(E and F\) [2010], EU:C:2010:382, para 44.
\(^8\) Case C-72/15 \(Rosneft\) [2017], EU:C:2017:256.
\(^9\) Ibid, para 73.
As for the Member States, it is stipulated in the second subparagraph of Article 19(1) TEU that ‘Member States shall provide remedies sufficient to ensure effective legal protection in the field covered by Union law’. The article is an expression of the principle of sincere cooperation, enshrined in Article 4(3) TEU. The duty of sincere cooperation imposes Member States to take appropriate measure to ensure the fulfilment of EU law obligations, including the obligation to ensure judicial enforcement of EU law before national courts.100

In accordance with Article 19(1) TEU, the judicial review of compliance with the EU legal order is ensured by the Court of Justice as well as the Member States’ courts and tribunals. In other words, domestic courts must also be understood as European courts. It is for the Court of Justice, however, to ‘ensure respect for the autonomy of the European Union legal order thus created by the Treaties’.101

The Treaties have established the preliminary ruling mechanism of Article 267 TFEU and the review of legislative acts of Article 264 TFEU and Article 277 TFEU, which according to the Court, constitutes:

‘[A] complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and [the Treaties] has entrusted such review to the Courts of the European Union’.102

An expression for the level of importance that the Court puts into judicial review, as an outflow of the rule of law, is the fact that it was used as an argument to set aside public international law in Kadi103, the Court of Justice describing it as ‘a constitutional guarantee stemming from the EC Treaty, as an autonomous legal system which is not to be prejudiced by an international agreement’.104

100 Case C-432/05 Unibet [2007], EU:C:2007:163, para 38. For an older judgment, see Case C-106/77 Simmenthal [1978], EU:C:1978:49, paras 21-22.
102 Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council [2013], EU:C:2013:625, para 92.
104 Ibid, para 316.
Ever since *Les Verts*, the Court of Justice has repeated that in accordance with the system of legal remedies, natural or legal persons who cannot directly challenge EU acts of general application, due to the admissibility conditions of Article 263(4) TFEU, still enjoys protection from those acts being applicable to them. When the EU institutions are responsible for the implementation of the acts, those persons are under the conditions laid down in Article 263(4) TFEU entitled to bring a direct action before the Courts of the EU against the implementing measures, and to plead in support of that action, the illegality of the concerned act. In cases when the implementation of the act is an issue for the Member States, the persons may plead the invalidity of the act before the national courts and tribunals and cause the latter to request a preliminary ruling from the Court of Justice. \(^\text{105}\) Subsequently, by pleading the invalidity of an EU act of general application before a national court, individual parties have the right to challenge the legality of any decision or other national measures relative to the application to them of that act. \(^\text{106}\) Judicial review is thus closely intertwined with the right to an effective remedy, the individual’s right to effective judicial protection, now enshrined in Article 47 of the Charter.

### 4.3 Article 47 of the Charter

#### 4.3.1 Status and Scope of Application

In the *Johnston* \(^\text{107}\) case, the Court of Justice stipulated that in the light of the general principle of judicial control, ‘all persons have the right to obtain an effective remedy in a component court’. \(^\text{108}\) Furthermore, the Court highlighted that the principle is enshrined in Articles 6 and 13 of the ECHR. \(^\text{109}\) These articles would later serve as the inspiration for Article 47 of the Charter. \(^\text{110}\)

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\(^{106}\) Case C-550/09 *E and F* [2010], EU:C:2010:382, para 45.

\(^{107}\) Case C-222/84 *Johnston* [1986], EU:C:1986:206.

\(^{108}\) Ibid, para 19.

\(^{109}\) Ibid, para 18.

The Charter came into force in 2000, but its legal status was resolved in 2009 when the Treaty of Lisbon was adopted. According to Article 6(1) TEU, it enjoys the same legal status as the Treaties, making it part of EU primary law. Nonetheless, it does not extend the competence of the Union beyond the Treaties. The Charter is addressed at the EU institutions and bodies and the Member States. As stipulated in Article 51(1) of the Charter, its scope towards the Member States is limited to ‘implementing Union law’.\(^{111}\) In *Åkerberg Fransson*\(^{112}\) however, the Court of Justice explained it as follows:

‘Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of the European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable’.\(^{113}\)

Put differently, the Charter could be described as ‘the shadow of EU law’, meaning that the scope of EU law determines the applicability of the Charter.\(^{114}\)

Article 47 of the Charter contains the right to an effective remedy, to a fair trial, and to an independent and impartial tribunal. In full, it reads as follows:

‘Everyone whose *rights and freedoms* guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice’.\(^{115}\)

The article has a wide scope since it is applicable wherever EU law guarantees ‘rights and freedoms’.\(^{116}\) Ward has described the scope of Article 47 as being

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\(^{111}\) Article 51(1) of the Charter.

\(^{112}\) Case C-617/10 *Åkerberg Fransson* [2013], EU:C:2013:105.

\(^{113}\) Ibid, para 21.


\(^{115}\) Article 47 of the Charter [emphasis added].

\(^{116}\) Case C-370/12 *Pringle* [2012], EU:C:2012:756, paras 178-182.
‘indistinguishable from the question of whether the Charter applies in the first place’.  

Article 52(3) of the Charter clarifies that when the rights in the Charter corresponds to rights guaranteed by the ECHR, the meaning and scope of those rights should be at least equivalent to the level of protection in ECHR and its case law. However, Article 47 of the Charter has a higher level of protection than its corresponding ECHR provisions. The first paragraph of Article 47 guarantees the right to an effective remedy before a court, in comparison with Article 13 of the ECHR, which ensures the right to an effective remedy before a national authority. In addition, Article 47 of the Charter is not limited to protecting the right to a fair trial in disputes relating to civil law rights and obligations such as Article 6(1) of the ECHR. According to the Explanations of the Charter, this is due to the fact that ‘the Union is a community based on the rule of law as stated by the Court in […] Les Verts’. Since Article 47 of the Charter implements the protection afforded by Article 6(1) of the ECHR, a reference to the latter provision is not a requirement, according to the Court.

According to Article 52(2) of the Charter, Article 47 of the Charter must be interpreted and exercised ‘under the conditions and within the limits’ defined by relevant Treaty articles. Consequently, Article 47 of the Charter should be understood in the light of Article 19(1) TEU.

4.3.2 An Effective Remedy Before a Tribunal

The right to an effective remedy in Article 47 of the Charter is more substantive than the obligation for Member States to provide sufficient legal remedies in Article 19(1) TEU because the wording includes the right to a fair hearing and the principle of judicial independence in the framework of the effective remedy. Article 47 of the Charter can regardless be understood as having different parts,

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118 Explanations relating to the Charter of Fundamental Rights, Explanation on Article 47 – Right to an effective remedy and to a fair trial (2007/C 303/02), 14 December 2007.
120 Article 52(2) of the Charter.
which is why they are outlined separately, starting with the overall concept of the right to an effective remedy.

As previously outlined, the EU system of legal remedies and procedures is designed to ensure judicial review of the legality of acts, and it has partly been entrusted to the national courts of the Member States.\(^\text{121}\) It is for them to ‘establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection’.\(^\text{122}\)

The provided remedy must permit a review of the legality of the decision at issue, as regards matters of both facts and law in the light of EU law.\(^\text{123}\) In order for the judicial review to be effective:

‘[T]he interested party must be able to obtain the reasons for the decision taken in relation to him, thus enabling that interested party to defend himself under the best possible conditions and to decide, with full knowledge of the relevant facts, whether it is worth applying to the courts. Consequently, the competent national authority is under a duty to inform that interested party of the reasons upon which its refusal is based, either in the decision itself or in a subsequent communication made at the request of that party’.\(^\text{124}\)

The terminology used in Article 47 of the Charter is partly confusing since it is contrary to Article 267 TFEU, the article under which the term was developed, only refers to ‘tribunal’, not ‘court or tribunal’. This is most likely due to the fact that Article 47 of the Charter, as previously laid down, is largely inspired by Article 6(1) of the ECHR, a provision that only uses the tribunal terminology. However, the strong connection between the preliminary ruling procedure in Article 267 TFEU and the principle of effective judicial remedy strongly suggests that the meaning of ‘tribunal’ under Article 47 of the Charter is the same as ‘court or tribunal’ under Article 267 TFEU. The effect of this is that the relevant

\(^{124}\) Case C-372/09 P-functional Fa [2011], EU:C:2011:156, para 63. See also Case C-222/86 Heylens [1987], EU:C:1987:442, para 15.
definition of a court or tribunal in the principle of effective judicial remedy is the same as the Court of Justice has elaborated on in relation to the bodies entitled to make a preliminary reference.\textsuperscript{125}

In order to determine if a body is a tribunal (or a court), one needs to assess a number of factors, such as ‘whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is \textit{inter partes}\textsuperscript{126}, whether it applies rules of law and whether it is independent’.\textsuperscript{127}

\section*{4.3.3 A Fair and Public Hearing Within a Reasonable Time}

As noted, the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR, but the former provision has a broader scope since it is not limited to proceedings which examine civil law rights and obligations. This is due to the fact that the EU is based on the rule of law.\textsuperscript{128} The right to a fair hearing was formally introduced in EU law by the adoption of the Charter, but the principle had previously been developed by the Court of Justice, in order to uphold the rule of law in the EU legal order.\textsuperscript{129}

In order for a proceeding to be fair, it needs to be adversarial. The adversarial principle requires that the parties to a case have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision and to comment on them.\textsuperscript{130} Moreover, the Court of Justice has found that a court is:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{126} Latin for ‘between the parties’.
\item \textsuperscript{127} Case C-503/15 \textit{Margarit Panicello} [2017], EU:C:2017:126, para 27. A full analysis of ‘court or tribunal’ is carried out in section 4.3.3.
\item \textsuperscript{128} Explanations Relating to the Charter of Fundamental Rights, \textit{Explanation on Article 47 – Right to an effective remedy and to a fair trial} (2007/C 303/02), 14 December 2007.
\item \textsuperscript{130} Case C-89/08 \textit{P Commission v Ireland and Others} [2009], EU:C:2009:742, para 52 and Case C-472/11 \textit{Banif Plus Bank} [2013], EU:C:2013:88, para 30.
\end{itemize}
\end{footnotesize}
‘[A]s a general rule, required to inform the parties to the dispute of that fact and to invite each of them to set out their views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure’.  

The principle of equality of arms is another essential part of the right to a fair hearing, that by requiring procedural equality seeks to ensure a fair balance between the parties. It indicates that the parties to a case must be afforded a reasonable opportunity to present their case, and their evidence, under conditions which do not place the parties at a substantial disadvantage in relation to each other.  

However, there are no given rules on what procedural safeguards are required to guarantee that the principle is respected, it will depend on the nature of the case and what is at issue between the parties.

Moreover, the right to a fair hearing requires reasoned judgments from the Court. This means that the reasoning of the judgment ‘must enable the defendant to see why the judgment has been pronounced against him and to bring an appropriate and effective appeal against it’. The extent of the obligation to give reasons to a judgment may vary, depending on the nature of the decision, the proceedings taken as a whole and other circumstances.

The right to a public hearing is not absolute and may, for instance, be limited due to a waiver from the accused in criminal proceedings, or due to the absence of the accused in certain circumstances. As regards to the reasonable time requirement, the Court of Justice does not impose a fixed time limit, but assess the circumstances in each case, examining criteria such as the complexity of the case and its importance for the person concerned.
4.3.4 An Independent and Impartial Tribunal Established by Law

The terms ‘court’ and ‘tribunal’ are not defined in the Treaties but have been established by case law from the Court of Justice.\(^\text{138}\) The Court has explained that the terms are governed by EU law alone.\(^\text{139}\) The first time that the Court of Justice elaborated on their meaning was in the case of *Vaassen-Göbbels*\(^\text{140}\), where the Court clarified that the expression ‘court or tribunal’ usually is broadly interpreted and therefore could include other bodies but ordinary courts under certain criteria.\(^\text{141}\) Consequently, bodies that are not formally part of the Member States’ judiciaries have been held as courts or tribunals within the meaning of EU law.\(^\text{142}\)

The Court of Justice takes a number of factors into account when determining whether a body constitutes a court or tribunal. In the case of *Margarit Panicello*\(^\text{143}\) the Court laid down the following as part of the settled case law:

‘[T]he Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.’\(^\text{144}\)

Apart from the above stated factors, impartiality is sometimes explicitly mentioned after the independence criteria.\(^\text{145}\) Other factors that the Court of Justice has highlighted are that a national body only may refer a question to the Court if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of judicial nature.\(^\text{146}\)

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\(^{138}\) As previously outlined, the term ‘tribunal’ will be examined on the basis of the Court of Justice’s case law on Article 267 TFEU, see further section 4.3.1.


\(^{140}\) Case C-61/65 *Vaassen-Göbbels v Beambtenfonds voor het Mijnbedrijf* [1966], EU:C:1966:39.

\(^{141}\) Ibid (pp. 272-273 in the published judgment).

\(^{142}\) Case C-17/00 *De Caster* [2001], EU:C:2001:651, paras 10-22.

\(^{143}\) Case C-503/15 *Margarit Panicello* [2017], EU:C:2017:126.

\(^{144}\) Ibid, para 27.

\(^{145}\) See for example Case C-17/00 *De Caster* [2001], EU:C:2001:651, para 17 and Case C-506/04 *Wilson* [2006], EU:C:2006:587, para 48.

All the criteria have not been further clarified by the Court of Justice. However, for a body to be considered permanent, it cannot exercise a judicial function on an occasional basis, such as arbitral bodies generally do. While some requirements have a more absolute nature, the \textit{inter partes} requirement has not. For instance, the Court of Justice has held that bodies with inquisitorial powers are courts. The rules of law criteria mean in essence that legally binding rules should be applied, not principles of fairness.

The Court of Justice will not issue a preliminary ruling when the proceedings are not of a judicial nature, meaning that this is a more decisive factor than the ones previously examined. The \textit{Antonopoulos} case concerned whether the Greek Court of Auditors constituted a court or tribunal under EU law. The Court of Justice found that the decision that the Greek Court of Auditors adopted when carrying out its power to review public expenditure where not part of proceedings intended to lead to a decision of a judicial nature, and thus it could not be classified as a court or tribunal in EU law. The ruling can be compared with the \textit{Vougioukas} case, that also concerned a preliminary ruling from the Greek Court of Auditors, but in which the competence of the body not was questioned by the Court of Justice.

Another decisive factor is whether the court or tribunal is independent. The Court of Justice has described it as ‘the concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted to contested decision’. Furthermore, the Court has made a distinction between the internal and external aspects of what the court or tribunal should be independent of. The external aspect entails that the judges should be protected from external intervention or pressure liable to jeopardise their independent judgment. As described in the

\begin{itemize}
\item \textsuperscript{147} Opinion of AG Tesauro in Case C-54/96 \textit{Dorsch}, EU:C:1997:245, para 28.
\item \textsuperscript{148} Joined Cases C-110/98 to C-147/98 \textit{Gabalfrisa and Others} [2000], EU:C:2000:145, para 37.
\item \textsuperscript{149} Ibid, para 38.
\item \textsuperscript{150} Case C-363/11 \textit{Epitropos ton Elektikon Syndrion} [2012], EU:C:2012:825.
\item \textsuperscript{151} Ibid, paras 26-28.
\item \textsuperscript{152} Case C-443/93 \textit{Vougioukas v Idryma Koinonikon Asfalisseon} [1995], EU:C:1995:394.
\item \textsuperscript{153} Ibid. See also Case C-64/16 \textit{Associação Sindical dos Juízes Portugueses} [2018], that is examined in section 5.2.
\item \textsuperscript{154} Case C-506/04 \textit{Wilson} [2006], EU:C:2006:587, para 49.
\item \textsuperscript{155} Ibid, paras 50-52.
\end{itemize}
In exercising its functions the [court] is wholly autonomous, it is not subordinate to any other body and it does not take orders or instructions from any source whatsoever. The guarantees of independence need to be sufficient to protect the integrity of the judges, such as guarantees against removal from office.

The internal aspect the independence seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. This includes an objectivity requirement, as well as an absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. As regards to impartiality, the Court of Justice clarified in Wilson that it is considered an internal part of the assessment of whether a court or tribunal is independent. The Advocate General in the case described impartiality as a ‘necessary condition’ for independence. In detail, the Court of Justice found that the guarantees of independence and impartiality require rules as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members. The object of the rules is to dismiss any reasonable doubt in the minds of the individuals as to the imperviousness of the body to external factors and its neutrality with respect to the interests before it. The dismissals of members of the body need to be ‘determined by express legislative provisions’.

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157 Ibid, para 22.
160 Ibid.
163 Case C-222/13 TDC [2014], EU:C:2014:2265, para 32.
4.4 Analysis: How does the Court of Justice Understand Judicial Review as Part of the EU Rule of Law?

The case law of the Court of Justice shows that the Court views the judicial review as an essential component of the rule of law. The Court emphasises that judicial review not only is the duty of the Court itself, but also an obligation of the Member States, enshrined in Article 19(1) TEU. The immediate consequence of this, as put forward by the Court in Opinion 2/13, is that the courts of the Member States also are European courts. Thus, judicial review spans over the entire EU legal order.

The Court of Justice looks upon the EU legal order as autonomous, and the system of legal remedies as complete. The Court must, according to itself, not only ensure the enforcement of the autonomous legal order but also ensure respect for that order. The wording suggests that the Court will act powerfully in order to protect and defend this system because it is of high importance to the EU. This is in line with Lenaerts description of the Court’s main role as upholding the checks and balances of the EU legal constitutional legal order, which we can conclude that judicial review is part of.

The obligation to ensure effective legal remedies in Article 19(1) is given more substance when read together with Article 47 of the Charter, which includes the right to a fair hearing and the right to an independent tribunal as parts of the right to an effective remedy. Nonetheless, the scope and thus also the impact of the article is limited. The article is dependent upon whether other provisions outside of the Charter are applicable, and that the issue at hand concerns rights and freedoms. For components such as the right to a fair hearing and an independent judiciary to be enforced, it is thus to a large extent dependent upon the circumstances of the case at hand.

It is interesting to find that the right to a fair hearing includes an obligation for the court or tribunal to pass judgments that are reasoned, the very criteria that is required for the Court of Justice itself to hold internal legitimacy. The obligation under Article 47 of the Charter does, however, not give much substance to exact
how reasoned the judgments need to be. They must somehow include a reason for the sentence, but there are no requirements as to the exact grade of reasoning, which of course is a difficult task to determine.

Furthermore, the criteria for determining whether a court or tribunal is independent or not, cannot be described as particularly straightforward. While the case law is somewhat extensive, the number of criteria that should be part of the determination makes it difficult to get a clear picture of the requirements. This is illustrated by the presented cases concerning the Greek Court of Auditors. In the Vougoukas case, the questions of whether it was a court or tribunal under EU law was not even up for question, whilst in the Antonopoulos case, the Greek Court of Auditors was not considered an EU court or tribunal. Coherence is one of the points put forward by Lenaerts for determining the internal legitimacy of the Court of Justice, and this outline shows that the criteria not might be as easily applied as it appears to be. The legal reasoning should be coherent in relation to the existing case law, but if there are contradictions within the case law, how should one proceed?

The unclearness of the criteria for considering a national court an EU court or tribunal could be problematic in regard to the ongoing dismantling of the rule of law in the Member States. If a national body is not assessed as an EU court or tribunal, the immediate consequence is that the Court of Justice cannot review requests for preliminary rulings from this body. This means that one part of the complete system of legal remedies is put on hold and that the right to an effective judicial remedy becomes limited. In the light of this, it might be worthwhile to consider if the criteria of whether the proceedings are of judicial nature or not should be given such great importance if the checks and balances of the EU legal order should continue to be upheld.

In conclusion, it can be said that the Court of Justice understands judicial review as a concept that at its core obliges the Court as well as the Member States and their courts to provide sufficient remedies to ensure legal protection. The Court of Justice views the system as complete, including the preliminary ruling procedure and the reviewing of the legality of acts. The Court’s statement in
Rosneft, that effective judicial review is ‘the essence of the rule of law’\textsuperscript{164} proves that there not only exists an immediate connection between the rule of law and judicial review, but judicial review is also considered a part of the rule of law, according to the Court of Justice. Article 47 of the Charter adds more substance to judicial review, including the right to a fair hearing and an independent court, but has a limited scope of application. In addition, the case law on independence is complex and can be questioned from a coherence point of view.

\textsuperscript{164} See section 4.2.
5 The Court of Justice, Rule of Law and Legitimacy

5.1 Introduction

In this chapter, the cases that at the time of writing were the most recent cases concerning judicial review and rule of law are presented and analysed on a case by case basis. The analyses are directed towards the determination of the internal legitimacy of the Court, with other words the legal reasoning, which requires a thorough presentation of the judgments of the Court of Justice. The last part of this chapter is a detailed examination of the Opinion of the Advocate General in the Commission v Poland case, whose outcome will be predicted in the following chapter.

5.2 Portuguese Judges

5.2.1 Background

The background of the Portuguese judges case was an act of legislation in Portugal that temporarily reduced the remuneration of a series of officeholders and employees performing duties in the public sector, including the judges of the Portuguese Court of Auditors. The judges’ trade union claimed the annulment of the legislation, arguing that it infringed the principle of judicial independence, enshrined in Article 19(1) TEU and Article 47 of the Charter. The Portuguese court sent a request for a preliminary ruling, asking the Court of Justice if the principle of judicial independence in Article 19(1) TEU and Article 47 of the Charter, as well as the case law of the Court of Justice, precluded the measures to reduce remuneration, when the legislation was implemented by the Portuguese legislature in the framework of EU austerity measures.

165 Case C-64/16 Associação Sindical dos Juízes Portugueses [2018], EU:C:2018:117.
166 Ibid, paras 11-18. Interestingly, the question of whether national implementing measures fall within the scope of EU law has previously been examined by the Court of Justice in Florescu, a case that concerned the Memorandum of Understanding between EU and Romania in the context of financial assistance. The Court held that the measures fell within the scope of
5.2.2 The Opinion of the Advocate General

Advocate General Øe emphasised that the scope of application of Article 19(1) TEU and Article 47 of the Charter is different. In order to determine whether Article 19(1) TEU is applicable to national judges, one needs to assess whether they ‘are likely to exercise their judicial activity in areas covered by EU law, and therefore to act as European judges’, which was the case with the Portuguese judges. The scope of Article 47 of the Charter requires an assessment of whether the austerity measures had implemented specific EU provisions, and in this case, the Advocate General found support for this in a Council decision.

The Advocate General found that although Article 19(1) TEU stipulates an obligation for Member States to lay down sufficient procedural rules to settle EU law disputes, the provision does not hold the principle of judicial independence of Article 47 of the Charter. In conclusion, the Advocate General found that reductions of judge’s remuneration are not contrary to EU law, but they need to pursue a legitimate public interest and be proportionate.

5.2.3 The Judgment of the Court

The Court of Justice framed the referring courts question to solely concern Article 19(1) TEU, thus not contemplating on whether Article 47 of the Charter was applicable or not. The Court pointed out that Article 19(1) TEU is applicable to ‘fields covered by Union law’, regardless of whether Member States are implementing EU law within the meaning of Article 51(1) of the Charter, with other words emphasising that the material scope of the Charter and of Article 19 TEU is different.
Subsequently, the Court emphasised that the EU in accordance with Article 2 TEU is founded on values such as the rule of law and that this is a prerequisite for mutual trust between the Member States.\textsuperscript{173} The Court continued:

\begin{quote}
‘Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals’.\textsuperscript{174}
\end{quote}

The Court highlighted its previous judgment \textit{Inuit Tapiriit Kanatami}, emphasising that Article 4(3) TEU and Article 19(1) TEU obliges Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law by establishing a system that ensures effective judicial review.\textsuperscript{175} Since the very essence of rule of law is judicial review, as put forward in the \textit{Rosneft} judgment\textsuperscript{176}, the Court held:

\begin{quote}
‘It follows that every Member State must ensure that the bodies which, as “courts or tribunals” within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection’.\textsuperscript{177}
\end{quote}

Furthermore, the Court of Justice continued to the issue of whether the Portuguese Court of Auditors should be considered a court or tribunal under EU law. The Court found that questions related to EU financial resources could be brought before the Court of Auditors, hence it ruled on questions concerning the application or interpretation of EU law. This obliges Portugal to ensure that the Court of Auditors meets the requirements essential to effective judicial protection.\textsuperscript{178}

The Court emphasised that independence is essential for judicial protection, as confirmed by Article 47 of the Charter, also at the level of Member States’ courts. Independence is fundamental for the proper working of the preliminary ruling mechanism under Article 267 TFEU, because ‘that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, the

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\textsuperscript{173} Case C-64/16 \textit{Associação Sindical dos Juízes Portugueses} [2018], para 30.
\textsuperscript{174} Ibid, para 32.
\textsuperscript{175} Ibid, para 34.
\textsuperscript{176} Ibid, para 36.
\textsuperscript{177} Ibid, para 37.
\textsuperscript{178} Ibid, paras 39-40.
\end{flushright}
criterion of independence’. The Court of Justice pointed out the external aspect of independence, and held that similar to protection against removal from office of the judges of the concerned body,

‘the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence’.

Nonetheless, since the reduction of wages applied to other public office holders, were temporary, and served to reduce Portugal’s excessive budget deficit, the Court of Justice concluded that the measures could not be considered impairing the judicial independence.

5.2.4 Analysis of the Case

Portuguese judges started off with the Court of Justice reframing the case by pointing out that it, in essence, concerned the interpretation of Article 19(1) TEU, not Article 47 of the Charter, because the former provision applies to ‘fields covered by Union law’, whilst the scope of the Charter covers ‘Member States implementing Union law’ according to Article 51(1) of the Charter. Hence, the Court suggested that the provisions had different scopes. The scope of the Charter has previously been outlined by the Court of Justice in Åkerberg Fransson, where the Court found that the application of the Charter follows the scope of EU law. In Portuguese judges, however, the Court of Justice suggests that there is room between the ‘fields covered by Union law’ and the implementation of EU law by the Member States. The consequence of this is that the question of whether Portugal with the austerity measures actually is implementing EU law is left open. Instead, the Court seems to assume that the Portuguese Court of Auditors decides on cases where the implementation of EU law arises, making it an actor with obligations, such as to make sure that effective judicial protection is ensured.

179 Case C-64/16 Associação Sindical dos Juízes Portugueses [2018], EU:C:2018:117, paras 41-43.
180 Ibid, paras 44-45.
181 Ibid, paras 46-51.
182 See further section 4.3.
Next, the Court of Justice elaborated on the relation between the rule of law value in Article 2 TEU and Article 19 TEU, by stating that Article 19 TEU is an embodiment of the rule of law, in that it entrusts the key function of judicial review to national courts and tribunals. In the Court’s view, the principle of judicial independence is also part of Article 19 TEU, because Article 47 of the Charter, used as a tool of interpretation, contains this principle. Thus, Article 47 is first ruled inapplicable by the Court of Justice but still plays an important part, because it transplants the principle of judicial independence into Article 19 TEU. The Advocate General had a contrary view, arguing that the principle of judicial independence not is embodied in Article 19 TEU. In light of the strict scope of application of the Charter, stipulated in Article 51 thereof, the Court’s usage of the provision is something new.

Moreover, the Court of Justice applied its previous case law on the independence criteria. It reached the conclusion that remuneration as such is important in order to guarantee independence, but that the general application to public servants, the legitimate purpose and the temporary nature, meant that the measures did not impair the judicial independence.

To summarise, in Portuguese judges the Court of Justice develops its mandate from the second subparagraph of Article 19(1) TEU to autonomously examine national measures that affect the judicial independence, regardless of whether specific EU provisions are implemented or not. Thus, the Court did not elaborate on whether the Charter was applicable or not but still used Article 47 of the Charter to transplant the principle of judicial independence into Article 19(1) TEU. Based on previous case law, the Court found that remuneration affects the independence of a Court, but in a limited manner.

5.3 LM

5.3.1 Background

The LM\(^{183}\) case concerned whether a crime suspect should be surrendered from Ireland to Poland under a European arrest warrant. The concerned person was

\(^{183}\) Case C-216/18 PPU Minister for Justice and Equality v LM [2018], EU:C:2018:586.
arrested in Ireland and brought before the High Court, where he submitted that his surrender would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 of the ECHR. Furthermore, he contended that the legislative reforms of the Polish judiciary would deny him his right to a fair trial, relying on the Commission’s reasoned proposal on the rule of law in Poland\textsuperscript{184}, submitted in accordance with Article 7(1) TEU.\textsuperscript{185} The Irish High Court considered that there was a real risk of the suspect being subjected to arbitrariness in the course of his trial in Poland, and sent a request for a preliminary ruling to the Court of Justice. The Irish High Court asked if the test for determining the risk of an unfair trial in the issuing Member State needed to be essentially abstract? Could surrender under a European arrest warrant be refused based on cogent evidence of systemic breaches to the independence of the judiciary in the Member State that issued the arrest warrant? Or was it in light of the \textit{Aranyosi and Căldăraru}\textsuperscript{186} case necessary to carry out a specific test, focused on an individualised risk to the person being sought pursuant to the European arrest warrant?\textsuperscript{187}

\textbf{5.3.2 The Opinion of the Advocate General}

Advocate General Tanchev argued in his opinion that a potential violation of the right to a fair trial in Article 47 of the Charter could postpone the execution of a European arrest warrant. It would require, according to the Opinion, that the surrendering would amount to a real risk of a flagrant denial of justice on account of systemic deficiencies in the judiciary of the issuing Member State, connected to the individual in question for the execution, thus a transplanting of the two-step test from \textit{Aranyosi and Căldăraru}\.\textsuperscript{188}

\begin{footnotesize}
\begin{enumerate}
\item European Commission, \textit{Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding Rule of Law in Poland}, COM(2017) 835 final, 20 December 2017. See further section 3.3.
\item Case C-216/18 PPU \textit{Minister for Justice and Equality v LM} \[2018\], EU:C:2018:586, paras 14-17.
\item Joined Cases C-404/15 and C-659/15 PPU \textit{Aranyosi and Căldăraru} \[2016\], EU:C:2016:198.
\item Case C-216/18 PPU \textit{Minister for Justice and Equality v LM} \[2018\], EU:C:2018:586, paras 22-25.
\item Opinion of AG Tanchev in Case C-216/18 PPU \textit{Minister for Justice and Equality v LM}, EU:C:2018:517, paras 72 and 121. On the two-step test, see section 5.3.3.
\end{enumerate}
\end{footnotesize}
5.3.3 The Judgment of the Court

The Court of Justice started by recalling that the common values in Article 2 TEU not only are shared but also recognised among the EU Member States. This premise is the foundation and justification of the mutual trust between the Member States. The principle of mutual recognition and the principle of mutual trust, that the former principle is based upon, are of fundamental importance to the EU, given that they preserve the internal market. Mutual trust obliges Member States to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law, within the area of freedom, security and justice, with an exemption for exceptional cases.

Exceptions from Member States’ duty to execute a European arrest warrant are listed in the Framework Decision 2002/584. Refusal to execute an arrest warrant is intended to be a strictly interpreted exception. However, in the Aranyosi and Căldăraru case, the Court found that further limitations to the principle of mutual trust and principle of mutual recognition may be made in exceptional circumstances.

Aranyosi and Căldăraru concerned the execution of two European arrest warrants, one issued in Hungary and one in Romania. The Court relied upon the fact that the obligation to respect fundamental rights should not be affected by the Framework Decision 2002/584, according to Article 1(3) of the Decision, and the absolute nature of the fundamental rights guaranteed by Article 4 of the Charter, to make an exception from the principle of mutual recognition. In order to reach this conclusion, the Court of Justice carried out a two-stage test.

In the first step, which is targeted towards general and systemic deficiencies, the

189 Ibid, para 35. See also Case C-284/16 Achmea [2018], EU:C:2018:158, para 34.
190 Case C-216/18 PPU Minister for Justice and Equality v LM [2018], EU:C:2018:586, para 36.
Court assessed, on the basis of objective, reliable, specific and properly updated material, whether there was a real risk of infringement of the fundamental right. In Aranyosi and Căldăraru case, this information consisted of judgments from the ECtHR on Article 3 of ECHR. The second step focused on whether there were substantial grounds for believing that the requested person would be subjected to a real risk of fundamental rights violations in a particular case. This step required that the executing judicial authority requested the issuing Member State for all necessary supplementary information. In conclusion, the Court found that the surrendering under a European arrest warrant could be refused due to the prison conditions, since they were contrary to the prohibition of torture and inhuman or degrading treatment or punishment as enshrined in Article 4 of the Charter, corresponding to Article 3 of the ECHR.

In LM, the Court of Justice referred to the Aranyosi and Căldăraru judgment, and turned to the question of whether an exception from the principle of mutual recognition could be made on the basis of a real risk of a breach of the fundamental right to an independent tribunal, and therefore the right to a fair trial in the second paragraph of Article 47 of the Charter. In light of this, the Court of Justice held:

‘In that regard, it must be pointed out that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals 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’.

Furthermore, the Court of Justice referred to Portuguese judges and emphasised that maintaining the independence of the courts or tribunals, as enshrined in Article 47 of the Charter, is essential for the proper working of the judicial cooperation system, embodied by the preliminary ruling mechanism. The Court thus established a link between the right to a fair trial to the independence of the

195 Ibid.
196 Case C-216/18 PPU Minister for Justice and Equality v LM [2018], EU:C:2018:586, para 47.
197 Ibid, para 48.
198 See further section 5.2.
judiciary and the rule of law, emphasising the connection between Article 47 of
the Charter, Article 19(1) TEU and Article 2 TEU. On the basis of this, the
Court found that it was possible for the executing judicial authority to refrain
from giving effect to the European arrest warrant based on the right to an
independent tribunal, by exception.

The Court of Justice continued by applying the above outlined two-stage test
from Aranyosi and Căldăraru. The first step thus concerned an assessment of
whether there was a real risk of the fundamental right to a fair trial being
breached, due to systemic or generalised deficiencies, connected to the lack of
independence in the court of the issuing Member State. According to the
Court, the information in the Commission’s reasoned proposal was ‘particularly
relevant for the purpose of that assessment’. As for the determination of the
independence criteria, the Court of Justice referred to its previous case law,
containing both internal and external aspects. In addition, the Court outlined
regarding independence disciplinary regimes:

‘The requirement of independence also means that the disciplinary
regime governing those who have the task of adjudicating in a
dispute must display the necessary guarantees in order to prevent
any risk of its being used as a system of political control of the
content of judicial decisions. Rules which define, in particular, both
conduct amounting to disciplinary offences and the penalties
actually applicable, which provide for the involvement of an
independent body in accordance with a procedure which fully
safeguards the rights enshrined in Articles 47 and 48 of the Charter,
in particular the rights of the defence, and which lay down the
possibility of bringing legal proceedings challenging the disciplinary
bodies’ decision decisions constitute a set of guarantees that are
essential for safeguarding the independence of the judiciary’.

The second step of the test required as mentioned a specific and precise
examination of the particular circumstances at hand. The Court found that the
Commission’s reasoned proposal pursuant to Article 7(1) TEU was not
satisfying in this regard, it would take a decision from the European Council in

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200 Ibid, para 59.
201 Ibid, para 61.
202 Ibid.
203 See further section 4.5.3.
204 Case C-216/18 PPU Minister for Justice and Equality v LM [2018], EU:C:2018:586, para 67.
accordance with Article 7(2) TEU for an automatic refusal of a European arrest warrant. According to the Court, the Article 7 TEU mechanism would be circumvented with another regime. Thus, the national court must make an individual assessment, having regard to the concerned person’s situation, the nature of the offence the person is being prosecuted for and the European arrest warrant’s factual context. In addition, the executing judicial authority must request the issuing judicial authority for any supplementary information that it considers necessary. Consequently, the Court of Justice did not rule on the particular conditions in Poland but provided the referring court with the requirements of carrying out this assessment.

5.3.4 Analysis of the Case

In LM the Court largely relies on Aranyosi and Căldăraru, in combination with the previously outlined Portuguese judges, to reach its conclusion. The Court of Justice initiates its reasoning by recalling the importance of the European arrest warrant mechanism for the EU legal order and then heads towards the direction of Aranyosi and Căldăraru and exceptions to principles of mutual trust and mutual recognition.

The apparent issue at hand for the Court, in order to argue for the applicability of Aranyosi and Căldăraru in the LM case, were that the conclusion of the former case relied on the fact that the prohibition of torture is an absolute right, which the right to a fair trial is not, nor in the Charter, nor in the ECHR. The Court of Justice tackles this issue by emphasising the importance of the independence of the judiciary for the right to a fair trial and connects them to the rule of law of Article 2 TEU, supported by Portuguese judges. This, in addition with the ‘cardinal importance’ of a fair trial in order to protect the other rights in the EU constitutional order, is found sufficient by the Court, in order to replace an absolute right with a relative one.

206 Ibid, paras 74-76.
The reasoning raises interesting questions as regards the possibility to make exceptions for ‘exceptional circumstances’ for other rights protected in the Charter. The criteria put forward by the Court of Justice, the requirement of essentiality and overall importance to the EU legal order is not an equally high threshold as the absolute right requirement was. As outlined, the Advocate General argued for a requirement of a flagrant denial of justice in order to grant exceptions. While that threshold is put very high, making it difficult to carry out any refusals, it might be more in line with the previous ‘exceptional circumstances’ criteria.

The Court continues by applying the two stage-test from Aranyosi and Căldăraru. The Commission’s reasoned proposal is not sufficient, according to the Court of Justice, to surpass the test, that would require an actual determination of a breach by the European Council in accordance with Article 7(2) and 7(3) TEU. Considering that the nature of Article 7 TEU is highly political, that the Court has a limited mandate to review, this is a good balancing act from the Court of Justice’s side, considering coherence and the institutional balance. Henceforth, the Court applies the general part of the previously developed test and the specified part. The Court does not seem to modify the test to fit into the specific characteristics of the right to a fair trial. While examinations of conditions in prisons can be carried out more specifically, it is difficult to determine whether a specific court or specific judge will uphold the principle, there is no meaningful way of separating the courts. Moreover, since this information according to the Court of Justice should be asked of the national court itself, they are in practice asked to determine their own credibility.

In conclusion, the LM judgment works as a way of prolonging the Court’s findings from Portuguese judges to make room for exceptions from the execution of European arrest warrants. The Court continued to develop the link between Article 2 TEU, Article 19(1) TEU and Article 47 of the Charter. Throughout the case, the Court of Justice appears to strive for coherence, in relation to Aranyosi and Căldăraru.
5.4 **Commission v Poland**

5.4.1 **Background**

The Commission has brought infringement procedures against Poland pursuant to Article 258 TFEU for failing to fulfil its obligation under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. The grounds of the Commission are firstly that the national measures lowering the retirement age of the judges of the Supreme Court appointed to the court before 3 April 2018 infringe the principle of irremovability of judges, and secondly that the national measures granting the Polish President discretion to extend the active mandate of the Supreme Court judges upon reaching the lowered retirement age infringe the principle of judicial independence. Poland contended that the Court of Justice should dismiss the action brought forth by the Commission as unfounded.²⁰⁷

5.4.2 **The Opinion of the Advocate General**

The Advocate General Tanchev initially dealt with the admissibility of the action. Poland had put forward that the case was devoid of purpose and should be withdrawn because all of the provisions challenged in the proceedings had been repealed by a law that was submitted on the 21 November 2018. The Commission had, on the contrary, underlined that although the provisions of the Law on the Supreme Court that the proceedings concerned were modified by a new law on 21 November 2018, it was not certain whether that law eliminated the alleged violations of EU law and furthermore.²⁰⁸ The Advocate General referred to the case law of the Court, stating that the question of whether a Member State has failed to fulfil its obligations under Article 258 TFEU is determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, 14 September 2018 in the present case. The modified law entered into force on 1 January 2019

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²⁰⁷ Opinion of AG Tanchev in Case C-619/18 Commission v Poland, EU:C:2019:325, paras 1, 14-15.
²⁰⁸ Ibid, paras 25 and 33.
and did therefore not remove the need for the Court of Justice to rule in the case. In addition, the Advocate General argued that the Commission still may have interest in bringing an action under Article 258 TFEU even when the alleged infringement is remedied after the said lapse of time.\textsuperscript{209}

Regarding the relationship between Article 258 TFEU and Article 7 TEU, the Advocate General highlighted that the grounds for finding that Article 7 TEU and Article 258 TFEU are separate procedures and can be invoked at the same time are firm. Firstly, the wording of the provisions does not rule out the other, and secondly, the articles have different scheme and purpose of the procedures established: Article 7 TEU is essentially political, while Article 258 TFEU constitutes a direct legal route.\textsuperscript{210}

As for the material scope of Article 19(1) TEU and Article 47 of the Charter, the Advocate General held that a separate assessment of the provisions was necessary and that the complaints based on Article 47 of the Charter should be ruled inadmissible. The Commission argued that the two articles had the same scope, in that Article 47 of the Charter imports the requirements of independence and impartiality into the second subparagraph of Article 19(1) TEU. Article 51(1) of the Charter was thus not applicable according to the Commission. Poland, on the other hand, had submitted that the articles have different scopes of application, why a separate examination was required.\textsuperscript{211}

The Advocate General referred to Portuguese judges and interpreted that case as the Court based its findings solely on Article 19(1) TEU and using Article 47 of the Charter to confirm its findings. Due to the provisions' different scopes of application, a combined application in the absence of the assessment under Article 51(1) of the Charter could not be derived from Portuguese judges, in the Advocate General’s view. He held that a contrary finding would undermine the current system of review and to circumvent the limits of the scope of application

\textsuperscript{209} Opinion of AG Tanchev in Case C-619/18 Commission v Poland, EU:C:2019:325, paras 44-47.
\textsuperscript{210} Ibid, paras 48-50.
\textsuperscript{211} Ibid, paras 26, 34, 42.
of the Charter, as stipulated in Article 51(1) thereof. According to the Advocate General, the Portuguese judges judgment:

‘[S]hould not be considered as diminishing the Charter or Article 47 thereof. It appears to be an elegant and coherent solution in which respects the limits of the Charter vis-à-vis the Member States, while advancing the EU system of judicial protection and protecting the core values of the EU as established in Article 2 TEU’.

Furthermore, the Advocate General found that Article 19(1) TEU was applicable to the case, because the Polish Supreme Court may rule on questions concerning the application and interpretation of EU law. The Advocate General argued that the contested measures were alleged to impair the court’s independence, and concerned an alleged breach of the rule of law, a foundational value of the EU as reflected in Article 19 TEU.

In the first complaint, the Commission alleged that by lowering the retirement age of appointed Supreme Court judges, the principle of irremovability of judges was violated by Poland. The Polish government opposed the Commission’s view, emphasising the number of judges affected and that the objective of the new regime was to align the judge’s retirement with the general retirement age in Poland.

The Advocate General highlighted judge’s protection against removal from office as an essential guarantee to judicial independence, reciting the classic ‘justice must not only be done, it must also be seen to be done’. Furthermore, the Advocate General drew attention to the fact that the circumstances of the case were distinguishable from Portuguese judges, a case where the Court of Justice found that salary-reduction measures did not impair the judicial independence:

212 Opinion of AG Tanchev in Case C-619/18 Commission v Poland, EU:C:2019:325, paras 53-57.
213 Ibid, para 58.
214 Ibid, paras 61-63.
216 Ibid, paras 70-73.
It does not follow from ASJP\textsuperscript{217} that provisions applicable to judges related to general policies at the national level are not contrary to the principle of judicial independence, but rather that the Court’s assessment depends on the circumstances of the case\textsuperscript{218}.

In the present case, the Advocate General emphasised that the lowering of the Supreme Court’s judges’ retirement age had a considerable impact on the composition of the Supreme Court, constituted specific legislation for the Supreme Court, were not envisaged to be temporary and created difficulties in terms of public confidence. In conclusion, the Advocate General concluded the Commission’s first complaint well founded.\textsuperscript{219}

The second complaint concerned the Polish President’s discretion to extend the activate mandate of the Supreme Court judges upon reaching the lowered retirement age, which according to the Commission violated the principle of judicial independence. The Advocate General underlined the external aspect of the principle of judicial independence and held that the Polish system was exposed to external intervention and pressure from the President. The argument from Poland that laws of the other Member States and the Court of Justice itself are comparable to Poland’s failed to convince the Advocate General, who held that ‘they operate in a different legal, political and social context, and in any event, […] has no bearing on Poland’s failure to fulfil obligations’.\textsuperscript{220} The Commission’s second complaint was also concluded well founded, in the Advocate General’s opinion, who concluded that Poland had violated the principles of irremovability and independence of judges and hence failed to fulfil its obligation under Article 19(1) TEU.\textsuperscript{221}

\textsuperscript{217} Short for Associação Sindical dos Juízes Portugueses, the Advocate General’s reference to the Portuguese judges case. Case C-64/16 Associação Sindical dos Juízes Portugueses [2018], EU:C:2018:117, paras 41-43.

\textsuperscript{218} Opinion of AG Tanchev in Case C-619/18 Commission v Poland, EU:C:2019:325, paras 74-75.

\textsuperscript{219} Ibid, paras 76, 83.

\textsuperscript{220} Ibid, paras 84, 86-87, 89.

\textsuperscript{221} Ibid, paras 94-95.
5.4.3 Analysis of the Opinion

In his Opinion, the Advocate General systematically meets the argument put forward by the Commission and Poland. The question of admissibility is handled accordingly and relies on established case law. The conclusion that modifications to a law do not exclude the Court from ruling on the procedure is completely logical. If the Court of Justice would come to another conclusion, this would open up for a system where the Member States could take advantage of the time factor in an undesirable way. The Advocate General’s conclusion on the relationship between Article 258 TFEU and Article 7 TEU is also well motivated. It does not rely on previous case law, because this is the first judgment on this particular issue, but instead relies on the logic of the provisions themselves. If the legislator had intended that Article 2 TEU solely should be enforced by Article 7 TEU, the wording of the article should suggest this, and it does not. Since the legal system should be understood coherently, as one complete system, the only possible conclusion is that the provisions do not rule out one another.

Due to Portuguese judges, the Advocate General does not have to decide on the application of the Charter, because the Court of Justice has already established that the principle of judicial independence is a part of Article 19(1) TEU. The Advocate General highlights the mentioned judgments by stipulating that it does not diminish the Charter or Article 47 of the Charter, but he acknowledges that the Court has advanced the EU system of judicial protection. The arguments of the Advocate General are coherent with the case law, but it is interesting to note that without Portuguese judges, he would have to take a longer and more unstable road to reach his final destination. The protection against removal from office is as previously outlined a well-established part of the principle of judicial independence, hence the Advocate General’s conclusion in this part is grounded, and same goes for the second complaint, containing a fundamental part of the external aspect of judicial independence.
6 Analysis and Conclusion

6.1 Introduction

In this chapter, conclusions from Portuguese judges and LM are drawn, followed by an analysis of the legitimacy of the Court of Justice. Finally, the primary research question is answered and the outcome of Commission v Poland is predicted.

6.2 Conclusions from Portuguese Judges and LM

In Portuguese judges, the Court of Justice established a link between rule of law in Article 2 TEU and Article 19 TEU, by finding that the latter provision gives concrete expression to the former, because it entrusts the key function of judicial review to national courts and tribunals. In addition, the Court found that the principle of judicial independence is enclosed in Article 19 TEU, meaning that the enforcement of this principle is not dependent upon whether the Charter is applicable. The consequence of this is that the Member States must ensure that the national bodies which are considered courts or tribunals under EU law meet the requirements of effective judicial protection, including the protection of its judicial independence. In essence, the Court of Justice considers that the national bodies that decide on the interpretation and application of EU law not solely are a matter for the Member States.

The Court continued to elaborate on its findings in LM, emphasising that judicial independence is an essential part of the fundamental right to a fair trial, a right that in turn is a guarantee for the protection of individual rights deriving from EU law and the safeguarding of the Article 2 TEU values. The Court held that the risk of not getting a fair trial could be a reason for exceptions from executing a European arrest warrant, and thus limit the principle of mutual recognition.
6.3 The Internal Legitimacy of the Court

The internal legitimacy of the Court is as we know focused on the soundness of the legal reasoning put forward, with regard to the different criteria pointed out by Lenaerts.

The first criteria concerns the determination of whether a judgment is coherent with existing case law. One example is the two previously mentioned cases that the Greek Court of Auditors has referred to the Court of Justice on different occasions. In the Vangionakis case, the questions of whether it was a court or tribunal under EU law was not even up for question and the Court of Justice’s examination could thus continue, whilst in the Antonopoulos case, the Greek Court of Auditors was not considered an EU court or tribunal.

In Portuguese judges, the Court ruled, in spite of the common perception\textsuperscript{222}, that the scope of Article 19 TEU and the Charter was different, since Article 19(1) TEU was applicable to ‘fields covered by Union law’ regardless of whether Member States implemented EU law in accordance with Article 51(1) of the Charter or not. Despite the fact that the referring court explicitly had asked about Article 47 of the Charter, the Court did not contemplate as regards to this question. The Åkerberg Fransson judgment, which formed the earlier perception about the scope of the Charter, was a ground breaking case, but the Court of Justice did not bring this up. The Court is of course not obliged to explain every single one of its considerations, but in the spirit of legitimacy and coherency, it would have been sufficient of the Court to address the question. This is particularly important with regard to the general nature of the Charter’s scope.

The coherence criteria has also proved itself difficult to implement when the Court has used a similar case to support its findings, for instance in LM, where the Aranyosi and Căldăraru case is used to justify an exception from the principle of mutual recognition. Since there is no cases that are just alike, the examination of whether the reasoning of the Court is coherent becomes easily subjective.

\textsuperscript{222} See section 4.3.1.
because it is hard to determine how coherent two cases need to be in order to fulfil the given criteria.

Another criteria mentioned by Lenaerts was whether the grounds of the judgment was strong enough to be convincing in that it meets the arguments put forward by the parties. The implementation of this criteria differs, depending on whether the case at hand is the result of a preliminary ruling or an infringement procedure. Both Portuguese judges and LM were preliminary rulings, meaning the criteria was not optimal, but it was still used to reflect on the dialogue between the referring court and the Court of Justice. In the former case, the Court of Justice reformulated the question to not include an examination of Article 47 of the Charter, and thus not giving a position on all arguments put forward by the referring court. When analysing the Advocate General’s Opinion in Commission v Poland, related to an infringement proceeding, it was easier to implement the criteria and to conclude that the arguments of the parties were met by the Advocate General.

The third criteria that Lenaerts put forward was whether the rationale of the case was sufficiently transparent and easy to understand. This is the criteria that has proven most difficult to make good use of, and where Weiler’s claim of legal reasoning being in the eye of the beholder has had the most reason. To determine if a case is sufficiently transparent depends to a large amount upon the knowledge of the person given this task, it is not an objective assessment of whether the Court of Justice acts legitimate or not.

In conclusion, the criteria for examining the internal legitimacy of the Court of Justice has been useful for reviewing cases, but they are certainly not flawless and contains an amount of subjective assessment.

6.4 The External Legitimacy of the Court

Lenaerts describes the external legitimacy of the Court of Justice by enhancing that the Court strives to uphold the principle of separation of powers, and to be deferential to the legislator’s policy choices by enhancing the objectives pursued.
Thus, the Court’s advancement of judicial review in order to protect the rule of law could be explained by an objective from the legislator to uphold the rule of law in the EU, that the Court of Justice is trying to pursue.

As previously concluded, the rule of law has a central position in the EU legal order, expressed by Article 2 TEU and the framing of rule of law as a founding value. However, the legislator, the Member States in this case, as parties to the Treaty of Lisbon, has chosen to depict the rule of law as a substantively vague concept. This makes it hard to detect the possible objective of the legislator. One could argue that it was framed without precision because the Member States wanted the Court to be able to elaborate on the concept, but one could also argue that the reason for the lack of substance is due to the Member States not wanting the rule of law to be enforced by the Court of Justice, understanding it as a political concept. The latter argument is supported by the existence of Article 7 TEU, granting the Council the possibility to enforce the founding values on its own terms, without the involvement of the Court.

In the same spirit, the principle of judicial independence was explicitly outlined by the legislator in the Charter, not in one of the Treaties. While the Charter enjoys the same legal status as the TEU and the TFEU, its enforceability is limited, due to its dependence upon other provisions outside of the Charter for applicability. Altogether, these circumstances do not seem to suggest that the apparent pursuit of the legislator is to promote the rule of law when possible.

Another possibility is that the objective of the legislator has changed due to the dismantling of the rule of law in the Member States, hence that the provisions of the Treaty of Lisbon should not be used to interpret the pursuit of the legislator. The difficulty that arises then, is that the legislative power is divided among the Council and the European Parliament, and no legally binding text apart from the Treaty of Lisbon exists that could be used to determine a common will of the legislative power. It is pretty apparent, however, that the two institutions do not share views on the rule of law issue. The European Parliament has by its Reasoned Proposal on Hungary223 expressed a willingness

223 See section 3.3.
to forcefully act to pursue the maintenance of the rule of law. The Council, on the other hand, has not been able to act in this regard.

What this proves, is that it is not as easy as it may appear at first glance to understand the objectives of the legislature, especially when the legislative power is divided between the Council and the European Parliament. Thus, it appears Weiler had reason for his critique also in this regard.

6.5 Conclusion: Does the Court of Justice Enjoy Legitimacy?

In light of the conclusions put forward on the internal and external aspects of legitimacy, answering the primary research question of the thesis – *in light of the Court of Justice's case law on judicial review, does the Court enjoy legitimacy, with regard to the EU rule of law?* – is a difficult task. However, this confirms what we knew from the beginning, that examining the legitimacy of the Court of Justice is not easy. What we have seen, nonetheless, is that the Court in a timely manner for the *Commission v Poland* judgment has managed to make the question of whether the Charter is applicable of lesser importance.

While the precise definition of the EU rule of law somewhat remains unclear, it has been clear for a long time that judicial review and rule of law are closely intertwined. At the same time, judicial review is intertwined with other fundamental principles of EU law, such as the right to a fair trial and the principle of judicial independence. However, the limited scope of application of the Charter has stopped the Court of Justice from linking all of the principles together. In the *Portuguese judges* case, the Court tackles this issue by finding that no link is necessary, because the principle of judicial independence is part of Article 19 TEU already. The consequence of this is that the Court of Justice can assess national measures that allegedly undermine the national judicial independence as part of the EU judiciary on the basis of EU primary law, irrespective of whether the Charter is applicable. The *LM* case further justified and strengthened these findings.
Considering that the different components of the right to an effective remedy and judicial review had a close connection even before the judgments, *Portuguese judges* and *LM* are perhaps not as long steps of the Court as initially thought. Nevertheless, the timing of the cases, making it possible for the Court of Justice to grasp aspects of the Polish legislative changes that otherwise would have been out of reach for the EU, is symbolic. It makes me conclude that the Court of Justice is a legitimate actor on the rule of law scene, in the sense that it stays within its judicial sphere when adjudicating, but that it is a Court with political timing to its pursued objectives.

As for *Commission v Poland*, the Court of Justice will most likely find that the Polish legislative changes are in violation of EU primary law, in line with the Advocate General’s Opinion. Due to the recent developments in the case law, the Court now has a sufficient line of cases to support its scrutinising of the Polish judiciary – just in time.
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