RECONNECT

Reconciling Europe with its Citizens through Democracy and Rule of Law

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Upholding the Rule of Law within the EU

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Ladies and gentlemen,

It is a great honour for me to deliver the keynote speech at this conference organised by RECONNECT, the multidisciplinary research project on ‘Reconciling Europe with its Citizens through Democracy and the Rule of Law’. I am also grateful to the Leuven Centre for Global Governance Studies, which is one of the 18 academic partners of RECONNECT, for hosting this conference.

With an explicit focus on strengthening the European Union’s (EU) legitimacy through democracy and the rule of law, RECONNECT seeks to build a new narrative for the European Union in order that it may be better equipped to meet the expectations of its citizens.

Against that backdrop, my purpose today is to focus on the important role that national courts and the Court of Justice of the European

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Union ('Court of Justice') play in upholding the rule of law within the EU.

The rule of law is so fundamental to our multilayered system of democratic governance that when reflecting upon its importance one hardly knows where to begin. It is, quite simply, the bedrock on which our democratic societies are built. Indeed, it is thanks to the rule of law that our democracies may be said to have a government of laws not of men and, as such, they cannot function properly without it.

The rule of law is the only reliable bulwark against the arbitrary exercise of power and means, in essence, that any legal dispute must be resolved in accordance with – and *only* in accordance with – the applicable norms provided for by law.

In the EU legal order, that is certainly the case. The rule of law is one of the values – listed in Article 2 TEU – on which the EU is founded. As the Court of Justice held in 1986 in its seminal *Les Verts*[1] judgment, the rule of law within the EU means that neither the EU institutions nor the Member States are above EU law.

Be it at national or European level, the rule of law also means that it is for an 'independent umpire' to determine what the law is. The very idea of justice itself is thus inextricably linked to the existence of independent courts upholding the rule of law.

[1] Judgment of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166, para. 23.

Today I shall therefore focus on one essential component of the rule of law within the EU – judicial independence – and, more particularly, on the way in which that independence is guaranteed under EU law.

To that end, I shall divide my speech into two parts that mirror the EU's system of 'dual vigilance' under which the judicial protection of EU rights is achieved:

First, I shall look at the preliminary reference mechanism under Article 267 TFEU as a means of protecting judicial independence through judicial dialogue between national courts and the Court of Justice.

Second, in the light of the Court of Justice's judgment in *Commission v. Poland*, I shall look at infringement actions brought by the European Commission as a direct remedy against any failure of the Member States properly to respect judicial independence.

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To begin with, the preliminary reference mechanism, which is the 'keystone' of the EU judicial system, enables national courts to engage in a dialogue with the Court of Justice. That dialogue is not based on hierarchical principles, but on a division of responsibilities.

Whilst it is for the Court of Justice *to say what the law of the EU is*, in order to ensure that 'in the interpretation of the Treaties the law is

observed',[2] it is for national courts *to apply that law* to the cases that come before them.

Whenever a national court has doubts as to how it should interpret an EU act, it is entitled – or in certain circumstances required – to seek guidance from the Court of Justice; the answer provided is authoritative and binding not only in the particular proceedings at hand but also in all other cases where that same act is applied.

Moreover, in order to guarantee the coherent and uniform application of EU law, the Court of Justice enjoys – together with the General Court – exclusive jurisdiction to carry out the judicial review of secondary EU law. Where, in national proceedings, a national court has doubts concerning the validity of an act of secondary EU law, that court should not itself review the legality of that act, but must refer the matter to the Court of Justice.[3] Conversely, where judicial review of an EU act is carried out in the context of a direct action at EU level, it is normally the General Court that has jurisdiction subject to an appeal on points of law to the Court of Justice.

Consequently, judges, both at national and EU level, are called upon to play a pivotal role in preserving the rule of law within the EU.

[2] Article 19(1) TEU

[3] Judgments of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452 and of 6 December 2005, *Gaston Schul Douane-expediteur*, C-461/03, EU:C:2005:742, para. 17.

By means of the preliminary reference mechanism, the Court of Justice and national courts engage in a dialogue based on the law and on the law alone.

Its successful operation thus depends on courts at both those levels being insulated from any form of pressure that might cause them to 'bend' the law and thus prevent them from impartially delivering substantive justice. Accordingly, the rule of law within the EU may only be upheld by courts that are truly independent.

The independence of national courts thus has a European dimension. National courts that are *not* independent cannot ensure effective judicial protection for EU rights. Nor can they guarantee the uniform and coherent application of EU law since they cannot have access to the preliminary ruling mechanism.

The question that thus arises is whether EU law may protect national courts whose independence is under threat from the political branches of government. The Court of Justice was confronted with precisely that question in the seminal *Juízes Portugueses*[4] case, sometimes referred to in English as the '*Portuguese Judges Case*', in which that court, sitting in Grand Chamber, held that Article 19 TEU *may* be relied upon in order to set aside national measures that call into question the independence of the national judiciary.

[4] Judgment of 27 February 2018, C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.

The facts were as follows. In the context of the 'Euro-crisis', Portugal passed a law that sought to cut public spending by reducing the salaries of public office holders, including members of the judiciary, in this case the members of the Portuguese Court of Auditors. The Union of Portuguese Judges, acting on behalf of the members of the Court of Auditors, brought legal proceedings against the acts implementing that legislation, arguing that those salary-reduction measures threatened the judicial independence of those members, as guaranteed by Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

Consequently, the Court of Justice was asked by the Portuguese Supreme Administrative Court (Supremo Tribunal Administrativo) whether the principle of judicial independence, as enshrined in EU law, precludes such salary-reduction measures.

In its judgment, the Court of Justice found, in essence, that such measures did not entail any breach of judicial independence: they were justified by mandatory requirements linked to the elimination of Portugal's excessive budget deficit; they were limited to a certain percentage of salary, varying in accordance with the level of remuneration; they were temporary in nature, and, most importantly, they did not target the judiciary specifically, but were part of a comprehensive package of measures affecting public officials generally, whose purpose was to cut spending in the public sector.[5]

[5] *Ibid.*, paras 46 to 50.

Judicial independence is *also* important for the proper functioning not only of the preliminary ruling mechanism, but also of judicial cooperation in civil and criminal matters in the Area of Freedom, Security and Justice (the 'AFSJ').

This cooperation enables decisions of the courts of one Member State to be recognised and enforced in other Member States. Judicial decisions thus acquire a cross-border reach.

Mutual recognition of court decisions is only possible where the court that issued the decision in question and the court that is to recognise and enforce that decision trust each other. More specifically, the courts of the executing Member State must trust that the courts of the Member State of origin provide effective judicial protection for the fundamental rights of the individuals concerned.

Mutual trust requires that in areas falling within the scope of EU law, courts in Sweden or Lithuania must offer a level of protection of fundamental rights that is as effective as that provided in Portugal, Austria or Croatia. It is mutual trust that makes mutual recognition of judicial decisions possible.

However, mutual trust must not be confused with blind trust. Under certain exceptional circumstances, it may be concluded that mutual trust has been breached in such a manner that limitations on certain forms of mutual recognition are warranted.

I shall illustrate this point by looking at the seminal judgment of the Court of Justice in *LM*.[6]

The facts of that case may be summarised as follows. Polish courts issued three European Arrest Warrants under the Framework Decision[7] against a Polish national for the purpose of conducting criminal prosecutions for drug trafficking. On that basis, that person was detained by the Irish authorities and remanded in custody. However, he objected to his surrender to Poland on the ground that it 'would expose him to a real risk of a flagrant denial of justice on account of the lack of independence of [Polish courts] resulting from implementation of the recent legislative reforms of the system of justice in that Member State'.[8]

The High Court of Ireland, which was the judicial authority responsible for executing the Europeans Arrest Warrants, found that the arguments put forward by the applicant were not totally unfounded. In particular, the Venice Commission had issued two opinions regarding the rule of law in that Member State.[9] Similarly, the European Commission had, in accordance with Article 7(1) TEU,

[6] Judgment of 25 July 2018, *LM (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586.

[7] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

[8] Judgment of 25 July 2018, *LM (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, para. 46.

[9] Opinion of the Venice Commission No 904/2017 of 11 December 2017 on the Draft Act amending the Act on the National Council of the Judiciary, on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the organisation of Ordinary Courts; and Opinion of the Venice Commission No 892/2017 of 11 December 2017 on the Act on the Public Prosecutor's office, as amended ('the opinions of the Venice Commission'). These documents are available on the Venice Commission's website at the following address: <http://www.venice.coe.int/webforms/events/>.

issued a reasoned proposal regarding the rule of law in Poland,[10] in which it urged the Council to determine that there was a clear risk of a serious breach by Poland of the values on which the EU is founded.

In the light of those circumstances, the High Court of Ireland asked the Court of Justice whether it was under an obligation to execute those European Arrest Warrants.

At the outset, the Court of Justice examined a question of principle: can the executing judicial authority refrain from executing a European Arrest Warrant where there is a real risk that the right to an independent tribunal and, consequently, the right to a fair trial of the person who is the subject of such a European Arrest Warrant may be infringed? The Court of Justice replied in the affirmative.

In what is in my view the most important passage of that judgment for present purposes, the Court of Justice held, and I quote, that 'the requirement of judicial independence forms part of the *essence* of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded'.[11]

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[10] Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final.

[11] Judgment of 25 July 2018, *LM (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, para. 48.

Next, drawing on its previous ruling in *Aranyosi and Căldăraru*,[12] the Court of Justice held that the executing judicial authority must carry out a two-step assessment. The first step focuses on the situation of the system of justice of the Member State concerned as a whole, whilst the second step looks at the circumstances of the case at hand.

As a first step, the executing judicial authority must examine, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State, whether there is a real risk, relating to a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the essence of the right to a fair trial being breached. In so doing, the executing judicial authority must look at both the internal and external aspects of independence.[13]

If such a risk exists, the executing judicial authority must, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his or her surrender to the issuing Member State, the requested person will run the risk of the essence of his or her right to a fair trial being breached.[14]

To that end, that authority must examine whether the systemic or generalised deficiencies are liable to affect the courts that have

[12] Judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198.
[13] Judgment of 25 July 2018, *LM (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, para. 61.
[14] *Ibid*., para. 68.

jurisdiction over the proceedings to which the requested person will be subject. If that is so, the executing judicial authority must then determine whether there is a risk of the essence of that person's right to a fair trial being breached, having regard to his or her personal situation, as well as to the nature of the offence for which he or she is being prosecuted and the factual context that forms the basis for the European Arrest Warrant.[15]

After the ruling of the Court of Justice in *LM* was delivered, the High Court requested further information regarding the state of the rule of law in Poland from the Polish courts that had issued the European Arrest Warrants in question. Upon receiving that information, the High Court finally decided to execute the European Arrest Warrants.[16]

The High Court reasoned that, although recent reforms had given rise to systemic deficiencies in the Polish justice system, there was no evidence to show that any other aspect of the fair trial right – such as the right to know the nature of the charge, the right to counsel, the right to challenge evidence and the right to present evidence – was at risk in Poland.[17]

It follows from that concrete example that judicial independence in the AFSJ is of paramount importance for the free movement of judicial decisions because only courts that are independent are able to attain the high level of trust that such movement requires.

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[15] *Ibid.*, paras 74 and 75.
[16] Appeal pending before the Supreme Court of Ireland.
[17] *The Minister for Justice and Equality v Celmer* No.5, [2018] IEHC 639, para. 103.

In that regard, it is true that not only courts may play a role in the European Arrest Warrant mechanism, but also other bodies that are considered to be 'judicial authorities' within the meaning of the European Arrest Warrant Framework Decision.

As the Court of Justice ruled in the *Połtorak* case, and I quote, 'the words "judicial authority", […], are not limited to designating only the judges or courts of a Member State, but may extend, more broadly, to the authorities required to participate in administering justice in the legal system concerned'. That is so provided that those authorities are independent from the executive.

In two recent judgments, the Court of Justice developed further that line of case law. In two joined cases, *OG* and *PI*, it held that the Public prosecutor's offices of Lübeck and Zwickau, in Germany, were not sufficiently independent from the executive to be considered 'judicial authorities' for the purposes of issuing European Arrest Warrants.[18] The Court of Justice reasoned that the notion of 'issuing judicial authority' *does not include* public prosecutor's offices in a Member State, which might potentially receive instructions from the executive in connection with the adoption of a decision to issue a European Arrest Warrant in a specific case.

Conversely, in *PF*, it found that the Prosecutor General of Lithuania enjoyed such independence and was therefore to be considered a

[18] Judgments of 27 May 2019, *OG (Public Prosecutor's office of Lübeck) and PI (Public Prosecutor's office of Zwickau)*, Joined Cases C-508/18 (OG) and C-82/19 PPU (PI), EU:C:2019:456.

judicial authority for those purposes.[19] It held that the notion of 'issuing judicial authorities' includes the Prosecutor General of a Member State, who, whilst institutionally independent of the judiciary, is responsible for the conduct of criminal prosecutions and whose legal position affords him or her a guarantee of independence from the executive in connection with the issuing of a European Arrest Warrant.

That said, the Court of Justice held that where a judicial authority that is not itself a court decides to issue a European Arrest Warrant, such decision and its proportionality must be capable of being the subject, in the issuing Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection.

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Infringement actions brought by the Commission — or conceivably by another Member State — may also serve as a means of protecting the judicial independence of national courts. This point is illustrated by the recent – and extremely important – ruling of the Court of Justice in *Commission v Poland*.

In that case, the Commission brought an infringement action against Poland on the ground that by passing a series of legislative reforms that impaired the independence of the Polish Supreme Court, that

[19] Judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, EU:C:2019:457.

Member State had failed to fulfil its obligations under Article 19 TEU. In that regard, the Commission put forward two complaints.

First, the Commission argued that those reforms sought to lower the retirement age of judges of the Supreme Court who were serving on that court at the date on which those reforms entered into force. Since those judges were forced to cease their judicial service prematurely – and since Poland failed to put forward a valid justification – those reforms were alleged to be incompatible with the principle of the 'irremovability' of judges.

Second, the Commission argued that by vesting the President of Poland with discretionary powers that enabled him to extend the retirement age of those judges for a period of three years, which could be extended for another three years, those reforms placed the Supreme Court under the direct influence of the executive.

For its part, Poland argued, first, that the contested legislation fell outside the scope of application of Article 19(1) TEU. It contended that Article 19(1) TEU only applies to situations that are governed by EU law. Thus, according to Poland, since that legislation related to the organisation of the national judiciary, an area in which the Member States retain their competence, that Treaty provision did not apply to the case at hand. Unlike the legislation at issue in the Portuguese Judges Case – which was adopted in response to the grant of financial assistance by the EU – Poland observed that the contested legislation had no link whatsoever to EU law.

In its judgment of 24 June 2019, however, the Court of Justice upheld the infringement action brought by the Commission against Poland.[20]

At the outset, the Court of Justice pinpointed the two key factors that trigger the application of Article 19(1) TEU: first, the fact that the body at issue in the main proceedings is a 'court or tribunal' within the meaning of EU law and, second, the fact that it may rule on questions concerning the interpretation and application of that law. If the answer to both those two questions is in the affirmative, Article 19(1) TEU protects that body from any measure that may threaten its independence. Moreover, whilst the Court of Justice acknowledged that matters pertaining to the organisation of the judiciary remain within the exclusive purview of the Member States, they must exercise their powers in that field in compliance with EU law, and in particular with Article 19(1) TEU.[21]

Regarding the Commission's first complaint, the Court of Justice ruled – and I quote – that 'the principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term'. According to the Court 'there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality', and 'inasmuch as [those exceptions are] not such as to raise reasonable doubt in the minds of individuals as to

[20] Judgment of 24 June 2019, *Commission v. Poland (Independence of the Supreme Court),* C-619/18, EU:C:2019:531.
[21] *Ibid.*, para. 52.

the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it'.

Applying those principles to the case at hand, the Court of Justice found, first, that there were serious doubts as to whether the reforms in issue were made in pursuance of the goal of standardising the retirement age of judges of the Supreme Court with the general retirement age applicable to all workers in Poland, rather than with the aim of side-lining a certain group of judges of that court.[22] Second, whereas judges of the Supreme Court who had reached the new retirement age were forced to retire, other workers who had reached the generally applicable retirement age could – *but were not obliged to* – retire. Third, the reforms provided for no transitional period and specifically targeted the judges of the Supreme Court. Fourth and last, the Court of Justice dismissed the argument put forward by Poland, according to which the reforms sought to prevent discrimination between judges who were serving at the Supreme Court prior to the reforms and those who were appointed to that court thereafter, by providing that both categories of judges would retire at the same age. The Court of Justice reasoned that those two categories of judges were not in a comparable situation since only the careers of those in the former category were shortened.

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[22] In that regard, those doubts arise, first, because of the explanatory memorandum accompanying those reforms. Second, the discretionary powers enjoyed by the President meant that he was free to choose the judges who could continue to carry out their judicial activity and those who would be forced to retire. Third, the effect of those reforms was that a third of serving judges would be forced to retire, including the First President of the Supreme Court whose six-year mandate is protected under the Polish Constitution. As a result of those reforms, the composition of the Polish Supreme Court would undergo a complete overhaul.

As regards the Commission's second complaint, the Court of Justice found that the discretion granted to the President of Poland to extend the period of judicial activity of judges who had reached retirement age when the reforms entered into force was such as to call into question the impartiality of the judges concerned. The Court noted, in that regard, that when exercising his discretionary powers the President was not bound to act in accordance with any detailed procedural rules setting out objective and verifiable criteria governing his choice; nor did he have to state the reasons for his decisions. In addition, such decisions could not be challenged before any court.[23]

On these grounds, the Court of Justice held that Poland had failed to fulfil its obligations under EU law.

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The time has come for me to conclude briefly. The cases that I have examined demonstrate that the Court of Justice is very conscious of its responsibility for upholding the rule of law within the EU and willing to act to defend that principle when necessary.

That responsibility lies at the very heart of the Court's function of ensuring that 'in the interpretation and application of the Treaties the law is observed'.

Those cases also attest to the fact that the Court of Justice would not be in a position to uphold the rule of law without being able to engage in judicial dialogue with national courts that are fully independent.

[23] Ibid., paras 114 and 118.

This is because only courts that fulfil that requirement may provide effective judicial protection for EU rights, whilst ensuring the coherence and uniform application of EU law.

The Commission also plays an important role in protecting the rule of law within the EU. As the ‘Guardian of the Treaties’, it may bring infringement actions against defaulting Member States who fail properly to protect the independence of their own domestic courts.

That said, and this brings me to my final point, it is also for civil society, and indeed for individual citizens, to be aware of the importance of having judges who are independent. That independence is a critical part of our identity as Europeans who believe in a society where no one is above the law and it is the bedrock on which the rule of law is founded. The strength of that independence is in close correlation to the strength of protection for the rule of law, and thus to the quality of our democracy.

That is why, in my view, research projects such as RECONNECT are so important in raising awareness of the fact that without judicial independence, there is no true justice, whether at national or supranational level.

Thank you very much.