

EDITORIAL COMMENTS

2019 shaping up as a challenging year for the Union, not least as a community of values

1. Much achieved, much to be done and much under threat

The EU has achieved a great deal for citizens and businesses. Its importance is not just economic, but also due to the free and open society it supports, based on the fundamental values set out in Article 2 TEU. The EU is, however, currently under huge pressure, externally and internally. The world is increasingly unstable and hostile to it. For instance, the first two years of the Trump Administration showed a marked departure from the traditional US approach towards Europe. After the “settlement” of Europe, through the re-unification of Germany, the implosion of the Soviet Union, and the velvet revolutions in Central and Eastern Europe, the US under Presidents Bush and Obama had already started retreating from Europe and turning towards other parts of the world (notably Asia); this re-direction is thus not entirely new. However, what is new is the intensity, speed and brashness – in terms of rhetoric, but also decisions.¹ The re-positioning of the US, Brexit, the increased assertiveness of Russia and China: all of these will have consequences for the world in general and for the EU in particular.

Internally, the EU has also been changing rapidly, as is shown up in clear fault lines. The Eurozone fault lines lie between North and South (who pays, who reforms, who balances the budget?). There are fault lines with regard to migration (who bears the burden of irregular migrants? Who shows solidarity?), and also when it comes to values (what is the rule of law? is democracy simply 50% +1 without considering the protection of the minority?), and whether upholding values is a matter of common concern or falls within the exclusive remit of national sovereignty. The

1. See US Secretary of State Pompeo’s speech in Brussels of 4 Dec. 2018, available at <www.state.gov/secretary/remarks/2018/12/287770.htm>. See also para 18 of the European Council conclusions of 28 June 2018, considering the US decision to impose tariffs on the EU for steel and aluminium products as not justified on grounds of national security, supporting rebalancing measures, potential safeguard measures and legal proceedings at the WTO in response to actions perceived to be of a protectionist nature.

financial-economic crisis hurt Member States badly – some more than others. While the economy has picked up throughout the EU, the recovery has been uneven. In combination with the migration crisis, this has become a poisonous political cauldron, in which extremist political movements are stirring – sometimes with success. Old notions of “the Jew”, or “the other”, our identity, national sovereignty, misogyny, nationalism, rejection of internationalism, rejection of complicated and seemingly ineffective democracy, calls for a strong leader, are gaining traction.

There are widespread concerns among EU citizens about disruptive changes in the economy and in society due to new technology and climate change, international competition and market access; concerns about jobs, the standard of living and that of our children; external threats; the consequences of migration. Uncertainty about these matters also leads to Euroscepticism and even hostility to the EU. The EU must show that it offers solutions if it wants to survive. Only then will the EU agenda garner support among the population.

Yet at the same time, the EU has huge potential. To realize this potential, its independence, cohesion, solidarity, resilience and assertiveness as regards what the EU stands for need to be strengthened.

These editorial comments aim to give a broad overview of how the EU at its highest political level – the European Council – is seeking to address the challenges. They also show how – in parallel – the ECJ, in its most recent case law, is making an indispensable contribution to the EU’s survival as a community of values in these turbulent times.

2. Major challenges facing the EU

If the EU wishes to claim its position in the world and determine its own path for the future, EU policy must urgently tackle at least three major challenges, identified in the various European Council conclusions of 2018, all adopted by consensus and synthesized below.

2.1. An EU standing strong and independent in the world

Managing migration flows is top of the political agenda in many Member States; but a sustainable solution is possible only at EU level. It relies on a comprehensive approach, combining more effective control of the EU’s external borders, increased external action and intra-EU management of

migration, in line with EU principles and values.² A structural approach to migration requires, therefore, besides a reform of the Common European Asylum System and effective policing of the EU's external borders, a comprehensive EU-Africa partnership with an investment fund and a plan for legal migration from that continent.³

The EU must also take greater responsibility for its own security, and take steps to bolster European defence, by enhancing defence investment, capability development and operational readiness. According to the European Council, EU initiatives will enhance its strategic autonomy while complementing and reinforcing NATO activities.⁴ Member States' law enforcement authorities, Europol and Eurojust must be provided with adequate resources to face new challenges.⁵ Moreover, the EU has to strengthen its capacity to prevent and respond effectively to radicalization and terrorism, with full respect for fundamental rights and common values.⁶

Free international trade and investments are essential to the EU's open economy, yet the world trade system is shifting from rules-based to deals-based. In order to maintain a rules-based system, the WTO rules need adapting.⁷ The EU must continue to conclude balanced and mutually

2. See paras. 1–12, European Council conclusions of 28 June 2018, paras. 1–6 of its conclusions of 18 Oct. 2018 and paras. 4–6 of its conclusions of 13–14 Dec. 2018. See also COM(2018)798 final, “Managing migration in all its aspects: progress under the European agenda on migration”. Without an EU approach, secondary movements of asylum seekers between Member States risk jeopardizing the integrity of the Common European Asylum System, and Schengen's open borders will be unsustainable – with a negative impact on the functioning of the internal market.

3. Work with third countries on investigating and prosecuting people smugglers and human traffickers must be intensified, so as to avoid people embarking on perilous journeys. Business has a role to play in developing technology and solutions for advanced border control systems and the reception of refugees, and by taking initiatives in Africa with the support of the investment fund; it can provide training to refugees and integrate them in the labour market.

4. See para 13, European Council conclusions of 28 June 2018. The EU defence industry has a strong technological basis, but major new R&D programmes are needed, and greater independence in the areas of technology and energy. See Blockmans, “The EU's modular approach to defence integration: An inclusive, ambitious and legally binding PESCO?”, 5 CML Rev., 1785–1826. An autonomous defence industry is an essential component of strategic autonomy.

5. E.g. hybrid, cyber, as well as chemical, biological, radiological and nuclear threats.

6. See paras. 7–9, European Council conclusions of 18 Oct. 2018. See also COM(2018)845 final, “Seventeenth Progress Report towards an effective and genuine Security Union”.

7. E.g. (i) new rules, that address current challenges, including in the field of subsidies, intellectual property and forced technology transfers; (ii) reduction of trade costs; (iii) a new approach to development; (iv) more effective and transparent dispute settlement, including the Appellate Body, with a view to ensuring a level playing field; and (v) strengthening the WTO as an institution, including its transparency and surveillance function.

beneficial FTAs with key partners across the world, promoting its values and standards.⁸ Special attention must of course be given to the negotiations on the agreement on the future relationship between the EU and the UK.

2.2. *An autonomous, transformative EU for technology, energy and the environment*

The world is undergoing not an era of change, but a change of era. The EU's strategic autonomy in the world also requires it to become more independent in terms of technology and energy. New technologies provide great opportunities to tackle the problems of our time, for instance in care, mobility and energy. However, the EU is slow to react to the rapid changes. Specific shortcomings are that the EU risks becoming dependent on non-EU solutions with regard to strategic Key Enabling Technologies, and that the EU does not sufficiently benefit from its own knowledge development. It must therefore further develop its high-quality research across the EU, and use this for new products, services and business models. The European Council called for a stronger, inclusive innovation ecosystem to foster breakthrough and market-creating innovation and provide comprehensive support for businesses, including SMEs, with disruptive potential to enter successfully global markets.⁹ It insisted on *inter alia* a regulatory environment that supports greater risk-taking, and on promoting digital skills as well as links between academia, industry and government.¹⁰

An EU model for innovation and digitalization must capitalize on the EU's strengths: 500 million consumers, its own standards for privacy and security, competition and public-private cooperation.¹¹

The EU's energy, climate change and environmental policies are significant not only for the economy but also for security: its energy and raw material dependence on other countries need to be reduced. The EU wants to lead the way in achieving the Paris targets and implementing the energy transition and energy independence. The transformation must be undertaken in a programmed and systematic manner across borders and requires a long-term strategy by 2020 in line with the Paris Agreement.¹²

8. See paras. 2–3, European Council conclusions of 23 March 2018 and paras. 16–17 of its conclusions of 28 June 2018. See also the Commission's concept paper on WTO reform attached to its press release IP/18/5786.

9. See para 19, European Council conclusions of 28 June 2018.

10. *Ibid.*, para 21.

11. See para 7, European Council conclusions of 22 March 2018.

12. See para 10, European Council conclusions of 13–14 Dec. 2018.

2.3. *An EU where everyone counts and contributes*

Most importantly, the EU needs to demonstrate not only that it offers solutions to the major challenges, but also that it takes into account the concerns of all its citizens, who increasingly have the feeling that they have lost control: over their lives, the economy, their future; lost it to elites, Brussels bureaucracies, international liberalism, immigrants, terrorism.¹³ This goes to the essence of the EU, *what makes Europe Europe*.

The EU stands for peace, prosperity and freedom and is based on respect for human dignity, enshrined in Article 2 TEU, which lists the core values: democracy, human rights and rule of law. Together, these values facilitate an open, liberal society; a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail, as stated in the second sentence of Article 2 TEU. That model of society is under pressure from the tide of authoritarianism, nationalism and lack of pluralism, internationally and within the EU. In order to withstand those growing pressures, it is important that the EU's common system of values be actively defended and upheld. EU values are not just abstract. They are reflected in the EU's privacy, trade, competition, social, innovation and JHA policies. In an era where social media controls much of what we see, hear and read, and we see the phenomenon that facts cannot convince strongly held emotions, our democratic debate is in a perilous situation. How can we bring convincing arguments if the facts no longer matter? The European Council therefore calls for measures to "protect the Union's democratic systems and combat disinformation, including in the context of the upcoming European elections."¹⁴ The elections in May 2019 for the European Parliament are particularly vulnerable in this respect, as they will help determine how legitimate our European *demos* is (in terms of turnout percentage); whether we will have an effective coalition or a hung Parliament; and how this is reflected in the composition of the new European Commission as of November 2019.¹⁵ The package of measures for securing free and fair European elections presented by the Commission in September 2018, shows that it is possible to make progress, with concrete measures aimed at increasing our democratic resilience.¹⁶

13. *Ibid.*, para 15.

14. See para 9, European Council conclusions of 18 Oct. 2018 and paras. 12–13 of its conclusions of 13–14 Dec. 2018. See also the action plan against disinformation, European Commission and High Representative joint document JOIN(2018)36 final.

15. See "Parlement Européen 2019: quel hémicycle? Quelle Europe?", Institut Jacques Delors, 25 Oct. 2018.

16. COM(2018)637 final, "Securing free and fair European elections"; Commission press release IP/18/5681.

Globalization has entered a new phase, the consequences of which call for major adaptations in society and an EU agenda for inclusiveness; otherwise, parts of the population will be left behind and inequalities will increase both within and between EU Member States. This can destabilize the EU; for instance, the *gilets jaunes* movement in France and Belgium, which embraces so much dramatic revolutionary imagery, has tapped into anger at the perception that government, be it national or EU, governs for the benefit of the better-off elite. The situation is volatile, and a spark can quickly turn into a fire.

Inequalities within Member States should be eradicated primarily through national policies. Nevertheless, European coordination of Member State policies and EU social policy can help to narrow differences. Citizens expect the EU to protect them against threatening developments; and they expect the EU to support them in coping with future changes.¹⁷

3. Important means to meet the EU's challenges: Better regulation, the internal market, EMU and the MFF

All these challenges require major transformative changes in our whole society. The transformations bring high costs, but also great opportunities. To manage this process in an efficient, fair and equitable way, the EU needs to work better and more effectively. In some areas, it is felt that the EU needs to do less, or do things differently; in others, more EU action is required, in line with the key principles of subsidiarity and proportionality.¹⁸ The EU will therefore need to continue pursuing an evidence-based better regulation policy. Moreover, the EU will be unable to achieve its ambitions without a strong economy that is internationally competitive. The internal market thus remains a cornerstone of the EU. Whilst it is the EU's main asset for ensuring citizens' welfare, inclusive growth, and job creation, and is the essential driver for investment and global competitiveness, it needs to be made fit for the digital age, and an enabler for further competitiveness, innovation and sustainability, according to the European Council.¹⁹ EMU brought many advantages by eliminating exchange rate risks and boosting growth. But the EU as a whole must be made sufficiently capable of weathering storms: for

17. See para 5, European Council conclusions of 22 March 2018.

18. See the report of the Task Force on Subsidiarity, Proportionality and "Doing Less More Efficiently", established by the European Commission and chaired by its First Vice President, of 10 July 2018. See also COM(2018)491 final, "The principles of subsidiarity and proportionality: strengthening their role in the EU's policymaking".

19. See para 1, European Council conclusions 22 March 2018 and paras. 2–3 of its conclusions of 13–14 Dec. 2018.

example, through completion of the Banking Union, completion of the Capital Markets Union, enhanced coordination of budgetary and economic policies, greater convergence between economies, and the introduction of the euro in all the Member States. The EU should therefore continue purposefully, but at the same time cautiously, down this path.²⁰ The key issue remains striking the right balance between the necessary reforms in a number of Member States and the collective shouldering of risk. Ensuring fair and effective taxation is also a key priority; the fight against tax avoidance, evasion and fraud must be vigorously pursued both at global level (notably in the OECD) and within the EU, and taxation systems need to be adapted to the digital era.²¹

The EU cannot carry out its tasks without adequate funding. The adoption of the new Multiannual Financial Framework for the period 2021–2027 should achieve savings wherever possible, but it must also ensure that there is enough budget to develop EU action where this is necessary, such as innovation, defence and migration, as indicated above. Member States benefiting from EU funds need to implement economic reforms and ensure sound financial accountability, as well as respect for the rule of law.²²

4. Threats to unity and its legal foundations: The need to uphold the rule of law

Despite these pious wishes reflected in the European Council conclusions, preceded and followed up by numerous Commission initiatives and meant to constitute “the necessary impetus” for the EU’s development in the sense of Article 15(1) TEU, the fact remains that at the turn of the year, Member States and citizens are deeply divided about the way to address many of these challenges. The fact that more than two hundred Commission legislative proposals, key for the implementation of this agenda, are still pending before the Council and the EP, just a few weeks before the electoral recess, is

20. See on deepening EMU, the Statement of the Euro Summit meeting of 14 Dec. 2018, endorsing the terms of reference of the common backstop to the Single Resolution Fund and the term sheet on the European Stability Mechanism reform and giving a mandate to the Eurogroup to work on a budgetary instrument for convergence and competitiveness for the euro area and ERM II Member States on a voluntary basis.

21. See para 15, European Council conclusions 28 June 2018; Commission proposals for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence (COM(2018)147 final) and for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services (COM(2018)148 final).

22. See the Commission proposal for a Regulation of the European Parliament and the Council on the protection of the Union’s budget in case of generalized deficiencies as regards the rule of law in the Member States (COM(2018)324 final).

indicative. Clearly, the EU's biggest challenge is to maintain unity, as the UK is to secede in a few months' time, the management of that painful process, at least on one side of the channel, less than a hundred days before Brexit date, is mayhem,²³ and the world goes through new paradigm shifts.

There are not only political differences posing a threat to its unity. The nature of the EU implies that it will only be able to preserve and continue to benefit from what it has achieved, and to meet successfully its future challenges, with the help of the law. It remains for that reason a lawyers' paradise. That paradise, however, can turn into hell, not only for its lawyers but also for citizens and business overall, if the EU's legal foundations are threatened, in particular the rule of law where the independence of the national judiciary is under direct threat and, as result, compliance with EU law is at risk. Tribute should be paid to the ECJ, which through its carefully developed case law in 2018, building on its landmark judgment of 2006 in Case C-506/04, *Wilson*,²⁴ made a substantial contribution to further strengthening these foundations in turbulent times. In *Wilson*, it already made clear that the notion of "judicial independence" is an autonomous concept of EU law and that this independence implies that judges must be protected against any external intervention that could jeopardize their independent judgment as regards the proceedings before them (i.e. external independence). For reasons of impartiality, the ECJ also held that a level playing field for the parties to the proceedings with respect to the subject-matter of those proceedings must be assured (i.e. internal independence). In 2018, the ECJ developed its doctrine further. Because of their constitutional importance, some of the most crucial findings merit being quoted here in detail.

4.1. *Key findings in recent constitutional case law of the ECJ*

(i) In Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*,²⁵ the ECJ ruled that the salary reductions applied to the judges of the Tribunal de Contas in Portugal do not infringe the principle of judicial independence. Those measures, adopted in the context of EU financial assistance to Portugal, affected a large part of the Portuguese public administration in a general and temporary manner. Most importantly, the ECJ held that Member States are required by Union law to ensure that their courts

23. See the European Commission package of 14 measures in a number of policy areas where a "no-deal" scenario would create major disruptions for citizens and businesses in the EU27, European Commission press release IP/18/6581.

24. Case C-506/04, *Wilson v. Ordre des avocats du barreau de Luxembourg*, EU:C:2006:587, para 49.

25. Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, EU:C:2018:117.

meet the requirements of effective judicial protection, a concrete expression of the rule of law, and stated that the independence of national courts is essential to ensure such judicial protection.

The ECJ reached that conclusion by the following reasoning. First, it defined the function of the rule of law in the context of Article 2 TEU. It considered that the rule of law is common to the Member States in a society in which, *inter alia*, justice prevails, and recalled that mutual trust between the Member States and, in particular, their courts and tribunals, is based on the fundamental premise that Member States share a set of common values. Second, it held that Article 19 TEU gives concrete expression to the value of the rule of law stated in Article 2 TEU, and entrusts the responsibility for ensuring judicial review in the EU legal order not only to the ECJ but also to national courts. It stated that the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law (para 36).

What does that mean concretely in terms of enforceable obligations for Member States? The beginning of an answer can be found in paragraph 29, where the ECJ defines the material scope of the second subparagraph of Article 19(1) TEU. That provision relates to “the fields covered by Union law”, irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter. On questions concerning the application or interpretation of EU law, Member States must ensure that national courts meet the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU. To sum up, in order to fulfil the requirement of effective judicial review, Member States must:

- establish a system of legal remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law (para 34);
- ensure judicial independence, in the sense 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 (para 37). The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU (para 43).

The ECJ set essential conditions for the concept of independence (para 44). judicial independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to

any hierarchical constraint or subordinated to any other body; it may not take orders or instructions from any source whatsoever. It is thus protected against external interventions or pressure liable to impair the independent judgment of its members or influence their decisions.

(ii) A week later, the ECJ held, in Case C-284/16, *Achmea*,²⁶ that the arbitration clause in a bilateral investment agreement between the Netherlands and Slovakia was not compatible with EU law. In particular, it found that such a clause breached Article 19 TEU, as it removed from the mechanism of judicial review of EU law disputes which might relate to the application or interpretation of that law: the Member States thus failed to ensure effective legal protection (paras. 36–37). These findings again show how crucial the ECJ considers the role of the national courts and tribunals, in cooperation with the Court of Justice, to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law through the preliminary ruling procedure of Article 267 TFEU. The judicial system as thus conceived has as its “keystone” that procedure, which, by setting up a dialogue between one court and another, specifically between the ECJ and the courts and tribunals of the Member States, aims at securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the EU.

(iii) Three months later, the ECJ refined, in the context of the rule of law, the principle of mutual trust, in Case C-216/18 PPU, *LM*.²⁷ It ruled that mutual trust is the general rule, and exceptions must be interpreted strictly; however, a judicial authority called on to execute a European arrest warrant must refrain from giving effect to it if it considers that there is a real risk that the individual concerned would suffer a breach of his fundamental right to an independent tribunal and, therefore of his fundamental right to a fair trial on account of systemic or generalized deficiencies concerning the judiciary. These two key points (judicial independence and the approach to be followed in case of alleged systemic or generalized deficiencies) are clarified as follows:

- The requirement of judicial independence is 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 (para 48). The guarantee of judicial independence requires rules, particularly as regards the composition

26. Case C-284/16, *Achmea*, EU:C:2018:158.

27. Case C-216/18 PPU, *Minister for Justice and Equality/LM*, EU:C:2018:586.

of the judicial body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (para 66). In defining these requirements so widely, the ECJ brings matters within the scope of EU law which many Member States considered to be within the remit of their national sovereignty, in particular their procedural autonomy.

- In cases of alleged systemic or generalized deficiencies, liable to affect the independence of the judiciary in the issuing Member State, the executing judicial authority is required to assess whether there is a real risk that the individual concerned will suffer a breach of that fundamental right (para 60). *As a first step*, the court must assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State, whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalized deficiencies there, of the fundamental right to a fair trial being breached. Information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment (para 61). *As a second step*, if, having regard to these requirements, the executing judicial authority finds that there is indeed a real risk of breach of the essence of the fundamental right to a fair trial (in the issuing Member State) on account of systemic or generalized deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts, that authority must assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk. A specific assessment is also necessary where (i) the issuing Member State has been the subject of a reasoned proposal adopted by the Commission under Article 7(1) TEU in order for the Council to determine that there is a clear risk of a serious breach by that Member State of the values referred to in Article 2 TEU, such as that of the rule of law, on account, in particular, of actions impairing the independence of the national courts, and (ii) the executing judicial authority considers that it possesses, on the basis of such a proposal, material showing

that there are systemic deficiencies, in the light of those values, at the level of that Member State's judiciary (paras. 68–69).

(iv) Applying the key principles developed in the 2018 judgments mentioned above, the Vice-President of the ECJ held, in an Order of 19 October 2018,²⁸ that Poland must immediately suspend the application of provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges. The Order must apply, with immediate effect, to the judges of the Supreme Court concerned by those provisions.

In Case C-619/18 R, *Commission v. Poland*, the Commission had requested the ECJ, in the context of an infringement procedure, to order interim measures under Article 279 TFEU, in particular so as to (i) suspend the application of provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges; (ii) take all necessary measures to ensure that the Supreme Court judges concerned by the provisions at issue may continue to perform their duties in the same post, and under the same conditions as they did before the contested national Law entered into force; (iii) refrain from adopting any measure concerning the appointment of judges to the Supreme Court. All these requests were granted. Particularly noteworthy are the considerations (in para 18) regarding the urgency justifying these interim measures: if the infringement action brought by the Commission is ultimately upheld, all the decisions of the Supreme Court up to the decision of the ECJ regarding that action would have been given without the guarantees connected with the fundamental rights of all individuals to an independent court or tribunal, as enshrined in Article 47 of the Charter. The infringement of a fundamental right such as the right to an independent court or tribunal is “thus capable, by the very nature of the infringed right” of giving rise to serious and irreparable damage in the present case. In other words, the ECJ bases itself here on a Charter provision solely, without referring to Article 19 TEU, although later on it does refer to the rule of law as set out in Article 2 TEU.

(v) In an extensively reasoned Order of 17 December 2018,²⁹ the ECJ Grand Chamber fully confirmed the earlier Order of its Vice-President,³⁰ confirming that the conditions for interim measures were satisfied. The following considerations are particularly relevant, and are presented here in an unofficial translation (at the time of drafting these comments, the Order was only available in French, Hungarian, Polish and Swedish).

28. Case C-619/18 R, *Commission v. Poland*, Order ex parte of 19 Oct. 2018, EU:C:2018:852.

29. Case C-619/18 R, *Commission v. Poland*, Order of 17 Dec. 2018, EU:C:2018:1021; at the time of drafting the editorial comment,

30. Case C-619/18 R, *Commission v. Poland*, Order of 19 Oct. 2018.

Fumus boni juris: “In particular . . . complex legal questions arise which deserve careful consideration by the court on the merits, such as, in particular, whether, as the Commission argues, the guarantee of the irremovability of judges requires that the provisions on lowering the retirement age do not apply to the judges of the Sad Najwyższy (Supreme Court) who were already appointed before the entry into force of these provisions, or the question of the extent to which an intervention by an organ of the executive power in the decision to keep in office, beyond the newly-appointed retirement age, such judges or those appointed to that court after the entry into force is likely to infringe the principle of judicial independence. It follows from the foregoing considerations that the pleas put forward by the Commission in connection with the action for failure to fulfil obligations are not *prima facie* lacking a serious basis within the meaning of the case law” (paras. 45–46).

Urgency: “In this regard . . . the preservation of the independence of the bodies which, as ‘court or tribunal’ within the meaning of EU law, are part of a Member State’s system of remedies in the fields covered by Union law is crucial for guaranteeing the judicial protection of the rights which litigants derive from this law. The independence of national courts is, in particular, essential to the proper functioning of the system of judicial cooperation embodied in the preliminary ruling procedure provided for in Article 267 TFEU, in that, in accordance with the settled case law of the Court, this mechanism can only be activated by a body responsible for applying Union law, which satisfies, in particular, this criterion of independence.³¹ The preservation of judicial independence is also essential in the context of measures adopted by the Union in the field of judicial cooperation in civil and criminal matters. Those measures are based on the particular mutual trust of the Member States in their respective judicial systems and are thus based on the premise that the courts of other Member States meet the requirements of effective judicial protection, which includes in particular, the independence of those courts.³² Consequently, the fact that, because of the application of the provisions of national legislation at issue, the independence of the Sad Najwyższy (Supreme Court) may not be ensured pending delivery of the final judgment is likely to cause serious damage to the EU legal order and, accordingly, to the rights that individuals derive from EU law, and the values, set out in Article 2 TEU, on which the EU is based, in particular that of the rule of law. Furthermore, it should be recalled that the national supreme courts play, in the judicial systems of the Member States to which they belong, a crucial role in the implementation at national level of Union law, so that a

31. Citing Case C-216/18 PPU, *LM/ Minister for Justice and Equality*, para 54 and the case law cited.

32. Referring by analogy to Case C-216/18 PPU, *LM*, para 58.

possible infringement of the independence of a national supreme court is liable to affect the entire judicial system of the Member State concerned.” (paras. 65–69).

“In this respect, contrary to the claim of the Republic of Poland, the risk of loss of confidence in the Polish judicial system is not fictional or hypothetical, but very real. This is evidenced by the reference for a preliminary ruling made by the High Court, in [Case C-216/18 PPU, *Minister for Justice and Equality/LM*], in proceedings for the execution of European arrest warrants issued by the Polish courts, because of that court’s fear that – as a result of the alleged systemic deficiencies in the independence of the courts of the Republic of Poland, resulting from the legislative reforms of the judicial system initiated by that Member State, in particular, the adoption of the national provisions at issue – the person who is the subject of a European arrest warrant would, in the event of surrender to the Polish judicial authorities, suffer a violation of his fundamental right to an independent court and, consequently, of his right to a fair trial, guaranteed by Article 47(2) of the Charter.” (para 77).

Balancing of interests: “The arguments of the Republic of Poland, however, are based on a misunderstanding of the nature and effects of the interim measures sought by the Commission in the present proceedings. In fact, the grant of such provisional measures entails the obligation for that Member State to suspend the application of the national provisions at issue immediately, including those having the effect of repealing or replacing the previous provisions governing the age of the retirement of the judges of the *Sąd Najwyższy* (Supreme Court), so that the previous provisions become applicable once more pending the pronouncement of the final judgment. Thus, the implementation of an interim measure suspending the application of a provision entails the obligation to guarantee the restoration of the legal situation which existed prior to the entry into force of this provision, in this case, of the legal regime provided for by the national provisions repealed or replaced by the national provisions at issue.” (para 95)

(vi) The last case to be recalled here is Case C-621/18, *Wightman*, on Article 50 TEU.³³ On 19 December 2017, a petition for judicial review was lodged in the Court of Session, Inner House, First Division (Scotland, United Kingdom) by members of the UK Parliament, the Scottish Parliament and the European Parliament, to determine whether the notification referred to in Article 50 could be revoked unilaterally before the expiry of the two year

33. Case C-621/18, *Wightman and Others v. Secretary of State for Exiting the European Union*, EU:C:2018:999.

period, with the effect that such revocation would result in the UK remaining in the EU. On 3 October 2018, the Court of Session referred this question to the ECJ for a preliminary ruling, pointing out that the response would allow members of the House of Commons to know, when exercising their vote on a withdrawal agreement, whether there are not two options, but three, namely withdrawal from the EU without an agreement, withdrawal from the EU with an agreement, or revocation of the notification of the intention to withdraw and the UK's remaining in the EU. In its preliminary ruling, the ECJ replied affirmatively; its reasoning made reference to all the values listed in Article 2 TFEU as foundations of the EU, including a reference to its judgment in *LM*, rendered a few months earlier (paras. 62–63). The ECJ underlined in particular the importance of the values of liberty and democracy, included in the preamble to the TEU, and which are among the common values referred to in Article 2 TEU and in the preamble to the Charter, and which, in its view, thus form part of the very foundations of the Union's legal order. As is apparent from Article 49 TEU, providing the possibility for any European State to apply to become a member of the Union and to which Article 50 TEU, on the right of withdrawal, is the counterpart, the EU is composed of States which have freely and voluntarily committed themselves to those values. EU law is thus based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that those Member States share with it, those same values.

4.2. *Significance for the rule of law*

The importance of these six judgments and orders, the speed with which they were rendered, and the interference with Member States' power to define their internal judicial organization they imply (e.g. the ruling in *LM*), are commensurate with the threat to the rule of law which the EU is facing. It is also in that light that one is tempted to explain the wide material scope the ECJ gives to the second subparagraph of Article 19(1) TEU in *Associação Sindical dos Juizes Portugueses*, as well as the wide interpretation given in *Białowieża forest*³⁴ to its own powers to sanction a Member State for not complying with ECJ interim measures. Rule of law problems, in varying degrees and with different intensity, are not limited to Poland and Hungary, which are currently the subject of Article 7(1) TEU procedures,³⁵ but arise also

34. See Case C-441/17 R, *Commission v. Poland*, Order of 20 Nov. 2017.

35. See European Commission reasoned proposal in accordance with Article 7(1) TEU regarding the rule of law in Poland (COM(2017)835 final); European Parliament resolution No. A8-0250/2018 (subject to appeal by Hungary before the ECJ, Case C-650/18).

in other Member States, e.g. Romania,³⁶ Bulgaria³⁷ and Malta.³⁸ In 2019, in the context of infringement procedures and requests for preliminary rulings, the ECJ is expected to render more judgments, often following accelerated procedures, shedding further light on the scope of the rule of law as concretized in other Treaty provisions, and the ensuing obligations for Member States.

Among the values-related infringement cases pending before the ECJ, three deserve particular attention:

- (i) Case C-78/18 regarding the Hungarian NGO law: on 7 December 2017, the Commission decided to refer Hungary to the ECJ for failing to fulfil its obligations under the Treaty provisions on the free movement of capital, due to provisions in the NGO Law which indirectly discriminated and disproportionately restricted donations from abroad to civil society organizations. In addition to these concerns, the Commission also argues that Hungary violated the right to freedom of association and the rights to protection of private life and personal data as enshrined in the Charter, read with the TFEU provisions on the free movement of capital.³⁹
- (ii) Case C-66/18 regarding the Hungarian Higher Education Law: on the same date, the Commission initiated ECJ proceedings against Hungary on the grounds that the law as amended was not compatible with the freedom for higher education institutions to provide services and the freedom of establishment. In addition, the Commission claims that the new legislation ran counter to the right of academic freedom, the right to education, and the freedom to conduct a business as protected by the Charter and the EU's obligations under international trade law (in particular the GATS).⁴⁰ The ECJ decided to grant priority to the case. The outcome is evidently of great importance to George Soros' Central European University, which, because of this law, felt obliged to move from Budapest to Vienna.
- (iii) Case C-808/18 on Hungarian asylum procedures: on 19 July 2018, the Commission decided to bring a case against Hungary before the ECJ

36. See the report from the European Commission on progress in Romania under the Cooperation and Verification Mechanism (COM(2018)851 final).

37. See the report from the European Commission on progress in Bulgaria under the Cooperation and Verification Mechanism (COM(2018)850 final).

38. See European Commission for Democracy through Law (Venice Commission) Opinion No. 940/2018 on constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement.

39. European Commission press release IP/17/5003.

40. European Commission press release IP/17/5004.

concerning the compliance of national legislation with the requirements of the Asylum Procedures Directive. The Commission takes the view that the border procedure implemented by Hungary did not respect the maximum duration of 4 weeks in which someone could be held in a transit centre and failed to provide special guarantees for vulnerable applicants; moreover, according to the Commission, Hungary failed to provide effective access to asylum procedures as irregular migrants were escorted back across the border, even if they wished to apply for asylum. In addition, the Commission argues that indefinite detention of asylum seekers in transit zones without respecting the applicable procedural guarantees breaches the Reception Conditions Directive. Finally, the Commission claims that the Hungarian law does not comply with the Return Directive as it fails to ensure that return decisions are issued individually and include information on legal remedies.⁴¹

One can only hope that Member States in such sensitive cases are ready to comply with ECJ judgments ruling against them. Or is there a risk that they will openly challenge them or find ways to circumvent them by making only slight adjustments to measures found to breach EU law or substituting them by new ones? In the latter two cases, for reasons of rights of defence, the procedure of Article 260 TFEU may be of no avail, but new infringement cases may be required, insofar as they target – strictly speaking – a new set of national rules. This would imply that the various administrative and judicial steps of such a procedure may well need to be taken all over again.

Even more worrying are attempts to deter national judges from making preliminary references to the ECJ, by launching disciplinary investigations against them,⁴² or by challenging the constitutionality of the preliminary ruling procedure set out in Article 267 TFEU before a Constitutional Tribunal.⁴³ Billboard campaigns, aimed at discrediting national judges, do not contribute either to a serene climate in which national courts as EU courts can

41. See European Commission press release IP/18/4522.

42. See the two recent letters of the Polish Deputy Disciplinary Officer Lasota addressed to Lodz Regional Court judge Igor Tuleya and Warsaw Regional Court judge Ewa Maciejewska for the mere fact that they had requested the ECJ to issue preliminary rulings (see Case C-558/18 and Case C-563/18), as published on the website of the Polish association of judges Iustitia (available at <www.iustitia.pl/en/2722-polish-disciplinary-prosecutor-michal-lasota-launched-a-case-against-judge-igor-tuleya-who-sent-pre-judicial-queries-to-luxembourg> and at <www.iustitia.pl/en/2714-polishdisciplinary-prosecutor-michal-lasota-launched-a-case-against-judge-ewa-maciejewska-who-sent-pre-judicial-queries-to-luxembourg>).

43. See the motion of the Polish Minister of Justice Ziobro, as published on the website of the Constitutional Court, available at <www.ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&sprawa=20793>.

ensure the legal protection required under Article 19 TEU.⁴⁴ Such developments warrant indeed the question whether in practice it is possible to enforce effectively values-related Treaty obligations through ECJ proceedings. This is key for the EU's future, since alternative means to induce Member States to comply with the rule of law either have not (yet) materialized (e.g. a minority in the Council still blocks the Commission's proposal to introduce rule of law conditionality in the context of the MFF⁴⁵) or have proved to be ineffective, at least for the time being. For instance, discussions in the General Affairs Council regarding Commission or European Parliament reasoned proposals based on Article 7(1) TEU with respect to the rule of law situation in Poland and Hungary are blocked, absent the required majority for any decision under that provision. This also reveals a deep divide between Member States. The Commission Rule of Law Framework⁴⁶ has at least the merit of addressing sensitive and complex problems and clearly identifying possible solutions. At the same time we should acknowledge that the current forms of dialogue mechanisms have shown their limits; they have not been very effective, and prompted the European Parliament⁴⁷ and individual Member States⁴⁸ to develop new initiatives of that nature but without much support yet. All this is regrettable because it does not allow for a comprehensive approach for rule of law problems arising in any given Member State, in particular if the problems identified are systemic, something to which an infringement procedure or a request for a preliminary ruling, given their intrinsically limited scope, do not lend themselves to. However, the potential of the existing EU rule of law toolbox should not be underestimated, but maximized instead. In particular, the monitoring of the independence, quality and efficiency of national justice

44. See the speech delivered by President of the Dutch Supreme Court Maarten Feteris on 10 Jan. 2018 in The Hague (available at <www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Nieuws/Paginas/President-spreekt-zorg-uit-over-rechterlijke-macht-in-Polen.aspx?pk_campaign=rssfeed&pk_medium=rssfeed&pk_keyword=Nieuws-van-de-Hoge-Raad-der-Nederlanden> and several media reports (e.g. available at <www.rp.pl/Sadownictwo/171009232-A-prawda-jest-taka-KRS-odpowiada-na-kampanie-prawiedliwe-Sady.html> and <www.newsweek.pl/polska/polityka/reforma-sadow-akcja-billboardowa-polskiej-fundacji-narodowej/r07vk0e>).

45. See *supra* note 21.

46. See COM(2014)158 final, "A new EU Framework to strengthen the Rule of Law". Though considered by some Member States to be *ultra vires*, it is to be noted that the ECJ refers to it in paras. 81–86 of its Order of 17 Dec. 2018, Case C-619/18 R, *Commission v. Poland*.

47. See the resolution of the European Parliament of 25 Oct. 2016 with recommendations to the European Commission for the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, available at <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0409+0+DOC+XML+V0//EN>.

48. See the written reply of Belgian Foreign Minister Didier Reynders to the Belgian Parliament, available at <dekamer.be/FLWB/PDF/54/3204/54K3294009.pdf>.

systems through the European Semester and the EU Justice Scoreboard⁴⁹ should be strengthened.

5. Final considerations

In a speech in July 2018, ECJ President Koen Lenaerts summarized most cogently the essence of the rule of law universally and specifically in the EU context.⁵⁰ He stated that respect for the rule of law is a value shared by the constitutional traditions common to the Member States. It is a common value of democratic societies around the world. It operates as a safeguard that enables democracies to function properly, and ensures that fundamental rights are protected effectively. Democracy, fundamental rights and the rule of law are interdependent. As regards the EU, Lenaerts specifically pointed at a key principle: democracy is not tantamount to tyranny of the majority. Compliance with the rule of law means, therefore, that there are limits to what the political majority of the moment can do. Notably, those limits – which are laid down in Member States’ constitutions – seek to protect a sphere of individual self-determination that must remain free from public interference. It also means that it is for the courts – acting as independent umpires – to protect that sphere by saying what the law is, since constitutional law determines those limits.⁵¹ At EU level, the same findings apply: democracy, respect for the rule of law and respect for fundamental rights are values on which the European Union is founded. This is clearly stated in Article 2 TEU. It means that neither the EU institutions nor the Member States are above the law of the EU.⁵²

In 1959, the philosopher Isaiah Berlin recalled that post World War II values tended increasingly to be the old universal standards, which distinguished civilized men, however dull, from barbarians, however gifted.

49. See section 2.2 of the 2018 EU Justice Scoreboard, COM(2018)364 final. In the autumn of 2018, the European Commission visited, with a view to the so-called Country Specific Recommendations in the context of the 2019 European Semester, 12 Member States (Belgium, Ireland, Greece, Croatia, Italy, Cyprus, Latvia, Hungary, Malta, Portugal, Slovenia and Slovakia) in order to develop a deeper understanding of their national justice systems.

50. Speech delivered at a seminar organized by the Belgian Ministry of Foreign Affairs in Brussels, 4 July 2018.

51. See also P.-H. Donner, “Taking back control”, Cleveringa lecture of 26 Nov. 2018, Prague. Compare ECJ judge von Danwitz, “Der EuGH als Hüter der Rechtsstaatlichkeit – mission (im)possible”, speech delivered at the Representation of the State of Hessen on 10 Dec. 2018, Brussels; Adam Bodnar, Polish Commissioner for Human Rights and National Ombudsman, “When human rights clash with politics and desire for power: Reflections on the current status of liberal democracy”, 2018 Sackler lecture delivered 10 Dec. 2018, Leiden.

52. See Case C-530/17 P, *Azarov*, EU:C:2018:1031, for a recent example where the ECJ applies equally high standards in terms of effective judicial remedies to the Council when deciding on restrictive measures regarding Ukraine.

“When we resist aggression, or the destruction of liberty, it is to these values that we appeal. Our hope must rest on genuine progress towards an international order, based on a recognition that we inhabit one common moral world”, he concluded.⁵³ This ought be the EU’s leitmotif for 2019.

As long as the EU faces increasing difficulties to reach consensus on this particular challenge at the highest political level, we should be especially grateful to the ECJ for developing through its case law the legal tools to build up the EU’s resilience in that respect. The EU summit on the future of Europe in Sibiu on 9 May 2019, less than two weeks before the elections for the European Parliament, would be an ideal moment for EU leaders to follow up this invaluable work and have a straight talk about their genuine attachment to the Union’s values. Will they dare?

53. Address to 3rd Congress of the Fondation Européenne de la Culture, Vienna, published as I. Berlin, “European Unity and its Vicissitudes”, in *The Crooked Timber of Humanity* (Pimlico, 1990), p. 207.