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# **Responses by the CJEU to the European Crisis of Democracy and the Rule of Law**

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## Abstract

Democratic structures and commitments to the rule of law are increasingly put under political pressure in member states of the European Union. This paper deals with one response among others to deviations from democracy and the rule of law in EU member states: the involvement of the European Court of Justice. The chapter gives a survey on the CJEU's jurisprudence in the current crisis, particularly in preliminary references referred by domestic courts, in infringement proceedings initiated by the European Commission, and through the more recent "discovery" of interim orders. These judicial responses as well as suggestions to broaden the court's jurisdiction through systemic infringement procedures or by extending the scope of EU fundamental rights will be critically analyzed. In light of this assessment, the role of the CJEU as the main actor to address authoritarian developments in EU member states must be relativized or at least contextualized: the crisis of democracy and the rule of law in the EU needs to be addressed within the political process, and may only be flanked, but not "solved" by judicial responses.

Keywords: CJEU, Crisis of Democracy and the Rule of Law, preliminary references, infringement proceedings, interim relief

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# Responses by the CJEU to the European Crisis of Democracy and the Rule of Law\*

Linda Schneider\*\*

Democratic states dedicated to the rule of law are increasingly put under political pressure in the European Union.<sup>1</sup> While it seems obvious that there need to be mechanisms to respond to the shifting of democratic political orders into authoritarian regimes, it is less obvious how such responses should look like. Given the current state of crisis of the European integration project, there is not a clear and easily manageable institutional solution to every political problem. At least since the emergence of governance research, the contrary assumption has been widespread,<sup>2</sup> and in particular the European Commission has contributed to this perception both practically and theoretically. While the European Parliament has at least occasionally served as a forum for political debate, the Commission has conveyed the impression that the problematic developments in some member states can be solved without political distributional conflicts, in other words, without political costs.<sup>3</sup> However, as historical developments and experiences reveal, political integration of federations has often dragged on for centuries and has almost never happened without dramatic political conflicts. For the European Union, this is particularly relevant since it has experienced rapid institutional change, and a relatively pronounced readiness to experiment.

But how to react to current threats to democracy and the rule of law in Europe? To assess possible response mechanisms, in our study we broadly distinguish five main categories. These are namely safeguarding through monitoring mechanisms, through the institutionalized procedure of Article 7 TEU, “politicised” responses whose main actors are the Council and the other European member states, capacity building and support of civil society and judicial responses by the CJEU.<sup>4</sup> Most of these approaches have been discussed and/or tested in the context of the European Union and its current crisis of democracy and the rule of law. Due to the increasing involvement, in particular through its increasing number of interim orders, this working paper will focus on one possible response mechanism, namely the involvement of the CJEU. To assess its role and involvement, this paper proceeds as follows. The first introductory section will set the scene by underlining the general advantages and limits of an involvement of courts. Against this background, the second section will provide an overview of the Court’s recent caselaw in preliminary references and infringement proceedings. The third section will provide an assessment of the CJEU’s responses, its limits and its potentials, in particular regarding the “discovery” of interim relief. This Working Paper will conclude with a critical appraisal

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1 We use the term “European Union” uniformly throughout this paper, and not only in relation to the developments since the Treaty of Lisbon (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007).

2 For a critique see Christoph Möllers, ‘European Governance: Meaning and Value of a Concept’ (2006) 43 *Common Market Law Review*; see also Jan-Werner Müller, ‘Protecting the Rule of Law (and Democracy!) in the EU: The Idea of a Copenhagen Commission’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) at 211.

3 On the problematic self-image of the Commission in this respect, see Joseph H. H. Weiler, ‘The Commission as Euro-sceptic: A Task-Oriented Commission for a Project-Based Union. A Comment on the First Version of the White Paper’ in Christian Joerges and others (eds), *Mountain or Molehill?: A Critical Appraisal of the Commission White Paper on Governance*, *Jean Monnet Working Paper No 6/01* (2001) at 207 et seq.

4 For another distinction between along material sanctions and social influence, see Ulrich Sedelmeier, ‘Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure’ (2017) 24 *Journal of European Public Policy* at 337 et seq.

of the CJEU's caselaw: although the Court has become one, if not the main actor reacting to the rule of law and democracy crisis in the European Union, courts alone cannot and will not solve the current problems. With their decisions, they will only contribute a piece of the puzzle of reactions that must be cumulatively applied with other response mechanisms such as capacity building and political pressure exercised both by institutions of the European Union and by other member states.

## 1. Introductory Remarks: Limits to the Involvement of Courts

Within the group of possible response mechanisms, judicial responses delegate the solution to the problems caused by the erosion of democratic structures to the European courts, especially through infringement proceedings<sup>5</sup> or preliminary references by national courts<sup>6</sup> to the Court of Justice of the European Union (CJEU). The involvement of the judiciary has several important advantages. Existing procedures can be used "here and now" without time-consuming, politically delayable or even unfeasible changes to the European Treaties.<sup>7</sup> Besides that, judicial procedures are generally less subject to allegations of bias and partiality. For example, unlike the Council, courts cannot refrain from making decisions.<sup>8</sup> Historically, since the rise of constitutionalism, few major conflicts within political units have not – in one way or another – also involved the courts, partially being fought out in the judicial arena.<sup>9</sup> As such, federal conflicts have been an important reason for the introduction of constitutional review<sup>10</sup> where a central federal court monitors the uniform application of federal rules. High and Constitutional Courts have thus been vested with special procedures to solve conflicts between the constituent states and the federal level.<sup>11</sup>

However, the involvement of courts must be contextualized, and its value and strengths at least be relativized. We will assess the CJEU's involvement in light of the following aspects: Firstly, it is not to say that the judiciary always offers a suitable forum to address fundamental federal and political problems in a satisfactory manner. Instead, examples from consolidated federations show that courts are not always able to resolve these fundamental conflicts or may even deepen existing differences.<sup>12</sup> Especially, not every conflict may be one that (only) concerns conflicts of competence between the state and the federal level. For example, a member state's claim to leave the federation involves much more fundamental questions than a mere allocation of resources and powers between competing federated units.<sup>13</sup> Nevertheless, the attempts are not rare to solve

<sup>5</sup> Articles 258 and 259 TFEU.

<sup>6</sup> Article 267 TFEU.

<sup>7</sup> As admitted by Müller, 'Protecting the Rule of Law (and Democracy!) in the EU: The Idea of a Copenhagen Commission' at 210.

<sup>8</sup> Armin von Bogdandy and others, 'Guest Editorial: A potential constitutional moment for the European rule of law – The importance of red lines' (2018) 55 Common Market Law Review at 989.

<sup>9</sup> See Christine Landfried, *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019).

<sup>10</sup> Olivier Beaud, 'De quelques particularités de la justice constitutionnelle dans un Système fédéral' in Constance Grewe and others (eds), *La notion de «justice constitutionnelle»* (Dalloz 2005) at 49 et seq.; Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013) at 131 et seq.

<sup>11</sup> See, for example, Article 93(1) No. 3 of the German Basic Law in conjunction with § 13 Nr. 7, and §§ 68–70 of the Constitutional Court Procedure Act, see Dirk Hanschel, 'Enforcement of Federal Law against the German *Länder*' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) at 278 et seq.

<sup>12</sup> That such a dissolution of a conflict has not always to be the case, can be shown by reference to the U.S. Supreme Court's decision in *Marbury v. Madison*, 5 U.S. 137 (1803) and pf the CJEU, judgment of 5 February 1963, case 26 v 62, *Van Gend en Loos*, ECLI:EU:C:1963:1. For their comparison see Daniel Halberstam, 'Pluralism in *Marbury* and *Van Gend*' in Luis Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010).

<sup>13</sup> For an analysis of current struggles within the EU see Carlos Closa, *Secession from a member state and withdrawal from the European Union: Troubled membership* (Cambridge University Press 2017).

such fundamental issues before courts. However, judicial responses bear risks as well, as illustrated by the disastrous role of the US Supreme Court in the outbreak of the American Civil War.<sup>14</sup> Also, the examples of the claims for independence of the territories of Catalonia and Quebec illustrate how different the consequences of judicial interventions can be. Both the Supreme Court of Canada and the Spanish Tribunal Constitucional had to decide without an explicit provision in the constitution on the secession of one member. But when the Canadian government submitted its question, among others, whether Quebec could secede from Canada unilaterally, the Supreme Court of Canada has contained and restricted the conflict by declaring a duty of the parties involved to negotiate, thereby referring to the constitutional principles of “federalism, democracy, constitutionalism and the rule of law, and respect for minority rights.”<sup>15</sup> In contrast, the decisions of the Spanish Tribunal Constitucional have rather been criticized as having been an accelerator of the escalation.<sup>16</sup> While the Supreme Court of Canada did not question the legality of the referenda preceding its decision and limited itself to the question of whether Quebec had a right to secede unilaterally, the Spanish Court, when dealing with the Catalan Declaration of sovereignty in 2013, decided that neither could Catalonia secede unilaterally nor could it hold referenda on independence.<sup>17</sup> Catalan secessionist leaders have been charged with heavy sanctions by the Spanish Supreme Court afterwards, among others for crimes of sedition and rebellion,<sup>18</sup> and with imprisonment ranging from nine to thirteen years.<sup>19</sup> It is however hard to consider these cases after the involvement of the judiciary as being “solved”.

Secondly, legal measures and a court’s decisions require a high degree of political consolidation of the federal level. Constitutional or high courts which are necessarily part of the federal level may issue decisions mainly regarding the relationship between these two levels. As such, the courts’ involvement as judicial conflict resolution tool functions along conflicts of competence within special procedures such as disputes between the Federation and the German Länder<sup>20</sup> or, in the European context, within an infringement procedure initiated by the European Commission against a member state.<sup>21</sup> Within these procedures, the courts however seem to be better vested to deal with specific and more technical questions, and not with fundamental questions such as the secession or the overall quality and structure of the political system of one member state.

Thirdly, and specifically in the context of threats to the rule of law and democracy, it is particularly difficult to develop clear legal criteria for judicial review that go beyond questions of competencies. This is particularly problematic at the level of the European Union. The Treaties’ provisions on its fundamental values and on the procedures to safeguard them are not sufficiently differentiated.<sup>22</sup> As we shall see, the CJEU has itself speci-

14 Scott v. Sandford, 60 U.S. 19 How. 393 (1856); on this, see Bruce Ackermann, *We the people*, Volume I: Foundations (Harvard University Press 1993) at 63 et seq.

15 Supreme Court of Canada, judgment of 20 August 1998, Reference re Secession of Quebec, [1998] 2 S.C.R. 217; for a detailed analysis, see Peter Leslie, ‘Canada: The Supreme Court Sets Rules for the Secession of Quebec’ (1999) 29 *The Journal of Federalism*.

16 For references see Victor Ferreres Comella, ‘The Spanish Constitutional Court Confronts Catalonia’s Right to Decide’ (2014) 10 *European Constitutional Law Review* at 574 et seq.

17 Constitutional Court of Spain, Case 42 v 2014 of 25 March 2014; *ibid* at 581.

18 Victor Ferreres Comella, ‘Constitutional Crisis in Spain: The Catalan Secessionist Challenge’ in Mark A. Graber and others (eds), *Constitutional democracy in crisis?* (Oxford University Press 2018) at 227.

19 El País, Catalonia after the ruling: The Supreme Court sentence on the Catalan separatist leaders is the result of the strict application of the law, not a partisan or revenge-driven trial (15 October 2019), available at: [https://english.elpais.com/elpais/2019/10/15/inenglish/1571131417\\_569321.html](https://english.elpais.com/elpais/2019/10/15/inenglish/1571131417_569321.html); Washington Post, Spanish Supreme Court sentences Catalan separatists to prison, sparking protests (14 October 2019), available at: [https://www.washingtonpost.com/world/spanish-supreme-court-sentences-catalan-separatists-to-jail/2019/10/14/a0590366-ee59-11e9-89eb-ec56cd414732\\_story.html](https://www.washingtonpost.com/world/spanish-supreme-court-sentences-catalan-separatists-to-jail/2019/10/14/a0590366-ee59-11e9-89eb-ec56cd414732_story.html) (both accessed: 11 May 2020).

20 Article 93(1) No. 3 of the German Basic Law.

21 See Emanuel C. Ionescu, *Innerstaatliche Wirkungen des Vertragsverletzungsverfahrens: Die Aufsichtsklage im föderalen Gefüge der Europäischen Union* (Mohr Siebeck 2016).

22 For another opinion see von Bogdandy and others, CMLR 2018 at 985, 990.

fied the criteria for judicial independence of national judges along the triad of Articles 276 TFEU, Article 19(1) TEU and Article 47 CFR, to which the European Commission has made reference in several cases against Poland since then. However, beyond the question of judicial independence, particularly threats to democratic equality and participation are rather hard to cover and to frame as violations of European law.

Fourthly, and related to this, the dismantlement of the protection of potential future majorities – what we define as core democratic requirement of the European constitutional system – proceeds gradually, and mostly in a conscious attempt to bypass existing barriers intended to safeguard these potential future majorities. A member state's shift to an authoritarian system is a creeping process made up of small changes which regularly evade judicial review. This is not only because all single measure taken separately may be in line with the national constitution and/or European law. These transformations are often also accompanied by muting other safeguarding institutions, for example through court packing and disciplinary procedures, which can hinder preliminary references to the CJEU as well. In these cases, judicial review will turn out to be far more challenging than usually expected, mainly because of the requirement of testable standards in judicial proceedings and the fact that courts are not equipped to solve general problems, but rather to make determinations on individual cases.

Lastly, one might also ask whether courts offer the right forum to address political conflicts. This is mainly because they are limited to judge upon a specific, individualised violation of legal rights and duties, and not broader political developments,<sup>23</sup> for the assessment of which they lack resources and legitimacy. An aggressive judicial role in overseeing the way in which a polity structures its democratic processes can be highly problematic.<sup>24</sup> The involvement of courts rather raises the risk of a further politicization of the judiciary.<sup>25</sup> Involving the CJEU more frequently would impose an immense burden on the Court regarding its legitimacy, and could also damage the perceptions of its legitimacy among the national public. Besides that, they decide on retrospective cases.<sup>26</sup> Thus, in times of crisis, they may only act when a domestic restructuring into an authoritarian system is already in progress. Contrary to the political process, courts can neither prevent these developments, nor can they intervene at lower thresholds when there is a mere risk of a violation of certain rights or duties. Their power to give clear and guiding answers – that a certain number of legal duties has or has not been infringed by an actor – becomes their main limitation when courts are asked to assess authoritarian tendencies which are less easy to tackle.

Despite these caveats, the CJEU has become one, if not the main actor in the current rule of law and democracy crisis in the European Union. At a moment when political processes have started to come to a hold, the focus is being shifted to the judiciary as neutral and impartial arbitrators. To overcome some of the limits to the CJEU's involvement into the crisis, several proposals have been made, in particular to broaden the scope of the infringement procedure. In exceptional circumstances, the court also found technical ways to treat the infringement of fundamental European values as an infringement of European law itself. Although it is to be expected that the role of the CJEU will remain an important object of discussion for all approaches on con-

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23 Christoph Möllers, *Gewaltengliederung: Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich* (Jus publicum, Mohr Siebeck 2005) at 95 et seq.

24 See also Richard H. Pildes, 'The Law of Democracy and the European Court of Human Rights' in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019) at 112.

25 Michael Blauberger and R. Daniel Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU' (2017) 24 *Journal of European Public Policy*.

26 Möllers, *Gewaltengliederung: Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich* at 95 et seq.

taining authoritarian tendencies, there are certain limits to its involvement, and courts alone will not solve the problems.<sup>27</sup>

## 2. A Survey on the CJEU's Recent Crisis Involvement

In its current form, the CJEU combines both functions of a constitutional court towards European institutions and those of a high court towards the member states.<sup>28</sup> Its broad jurisdiction does not only cover fundamental rights or the law of the European treaties, but also the full breadth of European Union private and administrative law with all its technicalities. It thus fulfils different functions and regulatory modes towards the national political processes than constitutional courts.<sup>29</sup> The conformity of national measures with European law can be challenged before the CJEU either (indirectly) through preliminary references by a national court or through infringement procedures which are mainly initiated by the European Commission against a member state. Traditionally, infringement proceedings do not range among the highest number of cases before the CJEU. In comparison, preliminary references under Article 267 TFEU represent more than a half of the CJEU's caseload.<sup>30</sup> However, both procedures do not allow the court to declare a national measure void, while it is up to the member states to implement the court's decision. Although its judgements do have considerable influence on the national political processes and even though the member states are under the obligation both under Article 260(1) TFEU and under the principle of sincere cooperation of Article 4(3) TEU, the court depends, in the first place, on their willingness to refer cases to it as well as to implement its caselaw.

### 2.1 Infringement Procedures

Against this background, for a long time, the European Commission made only moderate use of its power to initiate infringement proceedings in the current crisis of democracy and the rule of law. Instead, it limited itself to specific questions such as the Hungarian compulsory retirement of judges, prosecutors and notaries on reaching the age of 62<sup>31</sup> or the premature termination of the term of the head of the Hungarian Authority for the Protection of Personal Data.<sup>32</sup> Both cases had to be framed rather as a violation of the Employment Equality Directive,<sup>33</sup> respectively of the Data Protection Directive,<sup>34</sup> by omitting the fact that the overriding concerns were actually related to the independence of the judiciary,<sup>35</sup> respectively to the surveillance of the

27 Blauberger and Kelemen, JEPP 2017, see also Michael Blauberger and Vera van Hüllen, 'Conditionality of EU funds: an instrument to enforce EU fundamental values?' (2020) *Journal of European Integration* at 3.

28 Möllers, *The Three Branches: A Comparative Model of Separation of Powers* 172, Michael Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court' (2006) 4 *International Journal of Constitutional Law* ff. Anders Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003) 225; Karen J. Alter, *The European Court's Political Power: Selected Essays* (Oxford University Press 2009) at 186.

29 See Werner Heun, *Verfassung und Verfassungsgerichtsbarkeit im Vergleich* (Mohr Siebeck 2014) at 286 et seq.

30 Court of Justice of the European Union, Annual Report 2016, Judicial Activity, 88; Joseph H. H. Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 *International Journal of Constitutional Law* at 103.

31 Case C-286/12, Judgment of the Court (First Chamber), 6 November 2012, *Commission v Hungary*, ECLI:EU:C:2012:687.

32 Case C-288/12, Judgment of the Court (Grand Chamber), 8 April 2014, *Commission v Hungary*, ECLI:EU:C:2014:237.

33 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

34 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

35 For a critique: Gábor Halmai, 'The Early Retirement Age of the Hungarian Judges' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017). See also Catherine Dupré, 'The

Hungarian population and the collection of citizens' data.<sup>36</sup> However, the aggravation of the developments in Hungary as well as the obvious side effects, especially vis-à-vis Poland, forced the European Union to re-evaluate – at least partially – its means of intervention. It seems as if this has been among the reasons for the European Commission to open infringement proceedings more frequently, such as the procedures against the Czech Republic, Hungary and Poland for not relocating any migrants from Greece and Italy during the migration crisis,<sup>37</sup> vis-à-vis the Hungarian legislation on NGOs<sup>38</sup> and regarding the Hungarian Higher Education Law.<sup>39</sup> The latter case is still pending – even though the targeted Central European University was forced out of Budapest in December 2018 and launched a campus in Vienna in 2019.<sup>40</sup> Particularly with regard to Poland's reforms of the judiciary,<sup>41</sup> there has been a shift in the Commission's approach by increasingly bringing cases for failure to fulfil obligations under the European Treaties. The Court has thus been "activated" by the European Commission.<sup>42</sup>

A more recent line of developments mainly concerns infringement proceedings initiated against Poland. The European Commission's first infringement action in that regard, brought in March 2018, related to the restructuring of the Polish ordinary courts and the Supreme Court. Among others, with the new reforms, the retirement age for judges in the ordinary Polish courts, the Supreme Court of Poland and for public prosecutors had been lowered to 65 years for men and to 60 years for women, while the Polish Minister for Justice was vested with the right to extend the period of active service as a judge at ordinary courts upon request beyond this age.<sup>43</sup> The different retirement age had been challenged before the CJEU, both regarding the ordinary courts<sup>44</sup> as well as the Supreme Court.<sup>45</sup> It was deemed to be a direct discrimination on the basis of sex and a violation of the principle of gender equality, while the ability of the Minister for Justice to discretionarily suspend the retirement age for any specific judge was found to be a violation of the principle of effective legal protection guaranteed under Article 19(1) TEU, particularly with regard to the independence of judges.<sup>46</sup> As a response, Poland amended the relevant legislation, introducing a retirement age of 65 years for both genders.<sup>47</sup>

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Unconstitutional Constitution: A Timely Concept' in Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing 2015) at 365.

36 Kim Lane Scheppele and R. Daniel Kelemen, 'Defending Democracy in EU Member States: *Beyond Article 7 TEU*' in Francesca Bignami (ed), *The EU at a Crossroads: From Technocracy to High Politics?* (Oxford University Press 2019) at 434.

37 Joint cases C-715/17 et al, Judgment of the Court (Third Chamber) of 2 April 2020, Commission/Poland and others, ECLI:EU:C:2020:257.

38 European Commission - Press release, Hungary: Commission launches infringement procedure for law on foreign-funded NGOs, 13 July 2017.

39 Case C-66/18 Commission v Hungary (Lex CEU); European Commission - Press release, Hungary: Commission takes second step in infringement procedure on Higher Education Law, 13 July 2017.

40 For a timeline of the events, see Modifications to the Hungarian Higher Education Act and CEU's Objections, available at: <https://www.ceu.edu/istandwithceu/timeline-events> (accessed: 5 May 2020).

41 Thomas von Danwitz, 'Values and the Rule of Law: Foundations of the European Union – An Inside Perspective from the ECJ' (2018) 21 Potchefstroom Electronic Law Journal at 9 et seq.

42 Matthias Schmidt and Piotr Bogdanowicz, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' (2018) 55 Common Market Law Review. For an overview of these infringement proceedings, see Mirosław Granat and Katarzyna Granat, *The Constitution of Poland: A contextual Analysis* (Hart Publishing 2019) at 231 et seq. and Kim Lane Scheppele and Daniel R. Kelemen, 'Defending Democracy in EU Member States: *Beyond Article 7 TEU*' in Francesca Bignami (ed), *The EU at a Crossroads: From Technocracy to High Politics?* (Oxford University Press 2019) at 439, 451 et seq.

43 Case C-192/18, Judgment of the Court (Grand Chamber) of 5 November 2019, Commission v Poland, ECLI:EU:C:2019:924, para. 19 et seq. and ECLI:EU:C:2020:42; Case C-619/18, Judgment of the Court (Grand Chamber) of 24 June 2019, Commission v Poland, ECLI:EU:C:2019:575.

44 Case C-192/18, Judgment of the Court (Grand Chamber) of 5 November 2019, Commission v Poland, ECLI:EU:C:2019:924.

45 Case C-522/18, Order of the Court (Third Chamber) of 29 January 2020, DŚ (Supreme Court), ECLI:EU:C:2020:42 and Case C-619/18, Judgment of the Court (Grand Chamber) of 24 June 2019, Commission v Poland, ECLI:EU:C:2019:531 and Joined Cases C-585/18 et al., Judgment of the Court (Grand Chamber) of 19 November 2019, A. K. (Supreme Court), ECLI:EU:C:2019:982.

46 Case C-192/18, Judgment of the Court (Grand Chamber) of 5 November 2019, Commission v Poland, ECLI:EU:C:2019:924.

47 Granat and Granat, *The Constitution of Poland: A contextual Analysis* at 232.

The rules governing the retirement age of Supreme Court judges again came before the Court soon afterwards, both under a preliminary reference and through infringement proceedings initiated in October 2018.<sup>48</sup> The European Commission challenged – under the triad of Article 267 TFEU, Article 19(1) TEU and Article 47 CFR – the lowering of the retirement age of the judges appointed to the Supreme Court to the age of 65, which also applied retrospectively to judges in posts appointed to that court before the new legislation entered into force in April 2018. Besides that, it challenged the discretion of the President of the Republic to extend the period of judicial activity of Supreme Court judges beyond the newly fixed retirement age.<sup>49</sup> New about that case was the fact that the infringement proceedings were accompanied by the European Commission's request for and the Court's grant of interim relief. This instrument allows the CJEU to impose (additional) measures to preserve the effectiveness of its final judgment, and to ensure that the behaviour of the parties does not deprive the judgment of its effects.<sup>50</sup> Regarding the lowering of the retirement age of Supreme Court judges, in its interim order, the CJEU did not only request Poland to cease its behaviour by ordering the suspension of the effects of the national measure. It also required Poland to take all necessary steps so that the Supreme Court judges who were affected by the new legislation would be able to exercise their functions upon the same positions and under the same conditions again.<sup>51</sup> It was the first time that the CJEU combined interim orders that regulated a status quo by ordering the member states to refrain from certain measures with an order to take specific safeguarding measures.<sup>52</sup> Following the CJEU's interim order, the First President of the Supreme Court called the affected judges to return to their duties, and indeed they all reported back to the court.<sup>53</sup> Besides that, a new piece of legislation was signed on 21 November 2018 and entered into force on 1 January 2019.<sup>54</sup> All Supreme Court judges who have entered into service after that date shall now retire at the age of 65, and "older" judges at the previously set age of 70. All judges were to be reinstated in the same functions that they exercised on the date on which the previous legislation entered into force.<sup>55</sup>

Despite these proceedings before the CJEU, the Polish parliament "completed" its judicial reforms regarding ordinary judges and their supervision by the Law of 20 December 2019 which entered into force on 14 February 2020.<sup>56</sup> This piece of legislation modifies the notion of disciplinary offences, grants the newly established

48 Case C-619/18, Judgment of the Court (Grand Chamber) of 24 June 2019, *Commission v Poland*, ECLI:EU:C:2019:531; Joined Cases C-585/18, Judgment of the Court (Grand Chamber) of 19 November 2019, *A. K. (Supreme Court)*, ECLI:EU:C:2019:982; Case C-522/18, Order of the Court (Third Chamber) of 29 January 2020, *DŚ (Supreme Court)*, ECLI:EU:C:2020:42.

49 Case C-522/18, Order of the Court (Third Chamber) of 29 January 2020, *DŚ (Supreme Court)*, ECLI:EU:C:2020:42, para. 25.

50 Christine D. Gray, 'Interim Measures of Protection in the European Court' (1979) 4 *European Law Review* at 85; Guus Borchardt, 'The award of interim measures by the European Court of Justice' (1985) 22 *Common Market Law Review* at 204, 207; Francis G. Jacobs, 'Interim Measures in the Law and Practice of the Court of Justice of the European Communities' in Rudolf Bernhardt (ed), *Interim Measures indicated by International Courts* (1994) at 45; Koen Lenaerts and others, *EU Procedural Law* (Oxford University Press 2014) at 563.

51 Case C-619/18 R, Order of the Court (Grand Chamber) of 17 December 2018, *Commission v Poland*, ECLI:EU:C:2019:575; Case C-522/18, Order of the Court (Third Chamber) of 29 January 2020, *DŚ (Supreme Court)*, ECLI:EU:C:2020:42, para. 29.

52 For the same mechanism in the case of the Polish Disciplinary Chamber see Case C-791/19 R, Order of the Court (Grand Chamber) of 4 April 2020, *Commission v Poland*, ECLI:EU:C:2020:277.

53 Granat and Granat, *The Constitution of Poland: A contextual Analysis* at 233.

54 Case C-522/18, Order of the Court (Third Chamber) of 29 January 2020, *DŚ (Supreme Court)*, ECLI:EU:C:2020:42, para. 22. Ibid at 233; Scheppele and Kelemen, 'Defending Democracy in EU Member States: *Beyond Article 7 TEU*' at 452. The question whether the CJEU's order was self-executing (as argued by the Supreme Court) or did it require amendments to the laws (as claimed by the governing majority) therefore remained unsolved.

55 Case C-522/18, Order of the Court (Third Chamber) of 29 January 2020, *DŚ (Supreme Court)*, ECLI:EU:C:2020:42, paras. 18 et seq., para. 30 et seq.; Joined Cases C-585/18 et al., Judgment of the Court (Grand Chamber) of 19 November 2019, *A. K. (Supreme Court)*, ECLI:EU:C:2019:982, paras. 87 et seq.

56 See Venice Commission, Urgent Joint Opinion on the amendments to the Law on organisation on the Common Courts, the Law on the Supreme Court and other Laws, CDL-PI(2020)002-e and Poland - Amendments to the Act on the system of common courts, the Act on the Supreme Court, the Act on Supreme Court, the Act on the National Council of the Judiciary and certain other acts of 20 December 2019 Venice Commission = CDL-REF(2020)002-e.

Chamber of Extraordinary Control and Public Affairs of the Supreme Court the exclusive competence to rule on issues regarding judicial independence while other courts are prevented from assessing cases by other judges in the context of cases pending before them, and requires judges to disclose specific information about their non-professional activities.<sup>57</sup> Given the missing deterring effect of previous judgements by the CJEU and the unlikelihood of the success of the pre-stages of the infringement proceedings, namely the dialogue between the member states and the European Commission, it is highly probable that the Court will deal with the new Polish reforms in the near future, which will be very probably coupled with the Commission's request to grant interim relief.

## 2.2 Preliminary References

Through preliminary references, any court or tribunal of a member state may request the CJEU to give a ruling regarding the interpretation of European law. National judges are thus the main actors to enforce European law<sup>58</sup> as they apply the CJEU's response and give a final judgement in the national context.<sup>59</sup> So far, contrary to various infringement proceedings initiated by the European Commission, they played a rather limited role in the ongoing rule of law and democracy crisis in the European Union, but their role is steadily increasing. This is not only because courts and tribunals in other member states started to involve the CJEU in cross-border cases claiming threats to the independence of the judiciary, especially regarding the surrender of criminals under the European arrest warrant. Besides that, following the Court's clarifications, national courts increasingly involve the Court with regard to developments in their own country.<sup>60</sup> Preliminary references became even more important with regard to threats to the independence of the judiciary, and often paralleled infringement proceedings initiated by the European Commission,<sup>61</sup> as it has been the case regarding the retirement age of Polish Supreme Court judges.<sup>62</sup>

This path for an increasing role of preliminary references has been laid beginning in February 2018 (meaning before the European Commission started its set of infringement proceedings against Poland). The CJEU then took the opportunity and underlined the connection between the national courts and the CJEU in the so-called Portuguese Judges decision.<sup>63</sup> The referring Portuguese court had to rule on an action seeking annulment of administrative decisions reducing the remuneration of the members of the Portuguese Court of Auditors, based on national legislation that provided for reductions in the context of the financial crisis. While

<sup>57</sup> European Commission, Press Release, Rule of Law – European Commission launches infringement procedure to safeguard the independence of judges in Poland, IP/20/772 (April 2020).

<sup>58</sup> Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *The American Journal of International Law* et seq.; Joseph H. H. Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* at 413 et seq., 2420 et seq.; Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* at 218 et seq.; Lisa Conant, 'Compliance and What EU Member States Make of It' in Marise Cremona (ed), *Compliance and the Enforcement of EU Law* (Oxford University Press 2012) at 23 et seq.; Gertrude Lübke-Wolff, 'Constitutional Courts and Democracy. Facets of an Ambivalent Relationship' in Klaus Meßerschmidt and A. Daniel Oliver-Lalana (eds), *Rational Lawmaking under Review: Legisprudence according to the German Federal Constitutional Court* (Springer International Publishing 2016) at 25.

<sup>59</sup> Case 29/68, *Milch-, Fett- und Eierkontor*, ECLI:EU:C:1969:27, para. 3.

<sup>60</sup> For example, between 2004 and 2018, Polish courts referred around 160 requests to the CJEU, see Granat and Granat, *The Constitution of Poland: A contextual Analysis* at 125.

<sup>61</sup> For references see Scheppele and Kelemen, 'Defending Democracy in EU Member States: Beyond Article 7 TEU' at 453 et seq. and Granat and Granat, *The Constitution of Poland: A contextual Analysis* at 126.

<sup>62</sup> Case C-522/18, Case C-619/18, Judgment of the Court (Grand Chamber) of 24 June 2019, *Commission v Poland*, ECLI:EU:C:2019:575; Joined Cases C-585/18 et al., Judgment of the Court (Grand Chamber) of 19 November 2019, *A. K. (Supreme Court)*, ECLI:EU:C:2019:982.

<sup>63</sup> Case C-64/16, Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117.

the CJEU did not find judicial independence to be threatened or impaired by the temporary reduction of the judges' salaries, in an obiter dictum, it stressed the member states' obligation to ensure that domestic courts or tribunals must meet the requirements of effective judicial protection, which mainly presupposes judicial independence.<sup>64</sup> Since national courts and the CJEU are interlinked in the European judicial system, especially through preliminary references, the Court concluded that their independence can be subject to its control<sup>65</sup> and that Article 19(1) TFEU would cover the institutional dimension of domestic judicial independence.<sup>66</sup> After unsuccessful attempts by the European Commission to solve the ongoing conflict over authoritarian developments in Poland, this was widely regarded as the intervention of a new doctrine and the Court's warning to the Polish government.<sup>67</sup>

It was only in March 2018 that the Irish High Court – including an analysis of the Portuguese judges-decision<sup>68</sup> – issued a preliminary reference to the CJEU on the question whether a Polish citizen could be surrendered on the basis of the European arrest warrant even though there were systemic domestic rule of law deficiencies due to the ongoing restructuring of the judicial system in Poland.<sup>69</sup> In its urgent preliminary response, the CJEU adhered to its previously developed criteria governing arrest warrant cases. These required an assessment both of the general threats to fundamental rights in the receiving member state as well as the individual situation of the person that will be surrendered.<sup>70</sup> The CJEU underlined the referring court's task to conduct a specific assessment which excluded any automatic suspension of the duty to surrender, even in cases of risks of systemic deficiencies.<sup>71</sup> Instead, it stressed that "[...] it is only if the European Council were to adopt a decision [under] Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, [...] and the Council were then to suspend [arrest warrant Framework Decision] in respect of that Member State that the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected."<sup>72</sup> The CJEU thus refrained from a systemic, non-case-specific assessment of the situation in Poland and rather referred the systemic assessment to the political playground. As long as there was no Council decision under Article 7(2) TEU and no suspension of the arrest warrant Framework Decision, the Court would not replace that assessment by a judicial assessment on the "existence of a serious and persistent breach" of European values.

64 Case C-64/16, Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117, paras. 30 et seq. and 43.

65 Danwitz, (2018) PER 21, 12 et seq.

66 Scheppele and Kelemen, 'Defending Democracy in EU Member States: *Beyond Article 7 TEU*' at 447 et seq.

67 Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) 14 *European Constitutional Law Review*.

68 Case C-216/18 PPU, Minister for Justice and Equality (LM), Request for a preliminary ruling from High Court (Ireland), ECLI:EU:C:2018:586, para. 49 et seq.

69 Case C-216/18 PPU, Minister for Justice and Equality (LM), Request for a preliminary ruling from High Court (Ireland), ECLI:EU:C:2018:586.

70 Joined Cases C-404/15 and C-659/15 PPU, judgment of the Court (Grand Chamber) of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198. On these criteria, see e.g. Scheppele and Kelemen, 'Defending Democracy in EU Member States: *Beyond Article 7 TEU*' at 449 et seq.

71 Case C-216/18 PPU, Minister for Justice and Equality (LM), Request for a preliminary ruling from High Court (Ireland), ECLI:EU:C:2018:586, para. 68 et seq. For an analysis see Mattias Wendel, 'Mutual Trust, Essence and Federalism: Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM' (2019) 15 *European Constitutional Law Review*; Granat and Granat, *The Constitution of Poland: A contextual Analysis* at 193 et seq.; for a slight critique Scheppele and Kelemen, 'Defending Democracy in EU Member States: *Beyond Article 7 TEU*' at 450 et seq.

72 Case C-216/18 PPU, Minister for Justice and Equality (LM), Request for a preliminary ruling from High Court (Ireland), ECLI:EU:C:2018:586, para. 72.

One may criticize this decision as a “disappointment”.<sup>73</sup> However, one could also see the Court’s hesitation as focusing on its judicial task which does not include assessments of and standard-setting for a domestic political situation, even though it is based on an analysis of the European Commission, the Parliament and the Venice Commission. Therefore, even though the CJEU left the door open that the extradition of criminal suspects could be refused because of individual threats to their fair trial rights, after requesting further information from the Polish authorities and by maintaining that there were systemic deficiencies of the judiciary in Poland, the Irish High Court extradited Mr Celmer to Poland. Its case did not reach the threshold of a clear risk of him being faced with an unfair trial.<sup>74</sup> His appeal to the Irish Supreme Court was later dismissed.<sup>75</sup> Nevertheless, what follows from this case was less the significance of the CJEU’s response but rather the peer pressure exercised by European domestic courts as institutions of control and supervision of developments in other member states. As predicted previously,<sup>76</sup> other European courts took up the High Court’s line of jurisprudence with regard to the extradition of criminals in the framework of the European arrest warrant, and at least requested further information from Polish courts on judicial independence and the right to a fair trial.<sup>77</sup>

The “weaknesses” of the preliminary reference procedure, however, have been revealed in November 2019, when the CJEU had to rule upon two preliminary references of August and September 2018 regarding threats to the judiciary in its so-called A.K. decision. The Court called into question the independence of the Polish Disciplinary Chamber because its judges are appointed by the President of the Republic on a proposal by the National Council of the Judiciary (‘the KRS’).<sup>78</sup> The independence of the Disciplinary Chamber was dependent on the KRS, since “that body [must] itself [be] sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal”.<sup>79</sup> In particular, the CJEU criticised that “[first, the KRS] was formed by reducing the ongoing four-year term in office of the members of that body at that time; second, whereas the 15 members of the KRS elected among members of the judiciary were previously elected by their peers, those judges are now elected by a branch of the legislature [...], third, the potential for irregularities which could adversely affect the process for the appointment of certain members [...]”.<sup>80</sup> But “[n]otwithstanding the assessment of the circumstances in which the new judges of the Disciplinary Chamber were appointed and the role of the KRS in that regard”, the CJEU criticised “other features that more directly characterise that chamber.”<sup>81</sup> First, it had been granted exclusive jurisdiction to rule on cases regarding the employment, social security and retirement of judges of the Supreme Court, which previously fell within the jurisdiction of the ordinary courts.<sup>82</sup> Second, the Disciplinary Chamber consists solely of

73 Scheppele and Kelemen, ‘Defending Democracy in EU Member States: *Beyond Article 7 TEU*’ at 450.

74 High Court of Ireland, *Minister for Justice and Equality v Celmer*, No.5 (2018) IEHC 639 (19 November 2018); Wendel, ECLR 2019 at 47; Granat and Granat, *The Constitution of Poland: A contextual Analysis* at 194. For another reference made by the Irish High Court regarding the independence of the German public prosecution, see Joint Cases C-508/18, Judgment of the Court (Grand Chamber) of 27 May 2019, *Minister for Justice and Equality v OG and PI*, ECLI:EU:C:2019:456.

75 Supreme Court of Ireland, *Minister for Justice and Equality v Celmer* [2019] IESC 80.

76 Scheppele and Kelemen, ‘Defending Democracy in EU Member States: *Beyond Article 7 TEU*’ at 451.

77 See for example the decision of the German Higher Regional Court in Karlsruhe, 301 AR 156/19, which refused the expulsion of a Polish citizen and requested further information from Polish authorities.

78 Joined Cases C-585/18 et al., Judgment of the Court (Grand Chamber) of 19 November 2019, A. K. (Supreme Court), ECLI:EU:C:2019:982, paras. 141 et seq.

79 Ibid., para. 138.

80 Ibid., paras. 141 et seq.

81 Ibid., paras. 146.

82 Ibid., para. 147 et seq.

newly appointed judges, thereby excluding judges already serving on the Supreme Court.<sup>83</sup> Third, it is highly autonomous within the Supreme Court itself.<sup>84</sup> With these critical observations, the CJEU answered to the referring Labour and Social Insurance Chamber of the Polish Supreme Court that, if the Chamber found the Disciplinary Chamber not to be impartial, it had to disapply the underlying provisions of national law because of the supremacy of European law, and that the case then had to be examined by another independent and impartial court.<sup>85</sup> By a judgement of 5 December 2019, the Polish Supreme Court's Labour and Social Insurance Chamber found that the KRS did not, in its current composition, represent an "impartial and independent organ from legislative and executive powers", and that the Disciplinary Chamber did not represent an impartial court in the sense of Article 47 of the Charter.<sup>86</sup> However, the Supreme Court's Disciplinary Chamber, on its part, responded by declaring that this decision did not affect its functioning because of the specific factual background of the case. It argued that its impartiality had not been questioned by the CJEU's response in the preliminary references, and that the Labour and Social Insurance Chamber's ruling did not have any effects in law towards the Disciplinary Chamber. According to the Disciplinary Chamber, other chambers lacked competence to rule upon questions confined to it (following the reforms of the Law of 8 December 2017). The Disciplinary Chamber thus announced that it would continue exercising its functions "that had been confined to it by the constitutional organs of the Polish Republic".<sup>87</sup> The Chamber underlined the fact that preliminary references only concern a single case. However, it ignored that they are also a means of indirect judicial review of domestic law.<sup>88</sup> Even though the Court cannot declare domestic legislation and other legal acts void, its interpretation will often reveal that the application of national provisions is "precluded" since they violate European law,<sup>89</sup> as it has been the case for the legislation underlying the Disciplinary Chamber.

This actually came close to an open and deliberate non-implementation of a decision by the CJEU.<sup>90</sup> In reaction, the European Commission brought an infringement procedure in October 2019 which is still pending. An infringement procedure has been thus used to enforce the Court's decision in a preliminary reference. This underlines that both procedures go hand in hand and compensate for the weaknesses of each procedure.<sup>91</sup> The effects of both procedures align to a large degree. This is because in preliminary rulings, the CJEU often

<sup>83</sup> Ibid., para. 150.

<sup>84</sup> Ibid., para. 151.

<sup>85</sup> Ibid., paras. 155 et seq.

For an unsuccessful preliminary ruling see however Joined Cases C-558/18 et al, Judgment of the Court (Grand Chamber) of 26 March 2020, *Miasto Łowicz* (Regional Court, Łódź), ECLI:EU:C:2020:234.

<sup>86</sup> Case C-791/19 R, Order of the Court (Grand Chamber) of 4 April 2020, *Commission v Poland*, ECLI:EU:C:2020:277, paras. 19 et seq.

<sup>87</sup> Case C-791/19 R, Order of the Court (Grand Chamber) of 4 April 2020, *Commission v Poland*, ECLI:EU:C:2020:277, para. 23.

<sup>88</sup> See e.g. Victor Ferreres Comella, 'The European model of constitutional review of legislation: Towards decentralization?' (2004) 2 *International Journal of Constitutional Law* at 480; Bo Vesterdorf, 'A Constitutional Court for the EU?' in Ingolf Pernice and others (eds), *The future of the European judicial system in a comparative perspective* (Nomos-Verlag 2006) at 84.

<sup>89</sup> See e.g. Case C-285/98, Judgment of the Court of 11 January 2000, *Kreil*, ECLI:EU:C:2000:2; see also Pål Wennerås, 'Making effective use of Article 260 TFEU' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) at 81 et seq.; Morten Broberg, 'Preliminary References as a Means for Enforcing EU Law' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017).

<sup>90</sup> See the *Białowieża forest* case below (Case C-441/17 R, Order of the Vice-President of the Court of 27 July 2017, *Commission v Poland*, ECLI:EU:C:2017:622).

For a court's retreat after the non-implementation of a judgment, see the ECtHR's caselaw after its pilot judgment had been ignored: ECtHR, *Burmych v Ukraine*, No. 46852/13; for analyses see Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2019) 29 *European Journal of International Law*; Geir Ulfstein and Andreas Zimmermann, 'Certiorari through the Back Door? The Judgment by the European Court of Human Rights in *Burmych* and Others v. Ukraine in Perspective' (2018) 17 *The Law & Practice of International Courts and Tribunals*.

<sup>91</sup> Stine Andersen, 'Procedural Overview and Substantive Comments on Articles 226 and 228 EC' (2008) 27 *Yearbook of European Law* at 126; Ulrich Haltern, *Europarecht: Dogmatik im Kontext, Band II: Rule of Law – Verbunddogmatik – Grundrechte* (3 edn, Mohr Siebeck 2017) at 56.

rules on the interpretation of European law in the context where the conformity of national legislation with European law is at stake, thus allowing the Court, at least indirectly, to rule upon the conformity of national laws with European law.<sup>92</sup> If necessary, following the Court's response, the member states need to change their national legislation in a way that complies with European law because of their duty to sincere cooperation.<sup>93</sup> However, to trigger changes to domestic legal systems, infringement procedures seem to be the more promising tool. In preliminary references, the Court may less directly assess a national measure which has violated European law, but may only rule upon the interpretation of the European treaties. The member states' duties regarding the implementation of the CJEU's decision are thus less explicit and obvious. Besides that, the question needs to be related to a specific case. The Court cannot give advisory opinions on a general or hypothetical question, which distinguishes the situation from infringement proceedings.<sup>94</sup> Besides that, in infringement proceedings there is more pressure on the member states due to the possibility to impose financial sanctions under Article 260(2) TFEU when a member states does not take the necessary measures to comply with a judgement of the Court. Since national measures can be more easily and comprehensively assessed in infringement proceedings, in cases of infringement proceedings and preliminary references regarding parallel or identical issues, the Court found "no longer any need to adjudicate on the request for a preliminary ruling" if it had rendered an infringement decision on the same matter.<sup>95</sup> The limitations of preliminary references became even more obvious recently, when Poland argued that the impartiality and independence of the Disciplinary Chamber had not been questioned by the judgements following the preliminary reference in *A. K.*, which in its view did not produce any legal effects in other cases.<sup>96</sup> The importance of infringement proceedings also arises from the recent "discovery of interim relief" allowing for a more rapid and effective intervention by the Court: Following the Commission's request for interim relief of January 2020, in April 2020, the Court ordered Poland to suspend the application of the Law of the Supreme Court of 8 December 2018 insofar as it concerned the Disciplinary Chamber. It further ordered Poland to abstain from submitting cases pending before the Disciplinary Chamber to another panel of judges that did not fulfil the requirements of judicial independence as clarified in its *A.K.* decision.<sup>97</sup>

### 3. Assessment of the CJEU's Involvement

We have started our analysis with some introductory remarks on the general limits to the involvement of courts in order to solve political and systemic crises. These aspects will now further be analysed and assessed with regard to the CJEU. Even if the Court has become an important actor to safeguard democracy and the rule of law in the European Union,<sup>98</sup> its role needs to be contextualised and relativized, especially with regard

<sup>92</sup> Wennerås, 'Making effective use of Article 260 TFEU' at 81 with further references.

<sup>93</sup> See e.g. Robert Schütze, 'Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption' (2006) 43 *Common Market Law Review* at 1031; Wennerås, 'Making effective use of Article 260 TFEU' at 82.

<sup>94</sup> Joined Cases C-558/18 et al, Judgment of the Court (Grand Chamber) of 26 March 2020, *Miasto Łowicz* (Regional Court, Łódź), ECLI:EU:C:2020:234, paras. 44 et seq.

<sup>95</sup> See e.g. Case C-522/18, Case C-619/18, Judgment of the Court (Grand Chamber) of 24 June 2019, *Commission v Poland*, ECLI:EU:C:2019:575.

<sup>96</sup> Case C-791/19 R, Order of the Court (Grand Chamber) of 4 April 2020, *Commission v Poland*, ECLI:EU:C:2020:277, para. 24.

<sup>97</sup> Case C-791/19 R, Order of the Court (Grand Chamber) of 4 April 2020, *Commission v Poland*, ECLI:EU:C:2020:277.

<sup>98</sup> See also the high number of Grand Chamber decisions with regard to recent developments, e.g. Joined cases C-411/10, Judgment of the Court (Grand Chamber) of 21 December 2011, *N.S.*, ECLI:EU:C:2011:865; Joined Cases C-585/18 et al., Judgment of the Court (Grand Chamber) of 19 November 2019, *A. K.* (Supreme Court), ECLI:EU:C:2019:982; Case C-791/19 R, Order of the Court (Grand Chamber) of 4 April 2020, *Commission v Poland*, ECLI:EU:C:2020:277.

to its dependencies on other actors, its focus on individual violations of European law, the scope of European law and its so far only moderate role as a human rights court. However, there is potential for an increasing role of the CJEU due to the “discovery of interim relief”.

### 3.1 Dependencies on other Actors

The CJEU's interventions depend on other actors. The Court cannot act on its own initiative but depends on being involved by other institutions. Its involvement may, on the one hand, follow from questions submitted by national courts in preliminary references, on whose functioning and cooperation the Court heavily depends. This system will not work when national courts are “captured” and politically undermined, for example by attempts to “discipline” judges for referring questions to the Court.<sup>99</sup> The CJEU's involvement may also follow from infringement proceedings initiated by the European Commission (which themselves are preceded by a specific dialogue procedure with a letter of formal notice and if necessary, a reasoned opinion). Most of the conflicts concerning the application of European law are solved within this preceding bargaining process between the Commission and the member state in question, thus making the CJEU's involvement largely dependent on the Commission's discretion.<sup>100</sup> However, not only its members<sup>101</sup> but also the Commission itself<sup>102</sup> follow their own policy agendas. In that light and for strategic reasons, it can be suitable to abstain from challenging a violation of European law before the Court, for example if there is a need for consent of a certain number of member states to introduce new projects.<sup>103</sup> Because of these “internal” political agendas, it seems less surprising that the European Commission initiated a number of infringement proceedings against Poland, but that there have been only a number of proceedings against Hungary with regard to its political transformations into an authoritarian system. Besides that, infringement proceedings can cover violations of European law only partially because the Commission lacks resources to monitor creeping and gradual developments in all member states<sup>104</sup> or information about an infringement at all.<sup>105</sup> In theory, these weaknesses and biases could be overcome by a more frequent use of Article 259 TFEU. It allows member states to claim violations of European law by another member state before the CJEU.<sup>106</sup> However, these procedures of „biting intergovernmentalism“ are extremely rare in practice.<sup>107</sup> Member states rather abstain from challenging the behaviour of one another for diplomatic reasons and in order to not become the subject of investigations themselves. Instead, these conflicts are more often resolved in a less confrontational manner by informing the European Commission or by supporting one party of the case before the CJEU.<sup>108</sup>

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99 European Commission, Press Release, IP/19/4189, Rule of Law: European Commission takes new step to protect judges in Poland against political control. Scheppele and Kelemen, ‘Defending Democracy in EU Member States: *Beyond Article 7 TEU*’ at 454.

100 Olivier De Schutter, *Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union*, Report for the Open Society European Policy Institute (Report commissioned by the Open Society European Policy Institute October 2017) at 14, 18.

101 Weiler, YLJ 1991 at 2420; Paul P. Craig, ‘Once upon a Time in the West: Direct Effect and the Federalization of EEC Law’ (1992) 12 Oxford Journal of Legal Studies at 455 et seq.

102 De Schutter, *Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union*, Report for the Open Society European Policy Institute at 14.

103 Craig, OJLS 1992 at 454 et seq.

104 Weiler, YLJ 1991 at 2420; Wennerås, ‘Making effective use of Article 260 TFEU’ at 80.

105 Craig, OJLS 1992 at 455.

106 In favour of this, see Dimitry Kochenov, ‘Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool’ (2015) 7 The Hague Journal of the Rule of Law.

107 But see e.g. Case C-591/17, Judgment of the Court (Grand Chamber) of 18 June 2019, Austria v Germany, ECLI:EU:C:2019:504.

108 See Luca Prete and Ben Smulders, ‘The Coming of Age of Infringement Proceedings’ (2010) 47 Common Market Law Review at 27 et seq.; Paul P. Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2015) at 453 et seq.

The Court's dependencies on other actors are not only limited to the initiation of cases before the Court. They also concern the implementation of its judgements, namely the stage after a judgment is given. The CJEU cannot declare national measures void, but depends on measures to be undertaken by national authorities. This is both true for responses offered by the Court in the context of preliminary references, which heavily depend on the referring court's application to the case at hand,<sup>109</sup> and for infringement proceedings, where the member states will take the measures which they consider being necessary to implement the Court's decision. And even when a member state does – at the surface – change national measures, deterrent effects of national reforms on public officials and judges may remain. For example, after lowering the retirement age of judges in Hungary and Poland, many of them did not or could not return to their former positions due to restructuring personal measures meanwhile undertaken or because a compensation had been offered to them by the government.

### 3.2 Individual Violations and Systemic Infringements

The Court's assessment is limited to the object of the proceedings and may only cover individual cases and not overall political developments. This is problematic since single violations and several small, individual steps, may, put together, undermine democracy and the rule of law without any possibility to address the broader political reality in a proper legal procedure.<sup>110</sup> For example, the infringement proceedings initiated against Poland more or less all covered the question of the independence of judges, in particular regarding the Polish Supreme Court. To overcome these problems related to the judicial assessment of individual cases in a broader context, the idea to bundle several violations of European law in one case has been discussed as a response to the current European rule of law crisis. In a similar way, but more to reduce the ECtHR's heavy caseload, the Strasbourg Court, following an initiative by the Committee of Ministers, has introduced the concept of so-called pilot proceedings to cover inner-state "systemic" or "structural" problems, and to trigger general measures at the national level.<sup>111</sup> In these cases, the ECtHR singles out an individual case for priority treatment in order to address these structural or systemic problems or other similar dysfunctions in member states, and may indicate what type of measures are required to remedy these problems or dysfunctions.<sup>112</sup> Unlike the selective infringement proceedings before the CJEU, this procedure provides for a means to identify and address general problems in the member states of the ECHR. On the European level too, there have been cases where several violations have been bundled together for joint treatment. Numerous single violations may be based on the same structural deficit, for example when, in implementing a Directive, a member state fails to change the practice according to that new legislation.<sup>113</sup> Instead of bringing several infringement proceedings before the CJEU, the Commission may bundle these individual infringements, with the scope of

109 See for their scope Takis Tridimas, 'Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction' (2011) 9 International Journal of Constitutional Law.

110 See Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 Governance.

111 Resolution CM/Res(2004)3 of the Committee of Ministers on Judgments revealing an underlying systemic problem, 12.5.2004; Recommendation CM v Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, 12.5.2004. See Philip Leach and others, *Responding to Systemic Human Rights Violations: An Analysis of "Pilot Judgements" of the European Court of Human Rights and their Impact at National Level* (Intersentia 2010); Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51 Common Market Law Review at 68 et seq.

112 Article 61 of the Rules of Court of the European Convention on Human Rights. The first Pilot Judgement has been rendered in ECtHR, *Broniowski v Poland*, Application No. 31443 v 96.

113 CJEU, 26.4.2005, C-494/01, *Commission v Ireland*, ECLI:EU:C:2005:250, para. 193; Wennerås, 'Making effective use of Article 260 TFEU' at 83.

the Court's decision then exceeding the single infringement.<sup>114</sup> In that spirit, it has been suggested to broaden infringement proceedings to cover systemic violations of Article 2 TEU, or a violation of the principle of sincere cooperation.<sup>115</sup> According to this view, individual infringements should be joined into one "systemic infringement procedure".<sup>116</sup> This could enable the European Commission to prevent member states from making only minor corrections following an infringement procedure without actually modifying the underlying fundamental political and/or institutional problem. Applied in that sense, Article 258 TFEU would function like the ECtHR's pilot procedure with the possibility to assess a broader, general and continuing violation of European law.<sup>117</sup>

There are, however, several arguments against these "systemic infringement proceedings". The suggested broadening of the jurisdiction of the CJEU would be revolutionary and test the legitimacy of the CJEU in a way similar to the ground-breaking decisions of the 1960s; it might particularly be met with resistance by the national court systems even in those member states with a stable democratic order.<sup>118</sup> And even generally, for example with regard to environmental cases, the concept of "systemic" breaches did not succeed before the CJEU. The Court does not apply the term of "persistent and general problems" or "systemic deficits" in a consistent manner.<sup>119</sup> Besides that, the bundling of several individual infringements is not used to respond to general legislative deficits. It is rather used as a mechanism to mitigate problems regarding the burden of proof in cases where there are broad and various administrative and functional problems in the application of European law, especially in environmental cases.<sup>120</sup> The European Commission therefore only bundles infringements in rare and exceptional cases,<sup>121</sup> and in general, the CJEU requires that every single violation by a member state must be proven in the Commission's letter of formal notice.<sup>122</sup> Even the comparable pilot procedures of the ECtHR are very limited in their application. They mainly cover problematic domestic areas with thousands of individual complaints pending before the ECtHR, especially violations of the right to the protection of property, the prolonged non-enforcement of court decisions and the excessive length of proceeding, both related to the lack of an effective domestic remedy, and prisoners' rights.<sup>123</sup> With these aspects and reservations in mind, the idea of "systemic infringements" becomes somewhat circular. It too requires the violation of specific norms of European law, thereby causing similar questions regarding the burden of proof as other violations. In the recent rule of law and democracy crisis, the European Commission has thus limited

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114 Ibid at 83.

115 Article 4(3) TEU.

116 Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016); Scheppele and Kelemen, 'Defending Democracy in EU Member States: Beyond Article 7 TEU' at 435 et seq.; Schmidt and Bogdanowicz, CMLR 2018. For a critical assessment, particularly with regard to the scope of Article 2 TEU and the primacy of Article 7 TEU: Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review* at 520; see also Blauberger and Kelemen, JEPP 2017 at 330 et seq.

117 Laurence W. Gormley, 'Infringement Proceedings' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) at 75.

118 Blauberger and Kelemen, JEPP 2017 at 331.

119 See also Craig and de Búrca, *EU Law: Text, Cases, and Materials* at 449 et seq.; Gormley, 'Infringement Proceedings' at 73.

120 Case, C-365/97, Judgment of the Court of 9 November 1999, *Commission v Italy*, Case C-365/97, para. 37; case C-441/02, Judgment of the Court (First Chamber) of 27 April 2006, *Commission v Germany*, ECLI:EU:C:2006:253; for examples see: Gormley, 'Infringement Proceedings' at 73; Craig and de Búrca, *EU Law: Text, Cases, and Materials* at 449 et seq.

121 Wennerås, 'Making effective use of Article 260 TFEU' at 84; Craig and de Búrca, *EU Law: Text, Cases, and Materials* at 449.

122 See the wording of Article 258(1) TFEU. See also CJEU, 20.2.1986, C-309 v 84, *Commission v Italy*, ECLI:EU:C:1986:73, para. 14 et seq.; Gormley, 'Infringement Proceedings' at 73 et seq.; Wennerås, 'Making effective use of Article 260 TFEU' at 84. See also for the need to generate legitimacy in every single proceeding: Christoph Möllers, 'Individuelle Legitimation: Wie rechtfertigen sich Gerichte?' in Anna Geis and others (eds), *Der Aufstieg der Legitimitätspolitik (Leviathan Sonderband)* (Nomos 2012) at 398-418.

123 ECtHR, Factsheet – Pilot Judgments, January 2019.

itself to initiate single infringement proceedings before the CJEU to challenge the national systems.<sup>124</sup> But more importantly, as revealed in the CJEU's *Celmer* case, the Court itself seems not willing to assess systemic developments in European member states. It underlined the need for an individualised assessment, and as long as there is no European Council decision on the existence of a serious and persistent breach of European values under Article 7(2) TEU, it will not replace that (lacking) political assessment by its own evaluation.<sup>125</sup>

Within the framework of "systemic infringements", it has also been argued that financial sanctions should be imposed in the event that the member state does not undertake significant domestic changes.<sup>126</sup> By applying a broad interpretation of Article 260(2) TFEU which does not dictate how the penalty is to be enforced,<sup>127</sup> and because the sanctioning procedure has often been impaired by delays by the member states, the systemic infringement of the European values should then even lead to the suspension of EU funds as long as the infringement persists. A similar procedure to the Excessive Deficit Procedure of the European Economic and Monetary Union, which permits cutting funds for violation of common goals, in particular of stability and growth, could then be introduced for systemic infringements of Article 2 TEU, and may lead to the cancelling of payments.<sup>128</sup> We do not only doubt the effectiveness of financial sanctions. More generally, sanctioning procedures must have an unambiguous legal basis in the European Treaties for reasons of legal clarity, and changes to the Treaties cannot be considered as an option in light of the current veto tendencies of some member states. Even though secondary legislation is theoretically possible, it appears less feasible in practice for the same reasons. A broad interpretation of Article 260 TFEU beyond the payment of lump sums and penalty payments to the reduction or withholding of European funds is clearly not supported by the wording of that provision. And lastly, even though financial sanctions appear tempting when the member states do not comply with a previous judgement of the CJEU, they generally take up to four years after the first judgement<sup>129</sup> and thus appear to be an inadequate judicial response in times of urgent crisis on democracy and the rule of law.

### 3.3 The Scope of European Law

The Court's involvement is also limited because measures taken by member states often do not constitute a specific infringement of European legal provisions, even if they are clearly anti-democratic. For example, when delineations of electoral districts are changed unfavourably for the opposition parties ("gerrymandering"), – except for cases in which this concerns the electoral districts for European elections – it seems hard to frame this kind of measure as an infringement of a European Directive or of a specific provision of European law, even though future elections might be heavily influenced by them. In that light, the Court's ability to examine anti-democratic developments in member states is limited, and, correspondingly, member states often make

124 See The EU 2018 Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2018) 364 final at 6.

125 Case C-216/18 PPU, Minister for Justice and Equality (LM), Request for a preliminary ruling from High Court (Ireland), ECLI:EU:C:2018:586.

126 Article 260(2) TFEU.

127 Lane Scheppele, Kim, *Enforcing the basic principles of EU law through systematic infringement procedures*, 2015 at 18 et seq., 22.

128 Ibid. at 22 et seq.

129 EuGH, 4.2.1988, Rs. 391/85, *Kommission/Belgien*, ECLI:EU:C:1988:58; EuGH, 10.1.2008, Rs. C-70/06, *Kommission/Portugal*, ECLI:EU:C:2008:3; EuGH, 9.12.2008, Rs. C-121/07, *Kommission/Frankreich*, ECLI:EU:C:2008:695, ECLI:EU:C:2008:695; EuGH, 17.11.2011, Rs. C-496/09, *Kommission/Italien*, ECLI:EU:C:2011:740. Sogar fünf Jahre in: EuGH, 8.7.2006, Rs. C-119/04, *Kommission/Italien*, ECLI:EU:C:2006:489; Pål Wennerås, 'Sanctions against Member States under Article 260 TFEU: Alive, but not kicking?' (2012) 49 Common Market Law Review at 174 et seq.

objections to the Court's competence to decide upon "internal" questions.<sup>130</sup> Article 2 TEU is not directly justiciable per se and would need to be developed into a more specific protection for democracy.<sup>131</sup> Also, in the context of Article 7 TEU, the Court has not been vested with further competencies but may only control acts of the European Council or by the Council at the request of the member state concerned in respect of procedural safeguards.<sup>132</sup>

To overcome these limitations, an extension of the jurisdiction of the CJEU regarding European fundamental rights has been discussed.<sup>133</sup> According to that idea, and inspired by the "Solange II" decision of the German Federal Constitutional Court,<sup>134</sup> member states remain autonomous in their fundamental rights protection as long as (solange) it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2 TEU. Otherwise, in case of systemic deficits, European citizens can turn to their national judges for the violation of their rights which can then refer a preliminary ruling to the CJEU.<sup>135</sup> Both the CJEU<sup>136</sup> and the ECtHR<sup>137</sup> have used similar approaches for (not) exercising their jurisdiction as long as an effective protection of fundamental rights which is substantially similar to the protections required under their jurisprudence was ensured.<sup>138</sup> According to the suggested "Reverse Solange" approach on the European level, member states remain generally autonomous outside the scope of the Charter of Fundamental Rights of the European Union, as long as they ensure the essence of fundamental rights enshrined in Article 2 TEU.<sup>139</sup> However, if this presumption is rebutted, the CJEU will control national measures in light of fundamental rights. The limits in scope of Article 51(1) CFR, according to which the provisions of the Charter will apply when member states implement European Law, will thus not apply where a violation of the values of Article 2 TEU is at stake.<sup>140</sup> European fundamental rights may thus be extended beyond the scope of Article 51(1) CFR, for example through a combination of Article 2 and 19(1) TEU. This is why, according to the doctrine, Article 2 TEU should be interpreted narrowly, and focus on domestic situations where the 'essence' of fundamental rights is concerned.<sup>141</sup>

The "Reverse Solange" approach focuses on fundamental rights (and not on democracy). It might be capable of addressing individual violations of fundamental rights, but it is not capable of addressing general violations of the principles of democracy or of the rule of law. Besides that, it heavily relies on the functioning of and the CJEU's cooperation with the national courts, but will not work if these are politically undermined. How-

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130 See more recently the arguments of Poland, Case C-791/19 R, Order of the Court (Grand Chamber) of 4 April 2020, *Commission v Poland*, ECLI:EU:C:2020:277, para. 26: "[...] ne seraient compétentes pour intervenir sur des questions liées au régime politique des diet seqérents États membres, aux compétences des diet seqérents organes constitutionnels de ces États et à l'organisation interne de ces organes. Ainsi, la Cour serait manifestement incompétente [...]".

131 See also Blauberger and Kelemen, JEPP 2017 at 330 et seq.

132 Article 269(1) TFEU.

133 See Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Jeff Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009); Armin von Bogdandy and others, 'Reverse Solange – Protecting the essence of fundamental rights against EU Member States' (2012) 49 *Common Market Law Review*.

134 German Federal Constitutional Court, Case 2 BvR 197/83 of 22 October 1986 (BVerfGE 73, 339).

135 von Bogdandy and others, CMLR 2012; see also Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15 *European Constitutional Law Review* at 405 et seq.

136 Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat International Foundation v Council and Commission*, ECLI:EU:C:2008:461.

137 Case *Bosphorus v Ireland*, Application no. 45036/98.

138 See also von Bogdandy and Spieker, ECLR 2019 at 407.

139 von Bogdandy and others, CMLR 2012 at 508 et seq.

140 von Bogdandy and Spieker, ECLR 2019 at 398, 409.

141 Ibid at 420 et seq.

ever, recent tendencies tell another story:<sup>142</sup> Both Poland and Hungary have tried to “discipline” judges, for example through disciplinary procedures because of the exercise of their power to request a preliminary ruling from the CJEU.<sup>143</sup> For example, the Polish Minister for Justice and Prosecutor General recently filed a request with the Polish Constitutional Court to declare Article 267 TFEU unconstitutional insofar as it allows national courts to ask questions concerning the structure and the organisation of the judiciary and the course of domestic proceedings.<sup>144</sup> To overcome the possible limitations of the national judiciary, a “Horizontal Solange” approach relying on the CJEU’s N.S. case, which allowed for the partial suspension of the principle of mutual recognition in case of the threat of inhuman or degrading treatment of asylum seekers,<sup>145</sup> has been discussed. In cross-border cases following a CJEU’s decision, national courts of other member states would then be able to suspend the cooperation with another member state’s organ by refusing to apply the substantive law of that member state which violates European values, or by refusing to enforce or to recognize its judgements.<sup>146</sup>

Moreover, there is also a risk that constitutional courts in the member states might regard the extension of the jurisdiction of the European Courts as an arrogation of power and as a potential weakening of their own standards of domestic constitutional law. Rather, it seems as if they took another road by incorporating the European Charter into their own scope of reviewable rights.<sup>147</sup> It is not the CJEU becoming the main adjudicator of European Charter rights but the national High and Constitutional Courts – except concerning judicial independence protected via the triad of Article 267 TFEU, Article 19(1) TEU, Article 47 CFR for which the CJEU installed itself as the main arbitrator.<sup>148</sup> At the same time, the CJEU lowered expectations regarding Article 267 TFEU by underlining its function to help the referring court to resolve a specific dispute pending before it which excludes abstract question on the conformity of national measures with European law. These boundaries of preliminary references became obvious in a more recent decision regarding preliminary references made by the Regional Court of Lodz and Warsaw. The courts expressed their concern that disciplinary proceedings could be brought against the single judge in charge of each case in the main proceedings if that judge were to give a ruling the outcome of which would be unfavourable for the state treasury respectively the criminal authorities.<sup>149</sup> Relying on the wording and scheme of Article 267 TFEU, the CJEU underlined that its answer had to be “necessary for the effective resolution of a dispute”, but that it could not give mere ad-

<sup>142</sup> For a more optimistic approach, see e.g. Ibid at 296 et seq.

<sup>143</sup> European Commission, Press Release, IP/19/4189, Rule of Law: European Commission takes new step to protect judges in Poland against political control. Scheppele and Kelemen, ‘Defending Democracy in EU Member States: *Beyond Article 7 TEU*’ at 454.

<sup>144</sup> Marek Safjan and Dominik Düsterhaus, ‘The EU Citizens’ Right to have Rights and the Courts’ Duty to Protect it’ in Koen Lenaerts and others (eds), *An Ever-Changing Union?: Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart Publishing 2019) at 210 with further references.

<sup>145</sup> Joined cases C-411/10, Judgment of the Court (Grand Chamber) of 21 December 2011, N.S., ECLI:EU:C:2011:865, para. 94 and 106. This is now formally enshrined in Article 3(2) Regulation (EU) No. 604 v 2013 of the European Parliament and the European Council of 26 June 2013 (the so-called Dublin III Regulation): “Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible”.  
for the German Federal Constitutional Court, see decision of 15 December 2015, 2 BvR 2735 v 14 (*European Arrest Warrant II*).

<sup>146</sup> See Iris Canor, ‘“My Brothers Keeper?”: Horizontal Solange: An Ever Closer Distrust Among the Peoples of Europe’ (2013) 50 Common Market Law Review at 383–422.

<sup>147</sup> See Austrian Constitutional Court, decision of 14 March 2012, U 466/11 et al., para. 5.5; Federal German Constitutional Court, decision of 6 November 2019, 1 BvR 276/17.

<sup>148</sup> Case C-64/16, Judgment of the Court (Grand Chamber) of 27 February 2018, Associação Sindical dos Juizes Portugueses, ECLI:EU:C:2018:117.

<sup>149</sup> Joined Cases C-558/18 et al, Judgment of the Court (Grand Chamber) of 26 March 2020, Miasto Łowicz (Regional Court, Łódź), ECLI:EU:C:2020:234, paras. 3 et seq.

visory opinions on a general or hypothetical question.<sup>150</sup> The Court (as well as the European Commission)<sup>151</sup> found the questions to be inadmissible because of their general nature.<sup>152</sup> Preliminary references must thus be distinguished from infringement proceedings where the CJEU must ascertain whether a national measure contravenes European law in general.<sup>153</sup> Only in a lengthy obiter dictum, the Court made clear that to “expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling [cannot] be permitted.”<sup>154</sup>

### 3.4 (Limited) Rights Protection

Our fourth reserve concerns the CJEU’s narrow human rights jurisdiction – which is another argument against the “Reverse Solange Doctrine”. Unlike the ECtHR, the CJEU has not been installed as a specific human rights court, but has rather been modelled after the French Conseil d’État as highest administrative court with a broader jurisdiction. Meanwhile, it combines both functions of a constitutional court towards the Union’s institutions and those of a High Court towards the member states.<sup>155</sup> Because of this, its jurisdiction covers a wide range of infringements of European law, from individual administrative measures to general legislation.<sup>156</sup> However, more than 60 per cent of infringement proceedings initiated by the European Commission concern delayed or unlawful transpositions of EU directives (and not infringements of fundamental rights).<sup>157</sup> The protection of individual rights of democratic participation – such as freedom of expression, thought, assembly, and association – rather play a role before the Strasbourg Court<sup>158</sup> and within organs of Council of Europe like the Venice Commission.<sup>159</sup> For example, when the new Fundamental Hungarian Law terminated the Supreme Court president’s term of office more than three years before the norm date of expiry, and after unsuccessfully challenging the early retirement before the national courts, he filed a case before the ECtHR, arguing that he was dismissed because of his views expressed in his capacity as president of the Hungarian Supreme Court.<sup>160</sup> The ECtHR found a violation of his right to a fair trial and his freedom of expression.<sup>161</sup>

150 Joined Cases C-558/18 et al, Judgment of the Court (Grand Chamber) of 26 March 2020, Miasto Łowicz (Regional Court, Łódź), ECLI:EU:C:2020:234, paras. 44 et seq.

151 Joined Cases C-558/18 et al, Judgment of the Court (Grand Chamber) of 26 March 2020, Miasto Łowicz (Regional Court, Łódź), ECLI:EU:C:2020:234, paras. 40.

152 See for a different approach in the CJEU’s interim order related to an infringement procedure: Case C-791/19 R, Order of the Court (Grand Chamber) of 4 April 2020, Commission v Poland, ECLI:EU:C:2020:277, para. 90: “[...] la simple perspective, pour les juges [de la] Cour suprême et des juridictions de droit commun, d’encourir le risque d’une procédure disciplinaire pouvant conduire à la saisine d’une instance dont l’indépendance ne serait pas garantie est susceptible d’affecter leur propre indépendance.”

153 See more recently Joined Cases C-558/18 et al, Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, ECLI:EU:C:2020:234, paras. 47.

154 Joined Cases C-558/18 et al, Judgment of the Court (Grand Chamber) of 26 March 2020, Miasto Łowicz (Regional Court, Łódź), ECLI:EU:C:2020:234, paras. 57 et seq.

155 Möllers, *The Three Branches: A Comparative Model of Separation of Powers* at 172, for another opinion see Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* at 225; Alter, *The European Court’s Political Power: Selected Essays* at 186.

156 For infringement proceedings, see Prete and Smulders, CMLR 2010 at 18.

157 See e.g. Single Market Scoreboard, Infringements, Reporting Period: 12/2015 -12/2016, at 12 (64 %); Single Market Scoreboard, Infringements, Reporting Period: 12/2016 -12/2017, 14 (62 %); Single Market Scoreboard, Infringements, Reporting Period: 12/2017 – 12/2018, 9 (66%).

158 Pildes, ‘The Law of Democracy and the European Court of Human Rights’ at 110, 114 et seq. See also Kim Lane Scheppele, ‘Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)’ (2014) 23 *Transnational Law and Contemporary Problems* at 88 et seq.; Iulia Motoc and Ineta Ziemele, *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (Cambridge University Press 2016).

159 This is important because all member states of the European Union are members of the Council of Europe.

160 ECtHR, *Baka v. Hungary*, Application No. 20261/12; see for an analysis Halmai, ‘The Early Retirement Age of the Hungarian Judges’.

161 Articles 6(1) and 10 European Convention on Human Rights.

However, although granting compensation, the president could not be re-installed into his former office.<sup>162</sup>

Following from its conception, there are two problems for the CJEU's role in the current crisis on democracy and the rule of law. Although the Court's role as a protector of fundamental rights is steadily increasing, it is still dominated by another rationale. The Court is protecting fundamental rights through general principles of European law to preserve the autonomy and primacy of European law,<sup>163</sup> thus to promote the European integration, and less with the goal of offering individual justice to European citizens.<sup>164</sup> These can challenge unfavourable national measures before domestic courts which can then refer a preliminary reference to the CJEU, thereby "transporting" national deficiencies to the CJEU and back. However, they cannot individually go to the CJEU to challenge the infringement of their personal rights,<sup>165</sup> unlike individual applications before the ECtHR.<sup>166</sup> The enforcement of individual rights plays a less important role both in infringement proceedings and in preliminary references,<sup>167</sup> and the Court's focus lies more on safeguarding the European integration, and less on treating individual infringements and the enforcement of individual justice. Thus, the principle of democracy rather plays a role with regard to European institutions in the CJEU's jurisprudence, and not with regard to the member states.<sup>168</sup> The CJEU's step forward to protect national courts on the basis of the triad of Article 2 TEU, Article 19(1) TEU and Article 47 CFR,<sup>169</sup> which has broadened its jurisdiction with regard to the question of judicial independence of member states' courts, must be seen in that light and the CJEU's institutional self-interest. This is because the functioning of the member state's judiciary – who are at the same time parts of the European court system – also concerns the power of the CJEU as its head. This does not make its new line of jurisprudence less vital and important. However, on the one hand, supporting the national courts and their independence appears less surprising as these are the main actors to enforce European law, and at the same time, central actors for the protection of typical "targets" of authoritarianisms such as the press and media, the freedom of assembly, the electoral system and political parties. Nevertheless, and on the other hand, threats to these other "targets" are often addressed through fundamental rights, for example the freedom of expression.<sup>170</sup> As we have seen, violations of such individual political rights are hard to frame as infringements of European law and principles, and, accordingly, hard to bring before the CJEU. What is more, even if these kinds of cases were to reach the Court, due to the CJEU's logic and its dependencies on national courts, it is even less likely that it will develop an own fundamental rights doctrine in the near future.

162 Halmai, 'The Early Retirement Age of the Hungarian Judges'.

163 Elise Muir, 'The Court of Justice: A Fundamental Rights Institution among Others' in Mark Dawson and others (eds), *Judicial Activism at the European Court of Justice* (Elgar 2013) at 80.

164 For another approach, see among others, and with reference to the CJEU's Kadi decision (Case C-402/05 P et al., Judgment of the Court (Grand Chamber) of 3 September 2008, Kadi and Al Barakaat International Foundation v Council and Commission, ECLI:EU:C:2008:461) Canor, CMLR 2013 at 384 et seq. However, in the context of the conflict of the primacy of United Nations Security Council Resolutions, the CJEU rather took an approach protecting its own status – instead of Mr Kadi's rights.

165 Johannes Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts: Europäische Impulse für eine Revision der Lehre vom subjektiv-öffentlichen Recht* (Duncker & Humblot 1997) at 45 et seq.; 51 et seq.; Craig and de Búrca at 185, 436; Karen Alter, *Establishing the Supremacy of European Law: The Making of an international Rule of Law in Europe*, at 209 et seq., 212 et seq.

166 Article 34 ECHR.

167 See both Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts: Europäische Impulse für eine Revision der Lehre vom subjektiv-öffentlichen Recht* at 46; for a different approach Haltern, *Europarecht: Dogmatik im Kontext, Band II: Rule of Law – Verbunddogmatik – Grundrechte* at 253.

168 For an analysis, see Koen Lenaerts, 'The Principle of Democracy in the case law of the European Court of Justice' (2013) 62 *International & Comparative Law Quarterly* at 271-315.

169 See e.g. Case C-192/18, Judgment of the Court (Grand Chamber) of 5 November 2019, *Commission v Poland*, ECLI:EU:C:2019:924; Case C-522/18, Case C-619/18, Judgment of the Court (Grand Chamber) of 24 June 2019, *Commission v Poland*, ECLI:EU:C:2019:575; Case C-619/18, Judgment of the Court (Grand Chamber) of 24 June 2019, *Commission v Poland*, ECLI:EU:C:2019:575.

170 Article 11(1) Charter, Article 10 ECHR.

### 3.5 The “Discovery” of Interim Relief

As mentioned previously, courts are generally not vested to respond promptly to political developments, and the length of proceedings can represent an obstacle to address inner state developments.<sup>171</sup> This is illustrated by the recent infringement decision against Poland, the Czech Republic and Hungary which had violated European law by refusing to relocate refugees during the migration crisis from other European countries, especially from Greece and Italy,<sup>172</sup> and which claimed that they wanted to safeguard domestic security and their public order against uncontrolled migration. Since the relevant Council decision <sup>173</sup> expired in September 2017, both Hungary and Poland do not feel bound by the CJEU’s judgment rendered in April 2020. Also, Hungary’s Higher Education Law<sup>174</sup> mainly aimed at eliminating the Central European University, and had been challenged in an infringement procedure by the European Commission in July 2017. The case is still pending. However, the Court’s decision will come too late because the University was forced out of Budapest in December 2018 and launched a campus in Vienna in 2019.<sup>175</sup> Nevertheless, these timely disadvantages of proceedings before the CJEU are increasingly compensated by urgent preliminary ruling procedures,<sup>176</sup> and procedural shortcomings of the CJEU’s jurisprudence *via-à-vis* national legal system have been countered by the “discovery of interim orders”.<sup>177</sup>

In infringement proceedings, the European Commission can request the CJEU to grant interim relief<sup>178</sup> to temporarily ensure a specific or abstract legal position, as well as to secure a legitimate legal interest.<sup>179</sup> Interim orders preserve the effectiveness of the final judgment and ensure that the behaviour of the parties does not deprive the judgment of its effects.<sup>180</sup> Because of the tension connected with that procedure, namely that one party might affect the legal interests of another party which is prevented from pursuing an action until the final judgement, the Court grants interim relief only under limited conditions and in rare occasions. Traditionally, its numbers rank with low figures in the annual caseload.<sup>181</sup> However, the role of this procedure is steadily increasing,<sup>182</sup> and, for example, has been activated three times so far in the context of the recent rule of law crisis in Poland.<sup>183</sup>

If interim orders are requested against member states’ actions, the CJEU acts more like an international court that can force member states to change their behaviour,<sup>184</sup> particularly when sought in conjunction with an

<sup>171</sup> For the European Commission see Craig, OJLS 1992 at 454 et seq.

<sup>172</sup> Joint cases C-715/17 et al, Judgment of the Court (Third Chamber) of 2 April 2020, *Commission/Poland and others*, ECLI:EU:C:2020:257.

<sup>173</sup> See Article 13(2) Decisions (EU) 2015/1523 and (EU) 2015/1601.

<sup>174</sup> Case C-66/18 *Commission v Hungary* (Lex CEU); European Commission - Press release, Hungary: Commission takes second step in infringement procedure on Higher Education Law, 13 July 2017.

<sup>175</sup> For a timeline of the events, see Modifications to the Hungarian Higher Education Act and CEU’s Objections, available at: <https://www.ceu.edu/istandwithceu/timeline-events> (accessed: 5 May 2020).

<sup>176</sup> Article 107 Rules of Procedure of the Court of Justice of 25 September 2012.

<sup>177</sup> Article 279 TFEU.

<sup>178</sup> Article 279 TFEU.

<sup>179</sup> Robert Grzeszczak and Mateusz Muchel, ‘Provisional Measures Against EU Member States in the light of the Białowieża Forest case’ (2018) 2 *Eastern European Journal of Transnational Relations* at 27.

<sup>180</sup> Gray, ELR 1979 at 85; Borchardt, CMLR 1985 at 204, 207; Jacobs, ‘Interim Measures in the Law and Practice of the Court of Justice of the European Communities’ at 45; Lenaerts and others, *EU Procedural Law* at 563.

<sup>181</sup> See e.g. CJEU Annual Report 2017, Judicial Activity at 102.

<sup>182</sup> It has doubled to six successful applications in 2018 compared to three such applications in 2017: CJEU, Press Release, No. 39 v 19, Judicial statistics 2018.

<sup>183</sup> Case C-441/17 R, Order of the Vice-President of the Court of 27 July 2017, *Commission v Poland*, ECLI:EU:C:2017:622; Case C-522/18, Case C-619/18, Judgment of the Court (Grand Chamber) of 24 June 2019, *Commission v Poland*, ECLI:EU:C:2019:575; Case C-791/19 R, Order of the Court (Grand Chamber) of 4 April 2020, *Commission v Poland*, ECLI:EU:C:2020:277.

<sup>184</sup> Jacobs, ‘Interim Measures in the Law and Practice of the Court of Justice of the European Communities’ at 37.

infringement procedure. In that context, interim orders become a mechanism to monitor and enforce national measures.<sup>185</sup> While the implementation of infringement proceedings lies in the discretion of the member state concerned which has to take the necessary measures to comply with the Court's judgement,<sup>186</sup> the scope of judicial measures is much broader when it grants interim relief. The European Commission can ask for a direct court order addressed at the interlocutory stage while it cannot do so in the main infringement procedure because its judgement in infringement proceedings is merely declaratory.<sup>187</sup> In main proceedings, the CJEU may only indicate what measures should be taken but cannot prescribe what needs to be done to put an end to the infringement.<sup>188</sup> In comparison, in an interim order, it may directly request a specific behaviour from the member states, for example, to "cease, immediately and until delivery of final judgment" the active forest management in the Białowieża case.<sup>189</sup>

In principle, it appears "awkward" that the European Commission can ask for a direct court order at the interlocutory stage while it cannot do so in the main infringement proceeding.<sup>190</sup> The CJEU had to deal with these allegations in its early caselaw, namely with the question whether interim measures sought in conjunction with infringement proceedings went beyond its jurisdiction.<sup>191</sup> However, the Court underlined that "the provisional measure sought will not necessarily have irreversible consequences"<sup>192</sup> and referred to the rationale of interim relief which is to grant temporary relief until the conclusion of main proceedings,<sup>193</sup> and is thus different from the objectives of the underlying infringement proceedings. This is because interim orders do not derive their binding force from the power to render judgment in the main proceedings, but from the power to grant interim relief itself.<sup>194</sup> Consequently, the CJEU may not only order the member state concerned to "freeze" a certain legal status, but also to protect certain interests by positive measures, which is more invasive vis-à-vis member state's competences than the mere duty to abstain from a behaviour. In the latter case, legal provisions need to be created or at least modified, thus raising the risk of establishing legal effects that could deprive the main infringement decision of its practical effects. This is even more so the case where both types of interim orders are combined. Both in the case concerning the forced retirement of Polish Supreme Court judges as well as the more recent interim order regarding the powers of the Disciplinary Chamber, the CJEU did not only require to suspend the application of the provisions of Law of the Supreme Court, but also to take all necessary measures to ensure that the judges of the Supreme Court who were concerned by the new law would be able to exercise their functions upon the same positions and under the same conditions as before the entry into force of the law<sup>195</sup> and to abstain from transmitting the pending cases before the Disciplinary Chamber if it has a board that does not satisfy the requirements of judicial independence.<sup>196</sup> Interestingly, where the CJEU requested the member states to not only abstain from a certain behaviour but to actively secure a certain status quo, it also introduced an additional reconciliation phase

<sup>185</sup> Craig and de Búrca, *EU Law: Text, Cases, and Materials* at 461.

<sup>186</sup> Article 260(1) TFEU.

<sup>187</sup> Lenaerts and others, *EU Procedural Law* at 571, Fn. 34.

<sup>188</sup> Gormley, 'Infringement Proceedings', 70; Prete and Smulders, CMLR 2010 at 47.

<sup>189</sup> Case C-441/17 R, Order of the Vice-President of the Court of 27 July 2017, *Commission v Poland*, ECLI:EU:C:2017:622.

<sup>190</sup> Lenaerts and others, *EU Procedural Law* at 571.

<sup>191</sup> In the affirmative see Opinion of AG Mayras Joined cases 31-77 R and 53-77 R, Order of the Court of 21 May 1977, ECLI:EU:C:1977:85; also Gray, ELR 1979 at 98 et seq.

<sup>192</sup> Joined cases 31-77 R and 53-77 R, Order of the Court of 21 May 1977, ECLI:EU:C:1977:86, para. 23.

<sup>193</sup> Jacobs, 'Interim Measures in the Law and Practice of the Court of Justice of the European Communities', 40.

<sup>194</sup> Fernando Castillo de la Torre, 'Interim Measures in Community Courts: Recent Trends' (2007) 44 *Common Market Law Review* at 280.

<sup>195</sup> Case C-619/18 R, Order of the Court (Grand Chamber) of 17 December 2018, *Commission v Poland*, ECLI:EU:C:2019:575.

<sup>196</sup> Case C-791/19 R, Order of the Court (Grand Chamber) of 4 April 2020, *Commission v Poland*, ECLI:EU:C:2020:277.

before the European Commission, thus activating its monitoring function which is related to the underlying infringement procedure. The Court then requires the member states to inform the Commission of the measures taken within a set time limit<sup>197</sup> which ranged from 15 days<sup>198</sup> to one month after notification of the interim order.<sup>199</sup>

In its Białowieska forest case, which was among the bundle interim orders against Poland so far, the CJEU even went further by introducing a system of financial sanctions if an interim order is ignored. In that order, concerning the removal and the felling of trees in the primeval forest, the CJEU had ordered Poland to immediately stop the active forest management operations until the final judgement (except where there was a threat to public safety).<sup>200</sup> However, Poland continued the clearing.<sup>201</sup> The European Commission thereupon supplemented its application by requesting the Court to order Poland to pay a periodic penalty payment if it failed to comply with the Court's orders,<sup>202</sup> while Poland argued that different from Article 260 TFEU, Article 279 TFEU did not empower the Court to impose periodic penalty payments on member states.<sup>203</sup> In November 2017, the CJEU rendered its interim order. It requested Poland to cease the deforestation until the delivery of its final judgment, and coupled it with a "prophylactic penalty payment".<sup>204</sup> However, the Court did not impose fines and only threatened to do so if the Commission found an infringement,<sup>205</sup> but roughly outlined a two-step framework for the imposition of financial sanctions<sup>206</sup> running parallel to the infringement proceedings under Article 260(2) TFEU. The Court justified the possibility to impose financial sanctions in interim proceedings by the need "to guarantee the effective application of EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the EU is founded."<sup>207</sup> Therefore, the guarantee of the effectiveness of an interim order also entails periodic penalty payments to be imposed should that order not be respected by the relevant party.<sup>208</sup>

Even though that order can be seen as a signal to the member states that the CJEU is ready to protect the values enshrined in Article 2 TEU and the conformity of national measures with these values,<sup>209</sup> its role has remained rather limited so far. Following the second Białowieska order, the European Commission did not find a further infringement, and the CJEU has not been informed of any other incident of non-compliance<sup>210</sup> that could have triggered financial sanctions. Since its introduction in November 2017, neither the Court nor the European Commission used the sanctioning mechanism again. However, in the context of the non-implementation of the previous preliminary reference in the A.K. case and follow-up infringement procedure, the Court

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197 Case C-154/85 R, Judgment of the Court of 17 June 1987, *Commission v Italy*, ECLI:EU:C:1987:292; Case C-293/85 R, Judgment of the Court of 2 February 1988, *Commission v Belgium*, ECLI:EU:C:1988:40.

198 Case C-441/17 R, Order of the Vice-President of the Court of 27 July 2017, *Commission v Poland*, ECLI:EU:C:2017:622, para. 115.

199 Case C-619/18 R, Order of the Court (Grand Chamber) of 17 December 2018, *Commission v Poland*, ECLI:EU:C:2019:575.

200 Case C-441/17 R, Order of the Vice-President of the Court of 27 July 2017, *Commission v Poland*, ECLI:EU:C:2017:622.

201 Grzeszczak and Muchel, *EEJTR* 2018 at 27; see also Case C-441/17 R, Order of the Vice-President of the Court of 27 July 2017, *Commission v Poland*, ECLI:EU:C:2017:622, para. 89.

202 Case C-441/17 R, Order of the Vice-President of the Court of 27 July 2017, *Commission v Poland*, ECLI:EU:C:2017:622, para. 7, 91, 101.

203 *Ibid.*, para. 10, 91.

For a critical assessment, see Pål Wennerås, 'Saving a forest and the rule of law: *Commission v. Poland*' (2019) 56 *Common Market Law Review* at 547 et seq.

204 *Ibid.*, para. 97 et seq.

For an analysis see Wennerås, 2 *CMLR* 56 (2019) at 543.

205 *Ibid.*, para. 118.

206 Wennerås, *CMLR* 2019, at 550.

207 Case C-441/17 R, Order of the Vice-President of the Court of 27 July 2017, *Commission v Poland*, ECLI:EU:C:2017:622, para. 103.

208 *Ibid.*, para. 100, 104 et seq.

209 Wennerås, *CMLR* 2019 at 548.

210 von Danwitz, *PER* 2018 at 12.

signalled its activation.<sup>211</sup> It remains to be seen whether the new sanctions regime “will also lay the foundations for the evolution of EU law”,<sup>212</sup> but there are several obstacles to it. The CJEU has indicated that the sanctions mechanism may only be activated in cases of a manifest breaches of EU law, if the member state does not intend to comply,<sup>213</sup> or does not comply “full[ly]”<sup>214</sup> and “immediate[ly]”<sup>215</sup> with the interim order. The degree of non-compliance is at first assessed by the European Commission, and will therefore be hampered by the problems of limited resources and lacking specific knowledge, often making reference to further sources necessary. The procedure will thus most likely remain limited to “rogue actions”, such as Poland’s manifest non-compliance in the Białowieża order.<sup>216</sup> Taking into account the rather ambiguous legal grounds of the new sanctions procedure<sup>217</sup> it will probably only apply in a very limited number of cases of obvious disobedience – and not with regard to hardly assessable “systemic” and creeping authoritarian changes. Again, even the new procedure rather functions as a warning system. Both the “activation” of interim relief as well as its sanction’s regime bring us back to the starting point of the assessment of the CJEU’s involvement, namely the dependencies on other actors. The Court can only step in if there has been a request by the European Commission to grant interim relief, and both the execution of these orders as well as the request to impose financial sanctions lies again in the Commission’s sphere of action. But if a Court’s interim order is ignored, and further action dependent on an intervention by the European Commission, it would then be for the national court to enforce interim orders.<sup>218</sup> In the light of the duty of sincere cooperation,<sup>219</sup> they would need to take into account the CJEU’s interim order and to treat it as having the effect of suspending the application of a national measure.<sup>220</sup>

## Conclusion

In the current crisis of the rule of law and democracy in Europe, the CJEU has become a, if not the main actor. The Court has been involved not only on the initiative of the European Commission in infringement proceedings for breaches of European law, but also through preliminary references of domestic courts of problematic member states as well as of courts from other member states, in particular regarding threats to judicial independence. It indeed seems as if the CJEU’s responses to secure its domestic counterparts – especially through the triad of Article 267 TFEU, Article 19(1) TEU and Article 47 CFR – exercises considerable pressure to secure at least a minimal protection of judges, and this even more since the “discovery” of interim orders as enforcement tool, which – in our view – should be activated more often and less hesitantly by the European Commission.

211 Case C-791/19 R, Order of the Court (Grand Chamber) of 4 April 2020, *Commission v Poland*, ECLI:EU:C:2020:277, para. 2: “Par ailleurs, la Commission signale qu’elle se réserve le droit de soumettre une demande complémentaire visant à ce soit ordonné le paiement d’une astreinte si jamais il découlait des informations notifiées à la Commission que la République de Pologne ne respecte pas pleinement les mesures provisoires ordonnées à la suite de sa demande en référé.”

212 Grzeszczak and Muchel, *EEJTR* 2018, at 33.

213 Case C-441/17 R, Order of the Vice-President of the Court of 27 July 2017, *Commission v Poland*, ECLI:EU:C:2017:622, para. 112.

214 *Ibid.*, para. 114, 116.

215 *Ibid.*, para. 114.

216 Wennerås, *CMLR* 2019 at 549 et seq.

217 *Ibid.*, at 547 et seq.

218 Jacobs, ‘Interim Measures in the Law and Practice of the Court of Justice of the European Communities’, 61.

219 Article 5 TEU.

220 Jacobs, ‘Interim Measures in the Law and Practice of the Court of Justice of the European Communities’, 61 et seq.

However, this paper cannot and will not conclude that the current crisis and threats to the rule of law and democracy will be “solved” by the CJEU. Involving the judiciary relies on the assumption that courts are better vested to solve conflicts about European fundamental values.<sup>221</sup> It is indeed true that the judgments of the CJEU do exercise not only symbolic pressure on the member states. Yet, an increasing involvement of the Court in highly delicate matters might, in the end, cause problems for it because its acceptance mainly depends on its perception as a non-political actor.<sup>222</sup> And even where political cases are brought before the CJEU, it may only respond to single violations of European law, but may not tackle evolving and structural developments, and thus trigger profound changes of policy. For example, until now, there have been more than five challenges to the Polish judicial reforms before the CJEU, clearly revealing systemic threats to the independence of the judiciary. However, the numerous and unfavourable sentences against Poland by the Court could only decelerate, but not prevent reform after reform, more recently the Law of 20 December 2019. This new law tries, among other things, to reduce the ability of national judges to refer preliminary references to the CJEU. At the same time, the Court itself underlined in recent cases that it will neither exercise an abstract and general review of national legislation in preliminary references<sup>223</sup> nor did it affirm the concept of the suspension of the principle of mutual trust outside the framework of Article 7(2) TEU.<sup>224</sup> Beyond the protection of judicial independence under the triad of Article 267 TFEU, Article 19(1) TEU and Article 47 CFR, the CJEU has thus rejected proposals to extend its jurisdiction, both regarding systemic infringements and systemic deficiencies in European member states.

Nonetheless, the Court’s involvement remains an important response mechanism to domestic developments, but it will remain an empty shell focusing on single violations if it is not accompanied by other political measures. This is why we need to assess and contextualise the CJEU’s role also in light of the cases where it has not been involved or cannot be involved. For example, when the Hungarian Constitutional Court was weakened after 2010, the CJEU could not react because the Commission did not initiate infringement proceedings (except for the punctual question of the lowering of the retirement age of judges).<sup>225</sup> Moreover, authoritarian developments will not only aim at muting the judiciary, on which the CJEU can react under its previously broadened doctrine of judicial independence which includes national courts, too. These authoritarian tendencies will also address “targets” such as the media, NGOs, and other “rooms for dissent”. But beyond the protection of judicial independence, these threats to other authoritarian “targets” can hardly be challenged or even addressed before the CJEU. The possibility of judicial reactions thus remains limited, unless accompanied by a substantial reform of the substantive criteria of Article 2 TEU into a more specific protection of democracy.<sup>226</sup>

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221 For a critique, see Blauberger and Kelemen, JEPP 2017 at 331.

222 Ibid at 331.

223 Joined Cases C-558/18 et al, Judgment of the Court (Grand Chamber) of 26 March 2020, *Miasto Łowicz* (Regional Court, Łódź), ECLI:EU:C:2020:234.

224 Case C-216/18 PPU, *Minister for Justice and Equality (LM)*, Request for a preliminary ruling from High Court (Ireland), ECLI:EU:C:2018:586.

225 Case C-286/12, Judgment of the Court (First Chamber), 6 November 2012, *Commission v Hungary*, ECLI:EU:C:2012:687.

226 See also Blauberger and Kelemen, JEPP 2017 at 330 et seq.

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