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Romanian version of the rule of law crisis comes to the ECJ: The *AFJR* case is not just about the Cooperation and Verification Mechanism

Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociaţia "Forumul Judecătorilor din România" and others* v. *Inspecţia Judiciară and others*, Judgment of the Court of Justice (Grand Chamber) of 18 May 2021, EU:C:2021:393

1. Introduction

Until recently, the ECJ's case law on rule of law backsliding and the ensuing controversial judicial reforms in post-communist EU Member States followed a common pattern. The big novel principles were first announced in cases coming from or concerning the old EU Member States,[1] only later to be applied to the Polish and Hungarian cases as part of established case law. The iconic *Portuguese Judges* judgment[2] made the rule of law principle in Article 2 TEU justiciable, elevated judicial independence to a whole new level, and found a jurisdiction to allow the ECJ to address threats to judicial independence at the national level.[3] This allowed the ECJ to address a remarkable number of judicial design issues, including the composition of judicial councils[4] and the selection[5] and disciplining[6] of judges, which had, until recently, been outside its reach. Three years later, the *Maltese Judges*

1. This pattern applies primarily to the case law on effective judicial protection. Beyond the case law on effective judicial protection, there are many exceptions to this pattern. See, most importantly, Joined Cases C-542 & 543/18 RX-II, *Simpson* v. *Council and HG* v. *Commission*, EU:C:2020:232.

2. Case C-64/16, *Associação Sindical dos Juízes Portugueses (Portuguese Judges)*, EU:C:2018:117.

3. See Bonelli and Claes, "Judicial serendipity: How Portuguese judges came to the rescue of the Polish judiciary", 14 EuConst (2018), 622.

4. Joined Cases C-585, 624 & 625/18, *A. K. and others* v. *Sąd Najwyższy, CP* v. *Sąd Najwyższy and DO* v. *Sąd Najwyższy*, *Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982.

5. Case C-824/18, *A.B. and others* v. *Krajowa Rada Sądownictwa (Nomination des juges à la Cour suprême – Recours)*, EU:C:2021:153; Case C-487/19, *W. Ż. (Chambre de contrôle extraordinaire and des affaires publiques de la Cour suprême – nomination)*, EU:C:2021:798.

6. Joined Cases C-585, 624 & 625/18, *A. K. and others.*

ruling[7] introduced the implied principle of non-regression, which showed its teeth as early as in the Polish cases.[8] In all those cases, the ECJ had to find the jurisdiction in, and deduce the new principles from, the Treaties through creative interpretation.

Now, in *AFJR*, in which the ECJ dealt with the first round of cases related to judicial reforms in Romania, things have changed dramatically. First, the case concerned a different country from the usual suspects, a country which had so far stayed under the radar of constitutional law scholars.[9] Second, compared to Hungary and Poland, the illiberal government which adopted the challenged reforms is no longer in power, so the ECJ, when addressing the Romanian reforms, did not meet the usual resistance. Third, as well as the general and relatively recently "discovered" possibility of rule of law supervision through Article 19 TEU, as in *Portuguese Judges*, in *AFJR* the ECJ had at its disposition the Cooperation and Verification Mechanism (CVM), a special post-accession rule of law framework, to which Romania (together with Bulgaria) voluntarily submitted itself when it acceded to the EU in 2007.

All this meant that *AFJR* was particularly interesting for the development of both EU law and the situation in Romania. From the EU law perspective, many of the *potentially* important variables influencing how the ECJ decides rule of law cases were different in this case. *AFJR* concerns a country with different problems and a different political situation, subject to a distinct rule of law mechanism. Moreover, Romania has a different legal culture and a broader understanding of "magistrates," a term which covers both judges and prosecutors. Finally, a different Advocate General (Michal Bobek) was assigned to the case, instead of Advocate General Tanchev who handled most of the early Polish cases. This new cocktail was in itself promising, as it could illuminate the ECJ's strategy for approaching rule of law cases in different situations. From the Romanian perspective, the case was also important as, at the time of writing this annotation, there are several preliminary references concerning the Romanian version of the rule of law crisis in the ECJ's

7. Case C-896/19, *Repubblika* v. *Il-Prim Ministru (Maltese Judges)*, EU:C:2021:31. See Leloup, Kochenov and Dimitrovs, "Non-regression: Opening the door to solving the 'Copenhagen dilemma'? All eyes on Case C-896/19 *Repubblika v Il-Prim Ministru*", 48 EL Rev. (2021), 692.

8. Case C-791/19, *Commission* v. *Poland*, EU:C:2021:596, para 51.

9. There are simply no monographs akin to Sadurski's study of the Polish constitutional breakdown (see Sadurski, *Poland's Constitutional Breakdown* (OUP, 2019)), and the comparative constitutional scholars have rarely included Romania as a case study in what is now a burgeoning field of abusive constitutionalism, democratic decay, and populist constitutionalism.

docket.[10] The *AFJR* judgment, analysed here, is thus just the first chapter in the Romanian rule of law saga.

In our view, while in the *AFJR* judgment the Court affirmed its previous position on many of the issues, the judgment also brings three new insights into how the Court approaches rule of law oversight in the Member States. First, by relying almost exclusively on the requirements of Article 19(1) TEU, instead of the more specific requirement stemming from the CVM, the Court showed that it prefers to tackle rule of law problems in the Member States using a framework which is unified, universally applicable, and forward-looking, rather than one which is specific, tailored-made, and retrospective. While such an approach might be criticized for ignoring Romania's special accession conditions, we argue that from a broader perspective of constitutionalism and the protection of the rule of law, the Court's approach may be sensible. Second, *AFJR* allows us to better understand the Court's minimalist approach in some of the national rule of law cases. Specifically, it shows that (i) the Court's silence on the limits of Article 19(1) TEU may not mean that the provision has no limits, but only that there has not yet been a suitable case for spelling out the limits, and that (ii) in cases such as *AFJR*, the Court's deferential approach, leaving much of the work on the shoulders of national courts, might be a conscious and prudent choice. Finally, we argue that the Court's analysis of the three Romanian judicial liability mechanisms not only clarifies the requirements which each of the three regimes must satisfy, but also brings to light a subsequent, more practical, risk relating to how and by whom the Court's standards, which require quite complex, contextual assessment, should – or even could – be properly applied. Overall, the commented judgment in our view does not concern only, or not even mainly, Romania or Bulgaria,[11] the only two EU Member States subject to the CVM. Its universalistic framework and its

10. See e.g. Case C-709/21, *MK*; Case C-216/21, *AFJR*; Case C-926/19, *BR,* all pending. Some cases from the second wave of Romanian preliminary reference have already been decided; see e.g. Joined Cases C-357, 379, 547, 811 & 840/19, *Euro Box Promotion and others*, EU:C:2021:1034; and Case C-430/21, *RS (Effet des arrêts d'une cour constitutionnelle)*, EU:C:2022:99. For further details, see Moraru and Bercea, "The *Asociația 'Forumul Judecătorilor din România'* case, The first episode of the Romanian rule of law saga before the Court of Justice of the European Union", 18 EL Rev. (2022), 82–113.

11. Where systemic threats to judicial independence exist too; see ECtHR, *Todorova* v. *Bulgaria*, Appl. No. 40072/13, judgment of 19 Oct. 2021; Stoychev, "This is how Bulgarian judicial independence ends . . . Not with a bang but a whimper", *Verfassungsblog* (3 June 2019), available at <verfassungsblog.de/this-is-how-bulgarian-judicial-independence-ends-not-with-a-bang-but-a-whimper/> (all websites last visited 8 Aug. 2022); Vassileva, "Capturing Bulgaria's justice system: The homestretch", *Verfassungsblog* (9 Jan. 2019), available at <verfassungsblog.de/capturing-bulgarias-justice-system-the-homestretch/>; and Vassileva, "Is Bulgaria's rule of law about to die under the European Commission's nose? The country's highest-ranking judge fears so", *Verfassungsblog* (23 April 2019), available at

comprehensiveness ensure that in the time to come, the judgment will be an important reference for assessing judicial organization throughout the Union.

2. Background to the case

In order to understand the preliminary references in *AFJR*, it is necessary to return to the period of Romania's accession to the EU. Like other Central and Eastern Europe countries, Romania had wanted to join the EU since the 1990s. However, it was not included in the big 2004 enlargement due to persistent rule of law problems and widespread corruption that also affected the judiciary. Romania and Bulgaria eventually joined the EU in 2007, but under tighter conditions than the 2004 accession group. Most importantly, they were subjected to the ongoing Cooperation and Verification Mechanism (CVM),[12] which seeks to prevent the State capture that undermined democratic institutions and the rule of law.

The CVM is a post-accession oversight tool that currently applies only to Romania and Bulgaria.[13] Its purpose is to ensure that administrative and judicial decisions and practices are in line with those of the rest of the EU. It sets out concrete benchmarks for each country, to be attained in the area of judicial reform and the fight against corruption. What is more, the CVM stipulates that the achievement of these benchmarks will be regularly monitored and assessed by the EU.[14] The assessment is conducted by the Commission and the results are published in annual Progress Reports.

While up until 2016 the system of CVM brought some partial improvements, it failed to bring any durable results which would lead the Commission to conclude that all the benchmarks were satisfactorily met.[15]

<verfassungsblog.de/is-bulgarias-rule-of-law-about-to-die-under-the-european-commissions-nose-the-countrys-highest-ranking-judge-fears-so/>. They have just not reached the ECJ yet.

12. Decision 2006/928/EC establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, O.J. 2006, L 354/56.

13. We leave aside here the criticism of the CVM as a non-functional and discriminatory tool. See e.g. Toneva-Metodieva, "Beyond the carrots and sticks paradigm: Rethinking the Cooperation and Verification Mechanism experience of Bulgaria and Romania", 15 *Perspectives on European Politics and Society* (2014), 534–551.

14. See Opinion of A.G. Bobek in Joined Cases C-83, 127, 195, 291 & 355, *AFJR*, EU:C:2020:746, paras. 150–152.

15. Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM(2016)41 final of 27 Jan. 2016 (CVM 2016 Report); Perju, "The Romanian double executive and the 2012 constitutional crisis", 13 I-CON (2015), 246; Carp, "The struggle for the rule of law in Romania as an EU Member State: The role of the Cooperation and Verification Mechanism", 10 *Utrecht Law Review* (2014), 1–16; Sedelmeier, "Anchoring democracy from above? The European Union

What is more, following the general elections of December 2016, Romania witnessed an illiberal turn which culminated in broad judicial and institutional reforms adopted in 2017–2019. The 2017–2019 Justice Reform consisted of three laws[16] adopted by the Parliament in an accelerated procedure which were quickly succeeded by five Governmental Emergency Ordinances.[17] Among other things, the Justice Reform included significant changes to the criminal, disciplinary and civil liability of judges.

Refining the liability regimes of judges is a delicate process that requires careful balancing between judicial independence and judicial accountability. This did not happen in the case of the Romanian Justice Reform, which has been heavily criticized by the European Commission, Venice Commission, as well as the Group of States against Corruption (GRECO).[18] Nevertheless, the European Commission did not initiate the infringement procedure, and all six joined cases that led to the *AFJR* judgment resulted primarily from litigation started by national associations of judges and prosecutors.[19]

The national associations of judges and prosecutors eventually picked the three most problematic aspects of the Justice Reform: (i) the controversial re-appointment of the Chief Inspector of the Judicial Inspection, who has wide powers in disciplining judges; (ii) the creation, organization, and functioning of the Section for the Investigation of Offences committed within the Judiciary (SIOJ) as a special prosecutorial unit, with jurisdiction only over judges and prosecutors; and (iii) the revamped civil liability proceedings for judicial errors committed by active or retired judges in bad faith or for serious

and democratic backsliding in Hungary and Romania after accession", 52 JCMS (2014), 105–121; Dimitrova and Buzogány, "Post-accession policy-making in Bulgaria and Romania: Can non-State actors use EU rules to promote better governance?", 52 JCMS (2014), 139–156.

16. Law No. 207/2018 for the amendment and supplementation of the Law No. 304/2004 on judicial organization was published in the Official Journal of Romania, Part I, No. 636 of 20 July 2018; Law No. 234/2018 for the amendment and supplementation of the Law No. 317/2004 on the Superior Council of Magistracy was published in the Official Journal of Romania, Part I, No. 850 of 8 Oct. 2018; and Law No. 242/2018 for the amendment and supplementation of the Law No. 303/2004 on the statute of judges and prosecutors was published in the Official Journal of Romania, Part I, No. 868 of 15 Oct. 2018.

17. Governmental Emergency Ordinances No. 77/2018 of Sept. 2018; No. 90/2018 of 10 Oct. 2018; No. 92/2018 of 16 Oct. 2018; No. 7/2019 of 19 Feb. 2019; No. 12/2019 of 7 March 2019.

18. Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM(2018)851 final of 13 Nov. 2018 (CVM 2018 Report); Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM(2019)499 final of 22 Oct. 2019 (CVM 2019 Report), 24; Venice Commission Opinion No. 950/2019, para 40; and GRECO Ad-hoc Report on Romania (2018/2), para 34.

19. Namely, the Asociația "Forumul Judecătorilor din România" (Romanian Judges' Forum Association), and Asociația "Mișcarea pentru Apărarea Statutului Procurorilor" (the "Movement for the Defence of Prosecutors' Status" Association).

negligence. More specifically, the first preliminary reference[20] alleged that the Chief Inspector had not been appointed in accordance with the regular domestic procedure, i.e. following a public competition organized by the general assembly of the Romanian Judicial Council, but instead had been retroactively reinstated in office via a Governmental Emergency Ordinance.[21] Four preliminary references concerned the SIOJ. Two questioned the compatibility of rules on the appointment of prosecutors to, and their removal from, the SIOJ[22] and on the operation of the SIOJ,[23] with EU law standards on judicial independence. The two other such references illustrated the concrete negative effects of the establishment of the SIOJ on corruption cases.[24] In the sixth preliminary reference[25] the domestic court asked whether the wide definition of judicial error, the leading role of the Ministry of Public Finance in initiating actions for indemnity against the judiciary, and the lack of sufficient fair trial guarantees for impugned judges are consistent with Articles 2 and 19(1)(2) TEU, the right to a fair trial enshrined in Article 47 CFR – and with the CVM Decision and the 2018 CVM Report. All six preliminary references also raised the issue of the nature and binding effect of the CVM and the Commission's Progress Reports, and indirectly also that of the primacy of EU law over the case law of the Romanian Constitutional Court.

3. The Advocate General's Opinions and the Court's judgment

Advocate General Bobek's Opinions[26] and the Court's judgment dealt with five substantive issues: (3.1) the legal nature and effects of the CVM; (3.2) the three sets of judicial legislation concerning the disciplinary, criminal, and civil liability of judges respectively; and (3.3) the question of the primacy of EU law, including the decision establishing the CVM, and the resulting obligation of national courts. We first summarize the Court's position on each of these issues, and thereafter briefly identify issues on which the Court disagreed with Advocate General Bobek (3.5).

20. Case C-83/19.
21. Governmental Emergency Ordinance No. 77/2018, adopted on 5 Sept. 2018.
22. Case C-127/19.
23. Case C-355/19.
24. Cases C-195 & 291/19.
25. Case C-397/19.
26. Opinion in Joined Cases C-83, 127, 195, 291 & 355 (hereafter "Opinion"); and Opinion of A.G. Bobek in Case C-397/19, *AX* v. *Statul Român – Ministerul Finanțelor Publice*, EU:C:2020:747 (this was a separate Opinion).

3.1. *The Mechanism for Cooperation and Verification: Its nature and legal effects*

Regarding the CVM, the ECJ first recalled that the mechanism was adopted in the context of Romania's accession to the EU, especially due to certain deficiencies in the area of justice and to widespread corruption.[27] According to the Court, the Act of Accession, in its Articles 37 and 38, empowered the Commission to take appropriate safeguard measures should there, as a result of Romania's non-compliance with its rule of law commitments, be an imminent risk to the functioning of the internal market or the area of freedom, security, and justice. Moreover, such measures could remain effective for three years or as long as the shortcomings persisted. It was on the basis of these articles that the Commission adopted Decision 2006/928 establishing the CVM.

Given this factual and legal background, the Court made three important observations. *First*, the CVM was validly adopted on the basis of the Treaties and, due to fact that deficiencies in the rule of law in Romania persist, is still legally in force.[28] *Second*, the CVM, together with its annex spelling out in the light of the observed deficiencies the exact commitments undertaken by Romania in the form of benchmarks, is binding on Romania from its accession.[29] This means that Romania has a "specific obligation to address those benchmarks and to take appropriate measures to meet them as soon as possible ... [and to] refrain from implementing any measure which could jeopardize those benchmarks being met".[30] By way of contrast, the Commission reports adopted under the CVM are not binding but must, on the basis of the principle of sincere cooperation enshrined in Article 4(3) TEU, be taken duly into account.[31] And, *third*, the scope of the CVM "encompasses the judicial system in Romania as a whole," including the Romanian legislation that was at issue in the present case,[32] which means that these reforms had to comply with the CVM's requirements.[33]

3.2. *The three accountability reforms*

After dealing with the nature and effects of the CVM, the ECJ addressed the three judicial reforms concerning judicial accountability. With respect to each,

27. Judgment, paras. 153–160.
28. Ibid., paras. 163–164.
29. Ibid., paras. 166–168.
30. Ibid., para 172.
31. Ibid., para 177.
32. Ibid., para 180.
33. Ibid., paras. 180–185.

the Court first reiterated its already established line of reasoning built around Article 19(1) TEU.[34] After that, it specified the standard applicable to each of the three accountability mechanisms concerned and, in the light of that standard, provided its guidance on how to assess the challenged Romanian reforms.

The first measure dealt with was the rule allowing the government to make interim appointments to the management positions of the Judicial Inspection, a body charged with conducting disciplinary investigations and bringing disciplinary proceedings. Citing its recent case law concerning the Polish judiciary, the Court spelled out that the disciplinary regime must include guarantees preventing it from being used as a system of political control over the content of judicial decisions.[35] In particular, the Court repeated that: (1) the conduct which is prohibited, as well as the potential penalties, need to be clearly defined; (2) the disciplinary body must be independent; (3) the procedure must fully safeguard the rights of the defence; and (4) there must be a possibility of challenging final decisions. To these requirements the Court in the current case added that, as a mere prospect of opening disciplinary proceedings is, as such, capable of exerting pressure on judges, it is also essential that (5) the body competent to conduct investigations and bring disciplinary proceedings acts objectively and impartially and is free of any external influence.[36] Guided by such a standard, the ECJ considered that it is not, in itself, problematic that the senior officer of such a body is appointed by the government, or that an official whose term has expired can remain in office until the date on which a new official is installed in their place.[37] What might be problematic, however, is the situation where the rules allow the government to appoint such officials in disregard of the normal procedure laid down by national law. In this particular case, the rules for the interim appointment of the head of the Investigation Section bypassed the judicial council, a body charged with protecting judicial independence which is normally involved in such appointments.[38] According to the Court, such an irregularity "is likely" to give rise to misgivings that the body might be an instrument to put political pressure on judges and prosecutors.[39] Whether or

34. Ibid., paras. 188–197, cross-referenced in paras. 210–112, 230 and 231. See e.g. Case C-64/16, *Portuguese Judges*; Case C-619/18, *Commission* v. *Poland (Independence of the Supreme Court)*, EU:C:2019:531; Joined Cases C-585, 624 & 625/18, *A. K. and others*; Joined Cases C-558 & 563/18, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową (Disciplinary regime for judges),* EU:C:2020:234.

35. Judgment, para 198.

36. Ibid., para 199.

37. Ibid., paras. 202 and 203.

38. See ibid., para 205, and Opinion, para 275.

39. Judgment, para 205.

not that was the case, however, was ultimately left for the referring courts to determine "taking into account all the relevant factors of the national legal and factual context".[40]

The second measure the Court dealt with was the creation of a specialized section of the Public Prosecutor's office with exclusive competence to investigate offences committed by judges and prosecutors. The Court explained that when there are specific rules governing criminal proceedings against judges and prosecutors, those rules must, under the general standard of judicial independence, satisfy three conditions.[41] They must: (1) be justified by objective and verifiable requirements relating to the sound administration of justice; (2) provide the necessary guarantees that these criminal proceedings cannot be used as a system of political control over the activity of judges and prosecutors; and (3) fully safeguard the right to a fair trial and the right to defence enshrined in Articles 47 and 48 CFR.

While again leaving the final word to the referring national courts, the ECJ raised doubts over the Romanian rules with regard to each of the three conditions. As regards the first, the Court noted that the explanatory memorandum to the relevant law does not offer any justification for the reform relating to the sound administration of justice. As regards the second requirement, the Court considered problematic the exclusivity of the Section's jurisdiction, which meant that any complaint lodged with that Section transferred the matter automatically to the jurisdiction of that body.[42] Such a system, according to the Court, might allow complaints to be lodged unreasonably in order to interfere with and transfer to the special Section ongoing sensitive, high-profile corruption cases, including cases which would otherwise belong to a special section charged with investigating corruption. Finally, as regards the right to a fair trial, the Court noted that the cumulative effect of (1) a reduction in the number of the Section's prosecutors (2) who lacked the means as well as expertise to investigate complex corruption cases and (3) who had an excessive workload, might prevent the cases of the judges or prosecutors concerned from being heard within a reasonable time and thus also extend the duration of investigations into corruption offences.[43] Whether or not that was the case was, yet again, left to the referring courts.

The third part of the judicial reform which the Court assessed concerned the civil liability of both the State and judges for damage caused by a judicial error. Quickly dealing with the former, the Court held that the liability of the State does not give rise to any particular risk to judicial independence, even if

40. Ibid., para 206.
41. Ibid., para 213.
42. Ibid., paras. 216–220.
43. Ibid., paras. 214, 221–222.

it defines the "judicial error" in general and abstract terms.[44] As regards the personal liability of judges, however, the Court held that while possibly contributing to the effectiveness of the judicial system, the possibility of holding judges liable for judicial errors might influence judicial decision-making, and hence it had to be made impossible for it to be used as a political tool. In particular, the Court laid down three requirements for laws governing the civil liability of judges. First, the conduct which gives rise to personal liability must be defined clearly and precisely and arise from the requirements relating to the sound administration of justice, not a desire to control the content of the decisions.[45] Secondly, as the mere opening of investigations or bringing charges against a judge may have a chilling effect on the judge concerned, and as such be used as a tool for influencing his or her decision-making, already such an initial phase must be conducted objectively and impartially and in accordance with detailed procedural and substantive rules.[46] Finally, the body with jurisdiction to rule on the personal liability should be a court before which the rights enshrined in Article 47 CFR, in particular the rights of defence, are guaranteed.

The ECJ directed attention to two particular features of the Romanian civil liability system. First, the Court pointed out that it was for the Ministry of Public Finances alone to decide whether the conditions for opening an investigation or bringing an action for indemnity were satisfied. Whether or not such a power could be used as an instrument to exert pressure on judicial activity was left for the national court to determine.[47] Secondly, and more conclusively, the Court found to be problematic the Romanian rule that the existence of a judicial error established in proceedings concerning the civil liability of the *State* is binding for the purposes of establishing the personal liability of the *judge* concerned, even though the judge who allegedly committed a judicial error was not heard in the first set of proceedings. Such a rule, according to the Court, is not only likely to create a risk of exerting external pressure on the activity of judges, but is also liable to infringe their rights of defence.[48]

3.3. *The primacy of EU law and the duty of the national courts*

Finally, the Court at the end of its judgment also provided an answer to the question concerning the Romanian Constitutional Court's position on EU law.

44. Ibid., paras. 226–228.
45. Ibid., paras. 233–234.
46. Ibid., para 236.
47. Ibid., para 240.
48. Ibid., para 239.

Fearing that it "might prevent the guidance to be provided by the Court's judgment" from being applied, one of the referring courts asked the ECJ what it should do when the Constitutional Court's case law *prohibits* ordinary national courts from disapplying, of their own motion, national rules which would run counter to the CVM or Article 19(1) TEU. As if to give courage to the referring court, and contrary to the Advocate General, who found that question inadmissible,[49] the Court reiterated the principles of the EU legal system and confirmed, unsurprisingly, that if it is established that a national rule conflicts with Article 19 TEU or the CVM Decision, the national courts are obliged to disapply the rule, regardless of what the national constitutional law as interpreted by the Constitutional Court might say.[50]

3.4. *Advocate General Bobek vs. the Grand Chamber: When two are doing the same, it is not always the same*

As regards the substance, the Court and the Advocate General adopted similar positions. They held that the CVM is a part of binding EU law, affirmed the established case law on judicial independence, specified the general standard for the three regimes, pointed to some features of the Romanian laws which might be problematic, but, ultimately, left all of them for the assessment of the referring national courts.

However, as far as the reasoning process is concerned, there was one great difference between the Advocate General and the Court. The Advocate General proposed to assess the laws in the light of the CVM Decision and Article 47 CFR.[51] He reasoned that due to the CVM Decision being an act binding in EU law obliging Romania to observe certain standards of judicial independence, the judicial reforms were "implementation of EU law" which triggered the application of the Charter and its detailed requirements on judicial independence.[52] Article 19 TEU, as the Advocate General read the current case law, was too general, without any limits to its application, and thus should not be used if something more specific was available.[53] Should it nonetheless be used as a legal basis, according to the Advocate General, the Court should elaborate more on its exact reach and limit it to extraordinary cases concerning systematic deficiencies of the rule of law.[54]

The ECJ, in contrast, applied the same line of reasoning as in its seminal *Portuguese Judges* judgment, as well as in later Polish cases. Without

49. Opinion, paras. 112–114.
50. Judgment, paras. 249 and 250.
51. Opinion, para 212.
52. Ibid., paras. 190 and 216.
53. Ibid., paras. 212–225.
54. Ibid., paras. 222–223.

addressing the issue of its limits, the Court took Article 19 TEU as the legal basis for intervention by EU laws and as the norm setting the substantive standard of review. It used Article 47 CFR only as a source of inspiration when interpreting the content of Article 19 TEU. The CVM played only a marginal role, if any, in the Grand Chamber's reasoning.[55]

4. Comments

The *AFJR* judgment raises several important questions of EU law and Article 2 TEU values that extend well beyond the CVM, which is unique to Romania and Bulgaria. This section focuses on four aspects of the judgment that have significant repercussions for the development of the ECJ's "rule of law jurisprudence" and Article 2 values more generally. First, we discuss the ECJ's choice of the legal basis, namely its reliance on Article 19 TEU rather than the CVM and Article 47 CFR, as suggested by Advocate General Bobek. Second, we analyse the gravity threshold for triggering Article 19 TEU proposed by Advocate General Bobek and, yet again, not explicitly addressed by the ECJ. Third, we deal with the Court's deferential approach in the rule of law cases, discussing factors which might justify or at least explain it. Finally, we analyse the substantive position of the ECJ on the three liability regimes introduced by the Romanian judicial reforms and on the consequences of the *AFJR* judgment at the domestic level (in particular, what exactly national courts should consider when implementing the ECJ's rule of law case law).

4.1. *Uncertain legal basi(c)s*

The ECJ's case law on judicial independence has hitherto been underpinned by uncertainty as to the proper legal basis for assessing national measures.[56] This case was no exception. In fact, this case went even further than its predecessors, as the range of proposed legal provisions which could govern the assessment was extraordinarily wide. The referring national courts, the Advocate General, and the Court together referred to as many as *four* distinct

55. See section 4.1. *infra*.

56. See e.g. the interaction between the advocates general and the ECJ in Case C-64/16, *Portuguese Judges*; Joined Cases C-585, 624 & 625/18, *A. K. and others*; Case C-619/18 R, *Commission* v. *Poland,* EU:C:2018:1021 and EU:C:2019:575; Joined Cases C-558 & 563/18, *Miasto Łowicz*. See also Leloup, "An uncertain first step in the field of judicial self-government: ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, *AK, CP and DO*", 16 EuConst (2020), 163–165.

EU law provisions which could govern the assessment.[57] At the same time, the arguments for and against using various provisions were made more explicit and articulate compared to those in previous cases. Before analysing the Court's choice of the legal basis and its significance, it might be helpful to explore in more detail the different legal provisions which were on offer and the logic of their application.

4.1.1. *Possible legal bases*

The *first* possible legal framework for assessing the Romanian judicial laws was *the CVM Decision*. As recounted above, the Decision sets out the concrete commitments that Romania accepted when it was acceding to the EU: commitments related to the reforms in the field of the judiciary and the fight against corruption. Such commitments, as the Court held in the case being commented on, are legally binding on Romania, which means that any reform concerning the judiciary and the fight against corruption has to be in line with them.[58] For this reason, the Romanian legislation at hand concerning three mechanisms of judicial liability can be measured against the obligations set out in the CVM Decision.

The *second* EU law instrument which could have served as a legal basis for assessing the reforms was the EU Charter of Fundamental Rights. The arguments for applying this instrument were especially strong in this case, as the usual objections against employing the Charter were not present.[59] In the first place, the facts of the present case rendered the Charter clearly applicable. Being an implementation of the requirements laid down by the CVM Decision – a legal act of the EU[60] – the relevant Romanian legislation was a textbook example of measures "implementing Union law" in accordance with Article 51(1) CFR.[61] So the factor which is often said to chill interest in applying the Charter – its limited and uncertain scope of application[62] – was not a problem in this case. Also, in this case the Charter provided a good standard for an overall abstract assessment of the relevant Romanian laws. Some authors call the Charter unfit for systemic assessment

57. See Opinion, para 183. The referring national courts also mentioned two other provisions in the questions they put to the Court, viz. Arts. 9 and 67 TFEU. The Court, however, did not deal with these as they did not have any clear relevance for the cases at hand. See judgment, para 130.

58. Judgment, para 178.

59. See Opinion, paras. 189–203.

60. See Art. 288(4) TFEU.

61. See Opinion, para 190.

62. See Kochenov and Morijn, "Augmenting the Charter's role in the fight for the rule of law in the European Union: The cases of judicial independence and party financing", RECONNECT Working Paper No. 11 (2020), p. 12.

of rule of law problems.[63] By its nature, the Charter is said to be focused on individual violations of a fundamental *right*, unlike Article 19(1) TEU which sets out a *principle* allowing for a general, systemic assessment of the national measure.[64] The case commented on shows that this drawback is not inherent in the Charter. In this case, the Charter was not meant to be used as a source of a right for an individual litigant, but as a general, objective standard for reviewing the constitutionality of national legislation.[65] As an act of implementation of the CVM Decision, *the national legislation as such* was the measure that needed to respect the standards set out in the Charter, especially its Article 47 enshrining the right to effective judicial protection and judicial independence. In such a scenario, even the Charter would allow for an abstract assessment of the legislative scheme, an assessment detached from the situation of an individual.[66]

The *third* possible legal framework for assessing the relevant national laws was the second subparagraph of Article 19(1) TEU, which obliges the Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. Compared to that of the CVM Decision and the Charter, the applicability of Article 19(1) TEU is more universal. As the Court established in the seminal *Portuguese Judges* case, and has repeated a number of times since,[67] Article 19(1) TEU applies to all national courts irrespective of whether or not they are implementing EU law within the meaning of Article 51(1) CFR.[68] As the three judicial liability regimes assessed in the case at hand were all liable to influence the independence of national judges, and thus also the effectiveness of the legal protection that the national courts secure, the laws had to be in line with Article 19(1) TEU's requirements. Article 19(1) TEU, therefore, was yet another possible legal basis for assessing the relevant Romanian legislation.

Finally, the *fourth* possible legal basis was Article 2 TEU. This provision is the most general of the four legal bases. It enshrines the foundational values of the EU, including the value of the rule of law. *Portuguese Judges* as well as subsequent cases used this provision only in connection with Article 19(1) TEU, the latter giving "concrete expression to the value of the rule of law" set out in the former.[69] However, in *Repubblika*, a judgment issued only shortly

63. Ibid., p. 11.

64. Ibid.; Krajewski, "*Associaçâo Sindical dos Juízes Portugueses*: The Court of Justice and Athena's dilemma", 3 *European Papers* (2018), 403–404.

65. See the explanation offered by the A.G. in Opinion, paras. 198–202.

66. See ibid., para 202.

67. See e.g. Joined Cases C-585, 624 & 625/18, *A. K. and others*, para 82; Case C-791/19, *Commission* v. *Poland*, para 53.

68. Case C-64/16, *Portuguese Judges*, para 29.

69. Ibid., para 32.

before the case at hand was decided, the Court decoupled the two provisions and opened the way to a self-standing enforcement of Article 2 TEU.[70] Prohibiting the Member States from reducing the protection of the value of the rule of law as it did,[71] Article 2 TEU could therefore potentially also be used as a legal basis for assessing the compatibility of the Romanian legislation with EU law.

4.1.2. *Specificity or generalizability?*

Of the pile of possible legal frameworks, Advocate General Bobek recommended that the ECJ rely only on the CVM Decision and the Charter.[72] His reasoning for doing so consisted of what he called a "double *lex specialis*" argument.[73] First, under the terms of its accession, Romania had submitted itself to the CVM, a specific, "far-reaching and detailed legal framework" governing its obligations relating to the effective organization of the judiciary and the fight against corruption.[74] Assessing the case under the "much more general and basic" framework of Articles 19(1) and 2 TEU, therefore, would fail to reflect the fact that, owing to the existence of the CVM, Romania's situation is objectively different from that of other Member States.[75] Similarly, Article 47 CFR should, according to the Advocate General, be preferred to Articles 19(1) and 2 TEU, as the Charter provision is a "much more elaborate and detailed instrument" compared to the latter two: it was not just that Article 47 CFR explicitly refers to the independence of courts, but its content is also much more specific due to its mandatory link to the European Convention on Human Rights, as set out in Article 52(3) CFR.[76] All this means, according to the Advocate General, that using the not yet "well mapped" and "at present apparently limitless" Article 19(1) TEU (and *a fortiori* also Art. 2 TEU[77]) would constitute not only an unnecessary detour (as Art. 19(1) TEU is anyway read in the light of Art. 47 CFR) but also a potentially unsafe and unjust approach.[78]

The Court, however, did not follow the Advocate General's recommendation, but used Article 19(1) TEU as the main framework of

70. Case C-896/19, *Maltese Judges*. See Leloup, Kochenov and Dimitrovs, op. cit. *supra* note 7.

71. Case C-896/19, *Maltese Judges*, para 63.

72. See Opinion, para 220.

73. Ibid., para 221.

74. Ibid., paras. 215 and 224.

75. Ibid., para 224.

76. Ibid., paras. 216 and 225.

77. Ibid., para 225.

78. Ibid., paras. 221 and 224 (citing Aristotle, Bobek notes that "[i]njustice is believed to arise not only when similar situations are treated differently, but also when objectively different situations are treated alike.").

assessment. The CVM Decision played only an ancillary role. While it was cited as a legal ground in the Court's answers to two of the three questions concerning the three liability mechanisms, in both instances it only mirrored the general requirements of Articles 19(1) and 2 TEU.[79] Similarly, in the substantive analysis itself, the key role was assumed by Article 19(1) and its interpretation, with the content of the CVM Decision being mentioned specifically only once (in relation to the rules governing criminal proceedings against judges), and even there it was only to show that certain arrangements would offend "not only" the Article 19(1) TEU requirement "but also" the specific obligation placed on Romania by the CVM Decision.[80] It does not require much hypothesizing to argue that had there been no CVM mentioned in the judgment, the Court's conclusions as to the three liability mechanisms would have been the same.[81] It is as if the CVM Decision was subsumed into Article 19(1) TEU. An even more marginal role was played by the Charter, as it was not applied as a stand-alone instrument at all but, as in a number of previously decided cases,[82] only as a hermeneutic tool for ascertaining the content of Article 19(1) TEU.[83]

If the Advocate General's stance rested on the *lex specialis* argument, the ECJ's approach reflected an entirely opposite logic: the Court opted for a framework that is general and allows for uniform application across various Member States and situations. By grounding its decision mainly in Article 19(1) TEU, the Court ensured that a uniform rule of law framework governs all Member States, including those which *might be* thought to be subject to a special rule of law regime, arguably more detailed and demanding.[84]

On the one hand, such an approach might be criticized as ignoring Romania's special position. The Court's reliance on Article 19(1) TEU might be questioned from the point of view of its legal method and for the lack of respect shown for the political will reflected in Romania's accession agreements. The Court's decision also placed the requirements of the CVM

79. See the Court's fourth and fifth replies.

80. Judgment, para 214.

81. Dimitrovs and Kochenov, "Of Jupiters and Bulls: The Cooperation and Verification Mechanism as a redundant special regime of the rule of law", 61 *EU Law Live* (2021).

82. Case C-64/16, *Portuguese Judges*, para 41; Case C-791/19, *Commission* v. *Poland*, para 57.

83. See judgment, paras. 194, 198, 213, 221, 223 and 237, where the Charter seems to be invoked not as a standard directly applicable to the national measures, but as one which must be satisfied in order for the national measures to be consistent with Art. 19(1) TEU's requirement of judicial independence. The logic is that a liability mechanism violates judicial independence if the process for determining liability does not respect the rights of judges to effective judicial protection. Whether or not the Art. 51(1) conditions for the Charter's applicability were fulfilled was nowhere tested in the judgment.

84. See Moraru and Bercea, op. cit. *supra* note 10, 102.

Decision in a strange legal vacuum: the requirements of that act are binding but de facto irrelevant. The Decision sets out legal standards that have to be followed by Romania, but when it comes to the content of those standards, they do not provide for anything else than that which already stems from the generally applicable standards enshrined in Article 19(1) TEU.

On the other hand, from the broader perspective of the protection of the rule of law, the ECJ's approach may be sensible. There are two particular reasons possibly underpinning it. The first relates to the broader applicability of the Court's conclusions. By relying on Article 19(1) TEU instead of the CVM Decision or the Charter, the Court ensured that its analysis regarding the three liability mechanisms was directly and without further inquiry applicable to judiciaries in other Member States which are not subject to any mechanism such as the CVM or whose laws concerning the judiciary cannot be said to be implementing EU law and thus to be covered by the Charter. True, the Court's conclusions *could* be deemed to apply, at least in part, to other Member States even if the case was decided under the CVM Decision and the Charter. The point, however, is that such a generalization would not be automatic, but would require some argument comparing the requirements of the CVM Decision with those of Article 19(1) TEU. And that might create an escape route for those Member States that would like to cast doubt on the applicability of those standards to their situation. On the other hand, by relying on Article 19(1) TEU there cannot be any question that the Court, in the decision commented on, by elaborating on the three judicial liability mechanisms, contributed to generally applicable standards governing all judiciaries across the EU. In this way, the Court ensured that its judgment in the present case is not only, or not even mainly, about Romania; it is about the entire Union.

The second reason supporting the Court's universalistic approach is that subjecting Romania to a general framework might be considered more efficient and constitutionally justified. Over the 15 years for which the CVM has been in place, it has been consistently criticized for being inefficient and illegitimate.[85] As regards the former strand of criticism, observers considered the mechanism and its concrete benchmarks too technical and selective to bring a real-life improvement, a problem evidenced by the CVM's protracted

85. Pech and Kochenov, "Strengthening the rule of law within the European Union: Diagnoses, recommendations, and what to avoid", *Reconnect Policy Brief* (2019), 8; Dimitrov and Plachkova, "Bulgaria and Romania, twin Cinderellas in the European Union: How they contributed in a peculiar way to the change in EU policy for the promotion of democracy and rule of law", 22 *European Politics and Society* (2021); Spernbauer, "Benchmarking, safeguard clauses and verification mechanisms – What's in a name? Recent developments in pre- and post-accession conditionality and compliance with EU law", 3 *Croatian Yearbook of European Law & Policy* (2007), 273–306.

employment without any durable results.[86] As regards the legitimacy criticism, the CVM can be considered problematic from the standpoint of the equality of Member States. At the time of its adoption, the special rule of law regime for Romania was constitutionally justified because that country, together with Bulgaria, constituted a special case: a country which, compared to those countries which were already members of the EU, experienced systemic rule of law problems.[87] This special case justified a special mechanism, one that allowed the EU to control and monitor the steps taken to improve adherence to the rule of law in the country.[88] Now, 15 years later, the conditions underpinning this justification have changed. First, Romania is no longer a special case. Other Member States have experienced similar, if not worse, systemic rule of law problems.[89] Also, a special regime for monitoring rule of law compliance is no longer that special. In response to rule of law problems in several Member States, during the last decade the EU has developed legal tools for overseeing and protecting the rule of law in *all* Member States; tools which include, but are not limited to, Article 19(1) TEU and the Commission's Rule of Law Reports.[90] As a result, from a pragmatic and constitutional perspective, there are few reasons for sticking to the CVM as the main tool for protecting the rule of law in Romania.

All in all, what the case commented on does is to suggest the Court's preference for tackling rule of law problems within a single, universal framework. Instead of doing it in a framework which is specific, tailored-made, and retrospective, the Court prefers to use a framework which is unified, universally applicable, and forward-looking.

4.2. *Article 19: Searching for the limits*

By prioritizing such a universal legal framework, however, the ECJ increased the need to inquire into the exact requirements of Article 19(1) TEU. Like advocates general in earlier cases concerning that provision,[91] Advocate General Bobek even in this case argued that Article 19(1) TEU as such should not govern all of a Member State's measures potentially concerning judicial

86. See e.g. Toneva-Metodieva, op. cit. *supra* note 13; Dimitrov and Plachkova, op. cit. *supra* note 85.

87. Dimitrov and Plachkova, op. cit. *supra* note 85.

88. von Bogdandy and Ioannidis, "Systemic deficiency in the rule of law: What it is, what has been done, what can be done", 51 CML Rev. (2014), 59–96.

89. See e.g. Pech and Scheppele, "Illiberalism within: Rule of law backsliding in the EU", 19 CYELS (2017), 3–47.

90. For an overview of the EU's current rule of law toolbox see e.g. Maurice, "Protecting checks and balances to save the rule of law", 590 *European Issues* (2021).

91. See the Opinions of A.G. Tanchev in Case C-192/18, *Commission* v. *Poland (Independence of the ordinary courts)*, EU:C:2019:529, paras. 114–116, in Joined Cases

independence.[92] Instead, he argued that the reach of Article 19(1) TEU in situations which are not covered by any (other) Union law should be restricted to extraordinary cases that concern systemic deficiencies of the rule of law, that is only cases that reach a higher threshold of seriousness.[93] This reiterates his earlier Opinion in *Torubarov*, where he contended that application of Article 19(1) should be limited to "the issues of transversal, structural changes to the national judicial function ... which will by definition be indiscriminately applicable to any and all functions exercised by national judges".[94] By way of contrast, what should be outside the scope of that provision, according to Advocate General Bobek, are remedy-specific or procedure-specific issues – such as an isolated, specific measure concerning non-promotion of a certain judge – where the arguments and considerations relate to a discrete element of the judicial operation or set-up.[95]

In spite of the Advocate General's invitation, the ECJ once again remained silent. Does the Court's persistent silence mean that Article 19(1) has no limit? While some authors argue so,[96] this is not necessarily the case.[97] The Court's silence may mean not that Article 19(1) has no limits, but only that there has

C-585, 624 and 625/18, *A. K. and others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:551, paras. 145–152, and in Joined Cases C-558 & 563/18, *Miasto Łowicz*, para 125.

92. Opinion, paras. 222–223.

93. Ibid. See also his Opinion in Case C-556/17, *Torubarov*, EU:C:2019:626, paras. 52–55. See also Rossi, "La valeur juridique des valeurs: L'article 2 TEU", 3 RTDE (2020), 657.

94. A.G. Bobek's Opinion in Case C-556/17, *Torubarov*, EU:C:2019:626, para 54. See also A.G. Bobek's Opinion in Joined Cases C-748-754/19, *Prokuratura Rejonowa* v. *Mińsku Mazowieckim and others,* EU:C:2021:403, para 148.

95. Opinion in Case C-556/17, *Torubarov*, para 53; Opinion, para 222. For other possible concepts which might serve as limits on Art. 19(1) TEU's reach see e.g. von Bogdandy, "Principles of a systemic deficiencies doctrine: How to protect checks and balances in the Member States", 57 CML Rev. (2020), 705–740; Craig, "Definition and conceptualisation of the rule of law and the role of judicial independence therein", *Rule of Law in Europe –Perspectives from Practitioners and Academics* (2019), 11, and A.G. Tanchev's Opinion in Joined Cases C-558 & 563/18, *Miasto Łowicz*, para 125; or the 1503 procedure before the UN Human Rights Commission, E.S.C. Res. 1102, 40 U.N. ESCOR Supp. (No. 1) 6, U.N. Doc. E/4179 (1966). For a detailed analysis of how a modified version of the 1503 procedure can be employed to tackle institutional failure, see M. Hailbronner, *Institutional Failure* (forthcoming 2022).

96. Bogdanowicz and Taborowski, "How to save a Supreme Court in a rule of law crisis: The Polish experience: ECJ (Grand Chamber) 24 June 2019, Case C-619/18, *European Commission* v *Republic of Poland*", 16 EuConst (2020), 320; Leloup, op. cit. *supra* note 56, 165.

97. See Scarcello, "Effective judicial protection and procedural autonomy beyond rule of law judgments: *Randstad Italia*", 59 CML Rev., 1445–1464, annotation of Case C-497/20, *Randstad Italia SpA* v. *Umana SpA and others*, EU:C:2021:1037, who shows how the ECJ carefully avoided potentially grand issues under Art. 19(1) TEU and issued a "business-as-usual" judgment.

not yet been a suitable case for spelling the limits out. Looking at the case law with the two categories proposed by Advocate General Bobek in mind, it is possible to argue that many, if not all, of the cases concerning judicial independence in which the Court has so far applied Article 19(1) TEU have passed that threshold, as they all in one way or another concerned generally applicable legislative schemes (e.g. governing the selection,[98] dismissal,[99] or remuneration[100] of judges) or the independence and functioning of institutions central to the functioning of the judiciary as a whole (such as judicial councils[101] or disciplinary chambers[102]). Besides being a side effect of the judicial case-by-case construction, the Court's silence on the limits of Article 19(1) might also be a part of a judicial strategy. Postponing an articulation of Article 19(1) TEU's limits might be motivated, yet again, by the Court's reluctance to offer an easy escape route for those eager to avoid oversight by EU law even in those situations where such oversight is mandated.[103]

Be that as it may, the issue concerning the limits of Article 19(1) TEU seems to be far from settled. The internal discussion on this issue among the members of the Court is clearly ongoing and it may be that one needs only to wait for a suitable case for some limits to Article 19(1) TEU to emerge.

4.3. *Too much deference?*

In general, the ECJ remained rather deferential in its substantive position on all three judicial liability reforms. For each liability mechanism, it spelled out a particular test of judicial independence. However, all three tests remained very general and balancing in nature. The ECJ suggested some factors that might be "especially relevant," but ultimately left the final assessment to the referring courts. In doing so, it created another "preparatory judgment".[104]

While the ECJ is often criticized for its overly deferential preliminary rulings concerning rule of law issues,[105] arguably there are several factors

98. Case C-896/19, *Maltese Judges*.

99. Case C-619/18 R, *Commission* v. *Poland*.

100. Case C-64/16, *Portuguese Judges*.

101. Joined Cases C-585, 624 & 625/18, *A.K. and others*.

102. Case C-791/19, *Commission* v. *Poland*.

103. Note that ECJ's judicial strategy may also be skillfully used to achieve opposite ends. By leaving Arts. 4(3) and 19(1) TEU for major malfunctions, the ECJ may avoid unnecessarily acting as an arbitrator on internal constitutional disputes, see Scarcello, op. cit. *supra* note 97.

104. Krajewski, and Ziólkowski, "EU judicial independence decentralized: *AK*", 57 CML Rev. (2020), 1127.

105. Leloup, op. cit. *supra* note 56; Krajewski, "Who is afraid of the European Council? The Court of Justice's cautious approach to the independence of domestic judges: ECJ 25 July 2018, Case C-216/18 PPU, *The Minister for Justice and Equality* v *LM*", 14 EuConst (2018), 792–813.

explaining why, at least in some cases, the Court's deferential approach may be a conscious and prudent choice, and *AFJR* may be one such case.

First, *AFJR* is the first chapter in the Romanian rule of law saga; it would be unwise to overshoot in the very first ruling and adopt too stringent standards in a highly volatile Romanian context. Incrementalism is a safer strategy at this stage.

Second, the ECJ's judicial independence test calls for a highly contextual and fact-sensitive assessment, for which the ECJ itself may not have enough information and capacity. The ECJ knows that it is not just the rules that matter, but also the facts and context of the measures in question. Only after all legal and factual circumstances surrounding the judicial measure have been assessed, is it possible to balance the arguments and conclude that this measure preserves or impairs the appearance of judicial independence. However, such exercise requires an in-depth knowledge and understanding of the legal and factual circumstances surrounding the establishment and operation of the measure, as well as the national history, traditions, and shared meaning of specific institutions and procedural arrangements. For that, the national actors – provided that there are still some willing and able to do the job properly – are better placed.

Third, the preliminary ruling procedure may not be the best for providing the ECJ with reliable information, in particular in judicial independence cases. This is partly due to the nature of the procedure itself, which is designed not as a fact-finding procedure, but as one purely concerned with an interpretation of EU law.[106] However, the main elephant in the room is the reliability of the information submitted by the national court in issues concerning judicial independence. While in other scenarios, domestic judges are indisputably considered to be independent arbiters of fact, when they are themselves under attack they may no longer be "impartial thirds".[107] They may fear the possible consequences of their decision[108] and sometimes even downplay the scale of the problem. On the other hand, they may be deeply involved in the matter and thus tend to present the facts in a certain way when exercising their "judicial self-defence".[109] Advocate General Bobek suggests this by pointing to the "sensitive issue of the verification of statements concerning the actual application and the actual national practice which is based on the case file and arguments presented before the Court".[110] Based on

106. See Art. 267(1) TFEU.

107. Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981).

108. See Case C-558/18, *Miasto Łowicz*, para 41, where the referring judge spells out fear of the personal consequences of his rulings.

109. Barber, "Self-defence for institutions", 72 CLJ (2013), 558–577.

110. Opinion, para 245.

such facts, the ECJ may be hesitant in providing a conclusive assessment in rule of law preliminary ruling proceedings and instead prefer to adjudicate rule of law cases in infringement proceedings, as already noticed by some commentators.[111]

Fourth, the ECJ's "prudential avoidance"[112] – not giving the exact solution to national courts, a practice which would harmonize judicial organizations across Europe – respects national autonomy and constitutional pluralism.[113] In fact, certain aspects of the judiciary's institutional organization, such as their particular models of accountability,[114] may rather quickly cut close to the national constitutional identities the EU must respect.[115] Also, the ECJ may be aware that domestic actors hold the key to the ECJ's ability to affect the rule of law at the domestic level.[116] Deference, thus, may show respect for other actors (than judges) at the national level such as the legislature, the executive, or "fourth branch" institutions, and their assessment of the challenged judicial reforms. This argument, of course, presupposes that there are at least *some* national actors willing and able to implement the ECJ's ruling. In this respect, the deference in the *AFJR* case may have been a smart choice if the Court expected the new Romanian Government to dismantle the problematic reforms through traditional legislative and executive actions.[117] Thus, it may be strategic to provide general principles at the ECJ level and let the coalition of domestic actors willing and able to comply with the ECJ rulings fine-tune them. If this coalition fails to implement the ECJ's principles, there is always time to tighten the screws. Such an approach also follows the Elyian logic of judicial review[118] – where it seems likely that there will be other, more

111. Cf., e.g. Platon, "Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence of national courts: *Miasto Lowicz*", 57 CML Rev. (2020), 1863–1865.

112. Halberstam, "Understanding national remedies and the principle of national procedural autonomy: A constitutional approach", 23 CYELS (2021), 128–158.

113. von Bogdandy, op. cit. *supra* note 95, 733; Krajewski and Ziólkowski, op. cit. *supra* note 104, 1116.

114. This is particularly relevant for the personal liability of judges; see judgment, para 229.

115. Halberstam, op. cit. *supra* note 112.

116. Here, we paraphrase Courtney Hillebrecht who uses the same argument regarding compliance with the ECtHR judgments. Hillebrecht, "The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change", 20 *European Journal of International Relations* (2014), 1108.

117. This expectation, however, has not materialized so far. See the last Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM(2021)370 final of 8 June 2021.

118. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).

democratic means to address a broader problem, the ECJ should not intervene in an expansive manner.[119]

That said, a sceptic might still ask what exactly is the point of preliminary references in rule of law oversight? We see at least three values in the involvement of the ECJ by domestic judges. First, the ECJ announces and develops centralized tests which should be applied as a matter of EU law, even if they are open and quite abstract. In doing this, the ECJ unifies and structures debates on judicial governance across Europe. Second, by submitting preliminary references, domestic judges act as whistleblowers who inform the EU bodies that the rule of law may be coming under pressure in a given Member State. Such fire-alarm oversight is valuable, in particular to the Commission, as it is less costly and time-consuming than a comprehensive police-patrol oversight.[120] Third, and perhaps most importantly, direct effect and primacy give the national courts tools to correct infringements, directly and effectively, that they might otherwise lack under purely national law or by reference to the ECHR. Here, as elsewhere, it is often the enforcement tools of EU law, rather than its substantive legal principles or standards per se, that are most valuable to domestic stakeholders. This may also explain why the ECJ in the *AFJR* judgment also replied to the last question concerning the primacy of EU law *vis-à-vis* the case law of the Romanian Constitutional Court. In doing so, it provided judges of ordinary courts with EU-backed tools, to use against other national constitutional bodies which might potentially harass them.

4.4. *The three liability regimes, three tests and what to do with them at the national level*

The core of the substantive Romanian judicial reforms addressed by the ECJ concerned the three liability regimes applicable to judges – civil, disciplinary, and criminal. From the judicial governance point of view, abusive disciplining of judges has already been widely addressed by both the ECJ[121] and ECtHR,[122] but the Romanian reforms of civil and criminal liability of judges raised several novel issues.

119. See Hailbronner, op. cit. *supra* note 95.

120. See generally, McCubbins and Schwartz, "Congressional oversight overlooked: Police patrols versus fire alarms", 28 *American Journal of Political Science* (1984), 165.

121. See in particular Joined Cases C-585, 624 & 625/18, *A. K. and others.*

122. This case law is abundant. See for some recent high-profile examples, ECtHR, *Ramos Nunes de Carvalho e Sá* v. *Portugal*, Appl. No. 55391/13, judgment of 6 Nov. 2018; and ECtHR, *Eminağaoğlu* v. *Turkey*, Appl. No. 76521/12, judgment of 9 March 2021. For earlier case law, see Kosař and Lixinski, "Domestic judicial design by international human rights courts", 109 AJIL (2015), 713, at 735–739.

Regarding disciplinary liability, the main novelty of *AFJR* is that not only the disciplinary body that ultimately decides on the disciplinary offence, but also the body that *initiates* disciplinary proceedings matters. While the ECJ still accepts, given the variety of existing European models of judicial discipline, that a body appointed by the executive (e.g. a general prosecutor, judicial inspector, or court president) may trigger disciplinary motions against magistrates,[123] and even that a "lame duck" senior disciplinary officer must sometimes remain in office until a new one is appointed,[124] such a disciplinary officer must "act objectively and impartially in the performance of its duties and . . . be free from any external influence".[125] Any disregard of the ordinary appointment procedure of such "disciplinary prosecutors" is then a "smoking gun" of a potential abuse of disciplinary proceedings as an instrument to exert pressure on judges and prosecutors.[126] This is in line with the ECtHR's case law, which makes clear that flagrant procedural violations in key decisions on judicial careers violate judicial independence.[127]

The criminal liability of magistrates is undertheorized in most West European countries, as it is rarely used and its system has never been truly tested. In contrast, countries fighting widespread corruption, such as Romania or Slovakia, have to learn how to handle judicial corruption, often by trial and error. The creation of a special criminal unit within the office of Public Prosecutor to deal exclusively with offences committed by magistrates is a rather unique design choice, but, according to the ECJ, it may be in accordance with EU law values. However, it must meet a three-pronged test: (1) it must be necessary for the sound administration of justice; (2) it cannot be used as a system of political control over magistrates; and (3) it must fully safeguard Articles 47 and 48 CFR, including with regard to the reasonable length of criminal proceedings against accused magistrates.[128] While the third criterion is clear and the second already reasonably analysed in the ECJ's case law, the "sound administration of justice" might be difficult to operationalize. It is notoriously difficult to get the new judicial institutions up and running; and proving actual malice by the creators of the new institution is often impossible. Moreover, judicial reforms can often miss the target or the factual situation underpinning a new institution may change suddenly. Even the

123. Judgment, para 202.
124. Ibid., para 203.
125. Ibid., para 199.
126. Ibid., para 205.
127. ECtHR, *Guðmundur Andri Ástráðsson* v. *Iceland*, Appl. No. 26374/18, judgment of 1 Dec. 2020; ECtHR, *Xero Flor* v. *Poland*, Appl. No. 4907/18, judgment of 7 May 2021.
128. Judgment, paras. 213 and 221.

expansion of the General Court, which led to heated debates within the ECJ,[129] was perhaps in retrospect, due to the General Court's reducing docket, not even necessary.

Civil liability has also attracted far less attention from scholars than the usual suspects of judicial governance, such as the selection and disciplining of judges.[130] Even supranational associations of judges usually spend only a few lines on this accountability mechanism.[131] State liability for judicial errors does not pose many problems.[132] Judges make decisions within real-world constraints, such as imperfect information and uncertainty, cognitive limitations and erroneous information, and often under time pressure due to overloaded docket.[133] Thus, judicial errors inevitably arise. However, the individual civil liability of judges for judicial errors is tricky and entails a risk of interfering with judicial independence.[134] The shaky procedural rules and the problematic *application* of the Romanian reform regarding the personal liability of judges analysed in the *AFJR* judgment clearly identify that risk. Luckily, the ECJ did not throw the baby out with the bathwater, and found that neither the personal liability of judges nor the reformed definition of judicial error, worded in abstract and general terms, was in itself capable of raising suspicions of external political pressure.[135] According to the ECJ, the guarantee of judicial independence does not require the absolute immunity of judges for acts performed in the exercise of their judicial duties.[136] This view is in line with existing scholarship. One should not forget that immunity from personal liability of judges has been curtailed in several countries, such as Italy, in good faith in order to address poor administration of justice.[137] Economists also suggest that individual liability for "inexcusable judicial error" is a helpful tool in inducing judges to maintain high professional

129. Alemanno and Pech, "Thinking justice outside the docket: A critical assessment of the reform of the EU's court system", 54 CML Rev. (2017), 129; Robinson, "The 1st rule of ECJ fight club…is about to be broken", *Financial Times: Brussels Blog* (27 April 2015), available at <www.ft.com/content/b3979694-b42b-38b4-b1a7-dddbdb2c1878>.

130. For exceptions, see Haley, "The civil, criminal and disciplinary liability of judges", 54 AJIL (2006), 281; Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press, 2016), pp. 73 and 82; and Benvenuti, "The politics of judicial accountability in Italy: Shifting the balance", 14 EuConst (2018), 387–390.

131. See International Association of Judges (IAJ-UIM), Conclusions on Civil Liability of Judges: Meeting in Vienna, 9–13 Nov. 2003.

132. Judgment, paras. 226–227.

133. Tsaoussi and Zervogianni, "Judges as satisficers: A law and economics perspective on judicial liability", 29 *European Journal of Law and Economics* (2010), 333–357.

134. Judgment, paras. 226–227.

135. Ibid., paras. 228–229 in conjunction with para 241.

136. Ibid., para 234.

137. See Benvenuti, op. cit. *supra* note 130, 388.

standards.[138] The most problematic aspect of the Romanian civil liability reform was rather the lack of adequate safeguards and guarantees of the fair trial rights of judges indicted for judicial error, as a finding of judicial error, made in proceedings to establish the State's financial liability and without the judge concerned having been heard, was binding in subsequent proceedings relating to an action for indemnity to establish the personal liability of that judge.[139] Only the future will tell whether the ECJ will delve in more detail into what kind of gross negligence may give rise to the personal liability of judges. So far, the ECJ has exhibited "prudential avoidance".[140]

Leaving aside the subtleties of each liability regime, a bigger question that goes beyond the *AFJR* judgment looms large: what should the national courts do on getting such an abstract answer from the ECJ, and how should they apply the ECJ's tests? With only a very general assessment at the ECJ level regarding all three liability regimes, the burden of applying these abstract principles to concrete cases lies on the shoulders of the Romanian courts. What is puzzling is that the ECJ talks about necessary guarantees of judicial independence provided by *rules*, but then asks national courts also to look at *facts* and all relevant *contexts*.[141] The ECJ thus clearly prefers contextual rule of law adjudication. Yet it does not make clear what exactly should be assessed. Rules, practice, or both? And what is the relationship between these elements in each test?

Advocate General Bobek digs more deeply into this and offers three models of what should be assessed:[142] (1) the "paper assessment only" model, which means an assessment of formal institutional design in a general and abstract way;[143] (2) the "paper as applied" model which takes into account problems or potential misuse of the formal setup in practice;[144] and (3) the "practice only" or "paper is worthless" model, which accepts that specific enforcement of an otherwise solid model in conjunction with the practical legal and institutional context of a Member State makes the formal model irrelevant, since it is structurally misused.[145] The second and third models might also include informal institutions, but Advocate General Bobek eventually opts for a version of the "cumulative effects doctrine",[146] and argues that even though a contested provision may be considered to be correct when viewed in isolation,

138. Tsaoussi and Zervogianni, op. cit. *supra* note 133, 357.
139. Judgment, para 241.
140. Halberstam, op. cit. *supra* note 112.
141. See e.g. judgment, paras. 196 and 206.
142. Opinion, paras. 241–243.
143. Ibid., para 245.
144. Ibid., para 246.
145. Opinion, para 247.
146. See in particular judgment, paras. 214, 221–222.

it may be highly problematic when considered in relation to other relevant elements of the system.[147] The ECJ does not say explicitly which of Bobek's three models it prefers. Implicitly, however, it seems to recognize that all three models are relevant and points to the need to assess all relevant legal and factual contexts.[148]

This connects with the "doctrine of appearances" that is well embedded in the judicial independence and impartiality case law of the ECtHR[149] and has found its way also into the ECJ's case law.[150] Under this doctrine, what is analysed is still the rule, but not in isolation – instead, in its appearance in the relevant context. Indeed, reading the ECJ's *AFJR* judgment in the light of the Opinion of Advocate General Bobek, who suggests that "everything could be misused",[151] the assessment seems to require national judges to lay down concrete grounds for establishing that the particular rules have been, or might be, misused. So the very same rule may be problematic in one set of legal and factual settings, but quite functional in another. For instance, the secondment of judges to the Ministry of Justice in Germany and Austria may be compatible with the EU's values, while in Czechia or other post-communist countries it may not be, by reason of the risk of personal corruption.[152] The same may apply to the concept of the right to a lawful judge and the role of court presidents, understandings of both of which vary considerably across the EU.

Such contextual judging at the European level entails two risks. First, it seems like quite a tough test to apply. Indeed, it asks rank-and-file judges to understand the whole system and its working, even at the highest and partly invisible constitutional level, and assess its impact. That would be a daunting task even for Dworkin's Hercules.[153] Secondly, it may make the ECJ easily criticizable for introducing double standards on a thin factual basis, incomplete information about the domestic practice and doctrine, and a rather subjective doctrine of appearances. In that respect, the ECJ is in a far more difficult situation than domestic constitutional courts.

147. Opinion, para 248.

148. Rodríguez, "Poland before the Court of Justice: Limitless or limited case law on Art. 19 TEU?", 5 *European Papers* (2020), 331–346.

149. ECtHR, *Kleyn and others* v. *Netherlands*, Appl. No. 39343/98, judgment of 6 May 2003, para 191; Appl. No. 55391/13, *Ramos Nunes* cited *supra* note 122, paras. 144–145, 147 and 149; ECtHR, *Fruni* v. *Slovakia*, Appl. No. 8014/07, judgment of 21 June 2011, para 141.

150. See e.g. Joined Cases C-585, 624 & 625/18, *A. K. and others,* paras. 128–129. Opinion, paras. 232–233.

151. Opinion, para 248.

152. See Judgment of the Constitutional Court of the Czech Republic of 18 June 2002, case no. Pl. ÚS 7/02; and Judgment of the Constitutional Court of the Czech Republic of 6 Oct. 2010, case no. Pl. ÚS 39/08, § 46–49.

153. Dworkin, *Law's Empire* (Harvard University Press, 1986).

5. Conclusion

At first sight, *AFJR* did not bring much that was new to the general development of EU law. The Court of Justice affirmed the established case law on judicial independence, specified the general standard for the three liability regimes applicable to judges, and, yet again, left unanswered the Advocate General's proposal to limit the scope of Article 19 to issues of a systemic nature (and has done so consistently ever since[154]) and bring more life to Article 47 CFR. Yet, the judgment brings important lessons for the EU law's oversight of the rule of law in Member States. Perhaps the most important lesson relates to the legal framework in which the Court conducts its assessment. On the one hand, the Court held that the CVM Decision is part of binding EU law, which was rather expected. This finding should not be underestimated in these tumultuous times,[155] which may in some scenarios hasten the accession of other corruption-marred (Balkan) countries to the EU. On the other hand, the legal requirements of the CVM applicable in Romania have been de facto subsumed under general requirements of Article 19(1) TEU. While by such a move the Court created a single, universally applicable rule of law framework applicable across the EU, it also put the relevance of, and the need for, such a special rule of law mechanism in question.

AFJR also shows that Romanian judicial reforms are extremely complex and do not follow the Hungarian and Polish playbook. They are not about the outright capture of the judiciary, but they still present a threat to the rule of law because of their cumulative effects. In our opinion, it is the "cumulative effects doctrine",[156] which is already well-established in comparative constitutional law,[157] which may in the long run become the most important effect of *AFJR* in ECJ case law. If used aptly, this doctrine may become yet another part of the ECJ's toolbox to ensure the rule of law in the EU's Member States. The slightly later judgment in Case C-791/19, *Commission* v. *Poland*, concerning the

154. See e.g. Joined Cases C-748-754/19, *Prokuratura Rejonowa* v. *Mińsku Mazowieckim and others*, EU:C:2021:931.

155. We are aware that many EU Member States have been reluctant to accept a further enlargement of the EU, but the Russian invasion of Ukraine and the ensuing war may change their minds. If the EU decides to strengthen its alliances in the Balkans and, potentially, also in Ukraine itself, accession might become one of the ultimate ways to help some of those countries out of the Russian sphere of influence.

156. See in particular judgment, paras. 214, 221–222.

157. See e.g. Roznai, "The straw that broke the constitution's back? Qualitative quantity in judicial review of constitutional amendments" in Linares-Cantillo, Valdivies-Leon and Garcia-Jaramillo (Eds.), *Constitutionalism: Old Dilemmas, New Insights* (OUP, 2021).

Disciplinary Chamber of the Polish Supreme Court, has already shown how helpful this doctrine may be.[158]

As for the Romanian cases before the ECJ, it seems that they will not disappear from its docket for a while yet. In fact, they may well become the test of whether the ECJ's evolving case law on judicial independence and court organization may provide workable solutions on the ground. In this respect, the Romanian cases are potentially a minefield. Since Romania is an understudied jurisdiction, we know too little about Romanian (judicial) politics. The continuous rhetoric of the fight against corruption, with its susceptibility to being misused instrumentally for short-term political goals, further complicates the implementation of any reform. In this highly complicated environment, it is far more difficult to identify "good guys" and "bad guys" and their motivations than in Hungary and Poland.[159] The ECJ also faces the risk of alienating yet another constitutional court in one of its Member States. This risk has already materialized in the sequels to *AFJR*.[160] This may sound like an inevitable consequence, but one should be aware of the fact that the ECJ cannot enforce EU law efficiently in the long run without the help of domestic constitutional courts.[161]

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158. See Case C-791/19, *Commission* v. *Poland*, in particular paras. 103, 112 and 146. See also Joined Cases C-748-754/19, *Prokuratura Rejonowa*, in particular paras. 74 and 87.

159. See e.g. Iancu, "Hidden continuities?: The avatars of 'judicial lustration' in post-communist Romania", 22 GLJ (2021), 1209–1230.

160. See in particular Romanian Constitutional Court, Decision No. 390 of 8 June 2021 published in the Official Gazette of Romania No. 612 of 22 June 2021. On the commented judgment's aftermath at the national level, see Moraru and Bercea, op. cit. *supra* note 10, 103–113.

161. Komárek, "National constitutional courts in the European constitutional democracy", 12 I-CON (2014), 525–544.

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