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ARTICLE

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The Untapped Potential of the Systemic Criterion in the ECJ's Case Law on Judicial Independence

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Abstract
This article explores the use of the systemic criterion in the European Court of Justice's (ECJ) case law on judicial independence under Article 19(1)(2) Treaty on European Union (TEU). It starts from the observation that ever since the *Portuguese Judges* judgment, the case law has moved towards a more abstract and general assessment of issues of judicial independence. Yet, despite that evolution, the Court—perhaps surprisingly—only rarely uses the systemic criterion in its judgments. There are only two strands of case law to be found, neither of which tell us much about how the Court understands the notion of "systemic" in this field. This article argues that this criterion nevertheless has an important role to play in the case law on judicial independence and that the Court should explicitly limit the finding of a violation of Article 19(1)(2) TEU to those issues that have a systemic impact on the functioning of the domestic judiciary. By limiting the effects of Article 19(1)(2) TEU in such a way, the Court would strike a balance between the protection of the independence of the domestic judiciary, which is crucial for the proper functioning of the European Union (EU), and respect for the autonomy of the Member States as to the organization of their judiciary.

Keywords: judicial independence; Article 19(1)(2) TEU; proper functioning of judicial system; respect for institutional autonomy

A. Introduction

There are probably only few areas of EU law that have seen an evolution as rapid and profound as the right to effective judicial protection has in the last few years. The swift and sharp decrease in adherence to the fundamental values of the EU by some of its Member States have sparked a forceful response by the ECJ, thereby transforming Article 19(1)(2) TEU into an autonomous ground to assess the respect for effective judicial protection—and with it the right to an independent tribunal established by law—in the European Member States. While that jurisprudential move by the Court and the concrete judgments it issued in its wake have already been the topic of a mountain of scholarship, it also made it a most relevant aspect to discuss the topic of the systemic criterion in EU law. Given the more structural and abstract questions on judicial independence that have since been brought before the Court, its case law has rather quickly also gained a more structural and systemic character.

The article has been updated since original publication. A notice detailing the change has also been published.

This article explores the use of the systemic criterion by the Court in its case law on issues of judicial independence. It starts from the observation that the novel interpretation of Article 19(1)(2) TEU has allowed the Court to conduct a more abstract assessment of questions of domestic judicial independence (Section B). Yet, despite that evolution, the notion of "systemic" has not been used more often and is only rarely used explicitly by the Court. There are only two strands of case law that mention the criterion, neither of which tell us much about how the Court understands it (Section C). After a brief detour touching upon the Court's contextual approach in independence-related cases (Section D), this article further argues that the systemic criterion could and should play a more important role in the Court's case law on judicial independence, and that the Court should explicitly limit the finding of a violation of Article 19(1)(2) TEU to those issues that have a systemic impact on the functioning of the domestic judiciary, meaning they endanger the proper functioning of the judicial system (Section E). Such a use of the systemic criterion would allow to strike an appropriate balance between protecting domestic judicial independence, on the one hand, and respect for the institutional autonomy of the Member States, on the other. Section F concludes.

B. A Brief Recap: The Evolution Towards an Abstract Assessment of Domestic Judicial Independence

The topic of this article cannot be framed properly without at least briefly going back to the point where it all started: The Court's novel interpretation of Article 19(1)(2) TEU, which it introduced in the judgment of *Associação Sindical dos Juízes Portugueses*[1] and confirmed many times since. That line of case law has already been discussed countless times in great detail,[2] and here is not the place to do all of that again. Yet, for the sake of this article, it is important to stress that that provision, as interpreted by the ECJ, now requires all domestic courts or tribunals, which may be asked to apply or interpret Union law, to provide effective judicial protection. While the Court indicated already in *ASJP* that that meant that they should be independent,[3] it later clarified, following calls in legal doctrine and by Advocate General Tanchev in that regard,[4] that it equally requires that domestic courts are established by law.[5]

Essentially, Article 19(1)(2) TEU is now understood to create an autonomous requirement in EU law, free from the constraints inherent in Article 51 of the Charter, that domestic courts and tribunals are independent and established by law. In doing so, the Court instrumentalized a theretofore dormant provision of Union law, and gave the value of the rule of law a much sharper edge.[6] Recent history has shown that a lot of actors within the broader EU institutional framework quickly and gratefully made use of that possibility. It gave the Commission a welcome new basis

[1]ECJ, Case C-64/16, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, ECLI:EU:C:2018:117 (Feb. 27, 2018), https://curia.europa.eu/juris/liste.jsf?num=C-64/16 [herein after *ASJP*].

[2]*See* Matteo Bonelli & Monica Claes, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary*, 14 EU CONST. L. REV. 622 (2018); Laurent Pech & Sébastien Platon, *Judicial Independence Under Threat: The Court of Justice to the Rescue in the ASJP Case*, 55 COMMON MKT. L. REV. 1827 (2018).

[3]*See ASJP*, ECJ, Case C-64/16; Case C-49/18, Carlos Escribando Vindel v. Ministerio de Justicia, ECLI:EU:C:2019:106 (Feb. 7, 2019), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-49/18.

[4]*See* Mathieu Leloup, *The Appointment of Judges and the Right to a Tribunal Established by Law: The ECJ Tightens its Grip on Issues of Domestic Judicial Organization: Review Simpson*, 57 COMMON MKT. L. REV. 1139, 1155 (2020); Cécilia Rizcallah & Victor Davio, *L'article 19 du Traité sur l'Union Européenne: Sésame de l'Union de droit*, 31 REV. TRIM. DR. HOMME. 156, 178 (2020); Case C-791/19, Comm'n v. Poland, ECLI:EU:C:2021:366 (May 6, 2021), para. 67, https://curia.europa.eu/juris/liste.jsf?num=C-791/19.

[5]*See Comm'n v. Poland*, Case C-791/19 at para. 176.

[6]Not unlike what it did in *Repubblika* with Article 49 TEU. *See* ECJ, Case C-896/19, Repubblika v. Il-Prim Ministru, ECLI:EU:C:2021:311 (Apr. 20, 2021), https://curia.europa.eu/juris/liste.jsf?num=C-896/19 (establishing a principle of non-regression). For more on this, *see* Mathieu Leloup, Dimitry Kochenov, & Aleksejs Dimitrovs, *Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on Repubblika v Il-Prim Ministru*, 46 EUR. L. REV. 692 (2021).

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upon which to introduce infringement proceedings.[7] Moreover, it sparked an onslaught of preliminary references from national courts, asking increasingly detailed questions on whether the national institutional set-up as such respects the requirement to have an independent and impartial tribunal established by law. While the majority of these cases stem from Polish and Romanian judges, who use the preliminary ruling mechanism and its access to the Court of Justice as some sort of lifeline, similar questions can now be found from judges from all over Europe.[8]

Since Article 19(1)(2) TEU now imposes a general duty on the Member States to organize their judicial system in a way that respects the right to effective judicial protection,[9] it simultaneously provides the Court, as the final interpreter of that provision, with the power to conduct an abstract assessment of the domestic judicial system.[10] With *ASJP*, the Court thus placed questions of domestic judicial organization and governance squarely within its own purview.[11] It simultaneously made it easier to raise questions that were not strictly speaking about the courts themselves, but about other actors within the broader judicial architecture, that are crucial for judicial independence, such as disciplinary bodies, or bodies that are involved in the appointment process. As a direct consequence, the Court is now confronted with questions that more clearly address the way in which the judicial system as a whole operates.

C. The (Lack of) Use of the Systemic Criterion in the ECJ's Case Law

Many commentators have noted that systemic, structural character inherent in Article 19(1)(2) TEU.[12] Some pending preliminary references are even explicitly phrased from such a systemic angle.[13] Yet, perhaps somewhat surprisingly, that increased systemic character of the cases brought before the Court is not reflected in the judgments themselves, at least not in the vocabulary used by the Court. When one looks at the judgments, words like systemic, structural, institutional, or closely related words are used only very rarely by the Court. In fact, there are only two strands of case law in which the systemic criterion explicitly pops up.

The first of those two relates to the topic of the appointment of judges and was mentioned for the first time in the *A.B.* judgment. There, the Court held that Article 19(1)(2) TEU in principle does not require a legal remedy in the context of judicial appointments, but that the situation may be different

[7]*See Comm'n v. Poland*, Case C-791/19; *see also* ECJ, Case C-204/21, Comm'n v. Poland, ECLI:EU:C:2023:442 (May 6, 2023), https://curia.europa.eu/juris/documents.jsf?num=C-204/21; ECJ, Case C-192/18, Comm'n v. Poland, ECLI:EU:C:2019:924 (Nov. 5, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-192/18; ECJ, Case C-619/18, Comm'n v. Poland, ECLI:EU:C:2019:531 (June 24, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-619/18.

[8]*See Repubblika*, Case C-896/19; ECJ, Case C-256/19, S.A.D. Maler v. Magistrat, ECLI:EU:C:2020:523 (July 2, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-256/19&language=EN; ECJ, Case C-497/20, Randstad Italia v. Umana SpA, ECLI:EU:C:2021:1037 (Dec. 21, 2021), https://curia.europa.eu/juris/liste.jsf?num=C-497/20.

[9]*See* ECJ, Case C-19/21, I and S v. Staatssecretaris van Justitie en Veiligheid, ECLI:EU:C:2022:605 (Aug. 1, 2022), para. 36, https://curia.europa.eu/juris/liste.jsf?num=C-19/21.

[10]Michał Krajewski, *Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma*, 3 EUR. PAPERS 395, 404 (2018).

[11]*See* Leloup, *supra* note 4, at 1161.

[12]*See also* Giulia Gentile, *Effective Judicial Protection: Enforcement, Judicial Federalism and the Politics of EU Law*, EUR. L. OPEN, Oct. 28, 2022, at 1; Ruairi O'Neill, *Effet Utile and the (Re)organization of National Judiciaries: A Not So Unique Institutional Response to a Uniquely Important Challenge?*, 27 EUR. L. J. 240, 251 (2021). *See also* Opinion of Advocate General Rantos, Case C-781/21, Krajowa Rada Sądownictwa (Maintien en fonctions d'un juge), at para. 20, (Mar. 2, 2023).

[13]ECJ, Case C-521/21, Rzecznik Praw Obywatelskich (in progress), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-521; ECJ, Case C-269/21, BC and DC (Nomination des juges de droit commun en Pologne), https://curia.europa.eu/juris/liste.jsf?num=C-269/21. *See also* Opinion of Advocate General Collins, Case C-181/21, G. Nomination des juges de droit commun en Pologne, at para. 50, (Dec. 15, 2022).

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> in circumstances in which all the relevant factors characterising such a process in a specific national legal and factual context are such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges that are appointed at the end of that process.[14]

Here, the systemic criterion is thus used as a sort of benchmark to assess when Article 19(1)(2) TEU is violated. Yet, the requirement of systemic doubts is a remarkable one when seen in light of the rest of the case law. The concept of "systemic doubts" is used nowhere else in the entirety of the Court's case law.[15] In other cases, the Court rather uses the notion of reasonable or legitimate doubts.[16] It is not immediately clear how these two standards relate to each other. The most logical understanding would be that systemic doubts require a higher threshold than mere reasonable or legitimate doubts. Yet the question remains why in this very specific instance, the level of doubt needs to be systemic. One potential explanation could be that the Court wanted to indicate that the doubts in the minds of individuals must stem from the entirety of the circumstances surrounding the system of judicial appointments, in the sense that the system in itself instills doubts about the independence of the judges it appoints. The Court indeed refers to the circumstances "in which all the relevant factors characterising [the appointment] process in a specific national legal and factual context, and in particular in which possibilities obtaining judicial remedies which previously existed are suddenly eliminated, are such as to give rise to systemic doubts."[17]

But again, it is not exactly apparent how the issue here would be so fundamentally different from cases like *A.K.*, where the case concerned the appointment of the judges to the new Disciplinary Chamber in light of the newly composed national council of the judiciary, but where the Court did use the benchmark of reasonable doubts.[18] The confusing nature of the term can also be seen in its application in a recent opinion by Advocate General Collins. In that opinion, Advocate General Collins repeated the abovementioned excerpt from the *A.B.* judgment. However, he then followed it by saying that the referring court did not put forward any specific evidence "either of a systemic nature, other than the three factors to which it refers, or of an individual nature to substantiate the existence of legitimate and serious doubts in the minds of individuals."[19] Thus, instead of using "systemic doubts" as a substantive threshold, the Advocate General referred back to the standard test of legitimate and serious doubts, and rather verified whether there was evidence of "a systemic nature" that could lead to such doubts. All things considered, the current use of the notion of systemic doubts seems to add little to the case law and it seems preferable to replace it by the standard test of reasonable or legitimate doubts.

The second strand of case law in which the Court uses the systemic criterion is much more prevalent. It relates to the question whether a person may still be surrendered on the basis of a European Arrest Warrant, despite fears that he or she will not enjoy a fair trial by the issuing

[14]ECJ, Case C-824/18, A.B. v. Sądownictwa, ECLI:EU:C:2021:153 (Mar. 2, 2021), para. 129, https://curia.europa.eu/juris/liste.jsf?language=en&num=C-824/18; ECJ, Case C-508/19, Prokurator Generalny, ECLI:EU:C:2022:201 (Mar. 22, 2022), para. 80, https://curia.europa.eu/juris/documents.jsf?num=C-508/19; ECJ, Case C-491/20, Sąd Najwyższy, ECLI:EU:C:2022:1046 (order of Dec. 22, 2022), para. 92.

[15]In this respect it should also be noted that Advocate General Tanchev, in his *A.B.* opinion, never mentioned systemic doubts, but also used the standard phrasing of legitimate and reasonable doubts.

[16]*See Comm'n v. Poland*, Case C-791/19, at para. 108; ECJ, Case C-132/20, BN v. Getin Noble Bank, ECLI:EU:C:2022:235 (Mar. 29, 2022), para. 132, https://curia.europa.eu/juris/liste.jsf?num=C-132/20; *Repubblika*, Case C-896/19, at para. 72; ECJ, Case C-542/18 RX-II, Réexamen Simpson v. Council, ECLI:EU:C:2020:232 (Mar. 26, 2020), para. 75, https://curia.europa.eu/juris/liste.jsf?num=C-542/18.

[17]*See A.B.*, Case C-824/18, at para. 129.

[18]*See* ECJ, Case C-585/18, A.K. v. Najwyższy, ECLI:EU:C:2019:982 (Nov. 19, 2019), para. 134, https://curia.europa.eu/juris/liste.jsf?num=C-585/18.

[19]Opinion of Advocate General Collins, Case C-181/21, at paras. 75–78.

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authority. In the well-known *LM* judgment,[20] the Court applied the test which it had developed under the prohibition of torture and inhuman or degrading treatment or punishment in the judgment of *Aranyosi and Căldăraru*[21] to the right to a fair trial under Article 47 of the Charter. That test involves a two-step verification: The executing authority must first assess whether the issuing Member State shows signs of systemic or generalized deficiencies, and second whether the requested person will run an individualized risk for a breach of the essence of his or her fundamental right to a fair trial.[22] Both steps of the test need to be fulfilled before an executing authority may refuse to surrender the requested person.

Despite vocal criticism,[23] those two steps, requiring both systemic deficiencies and an individualized risk, have been repeatedly confirmed by the Court in subsequent judgments.[24] Later, the Court indicated that the same test should apply when concerns are raised about whether the issuing judicial authority is properly established by law rather than sufficiently independent.[25] Notably, that same test has later also been applied in other areas of EU law.[26] In the *Sped-pro* judgment, the Tribunal applied the principles that the ECJ had established in *LM* to the area of competition law and the requirement of independence for the national competition authority.[27] In a more recent judgment—without however referring to any of the previous case law—the ECJ appears to use a similar test in stating that a domestic court may apply a provision of *forum necessitatis* so as to hear an application for maintenance under Regulation No. 4/2009, in order to mitigate a risk of denial of justice. In this respect, the Court held that the domestic court "cannot rely solely on general circumstances relating to deficiencies in the judicial system of the third State, without analysing the consequences that those circumstances might have for the individual case."[28]

Up until now, the case law has not been very specific on when exactly the first step of systemic and generalized deficiencies in the functioning of the judicial system can be understood as being fulfilled. The only guidance that can be found is that that step requires an overall assessment, which must be based on objective, reliable, specific and duly updated material, which must be conducted in light of the standards on the right to a fair trial set out in the Court's case law.[29] Generally speaking, it seems like that step thus boils down to a general assessment of the level of

[20]*See* ECJ, Case C-216/18 PPU, LM, ECLI:EU:C:2018:586 (July 25, 2018), https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-216/18%20PPU.

[21]ECJ, Case C-404/15, Aranyosi v. Generalstaatsanwaltschaft, ECLI:EU:C:2016:198 (Apr. 25, 2016), https://curia.europa.eu/juris/liste.jsf?num=C-404/15.

[22]*LM*, Case C-216/18 PPU, at paras. 61, 68.

[23]This criticism came from both the scholarly world and the domestic judiciary. For scholarly criticism, see Agnieszka Frackowiak-Adamska, *Trust Until it is Too Late! Mutual Recognition of Judgments and Limitations of Judicial Independence in a Member State: L and P*, 59 COMMON MKT. L. REV 113. The criticism from the domestic judiciary can be seen in the fact that the Court was met with multiple preliminary references after *LM* essentially asking it to alter the test.

[24]ECJ, C-354/20 PPU, L and P, ECLI:EU:C:2020:1033 (Dec. 17, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-354/20; ECJ, Case C-480/21, WO v. Minister for Just. & Equal., ECLI:EU:C:2022:592 (July 12, 2022), https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-480/21&jur=C. *See however* ECJ, Case C-699-21, E.D.L., ECLI:EU:C:2023:295 (Apr. 18, 2023), https://curia.europa.eu/juris/documents.jsf?num=C-699/21. In the latter judgment the Court seems to carve out an exception on the two-step test when the mental health under Article 4 of the Charter is at stake.

[25]ECJ, Case C-562/21 PPU, X v. Openbaar Ministerie, ECLI:EU:C:2022:100 (Feb. 22, 2022), https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-562/21%20PPU.

[26]*See also recently* Opinion of Advocate General Emiliou, Case C-819/21, Staatsanwaltschaft Aachen (May 4, 2023). Applying the same test to Framework Decision 2008/909/JHA.

[27]ECJ, Case T-791/19, Sped-Pro v. Comm'n, ECLI:EU:T:2022:67 (Feb. 9, 2022), https://curia.europa.eu/juris/documents.jsf?num=T-791/19.

[28]ECJ, Case C-501/20, M P A, ECLI:EU:C:2022:619, para. 112 (Aug. 1, 2022), https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-501/20&jur=C.

[29]*X*, Case C-562/21 PPU, at paras. 68, 77; *LM*, Case C-216/18 PPU, at para. 62.

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respect that a Member State, specifically its legislative framework, shows for the right to an independent tribunal established by law.[30] Yet, there is nothing in the case law that provides any guidance on when the potential issues reach the level of systemic or generalized deficiencies.[31] There is no indication on whether that step is only met when the deficiencies that are described affect a large part of the judiciary, threaten certain important institutions within the judicial system, reach a certain level of gravity, or perhaps something different still. A big part of the reason for this lack of guidance must most likely be found in the fact that most of the judgments so far have concerned Poland, where the presence of such systemic and generalized deficiencies in the functioning of the judicial system have essentially been taken as a given.[32] Nevertheless, it seems inevitable that questions will pop up on this first step as well and when they do, it is up to the Court to then give the referring court(s) some clear guidance.[33]

D. The Contextual Approach as a Replacement for the Systemic Criterion?

The last section showed that, as the case law stands today–despite the increased systemic and structural character of the cases brought before it–the Court only rarely explicitly relies on the systemic criterion in its judgments on judicial independence. The two strands of case law where we do find the criterion being used tell us very little on how the Court actually understands this notion. At this point, it is worthwhile to make a little detour and address an aspect of the Court's case law on issues of judicial independence that may also prove relevant for the topic of this article: The Court's contextual approach. Indeed, several scholars have pointed out this context-sensitive approach by the Court, where it takes on board the institutional, legislative and political context surrounding the case before it in its reasoning.[34]

One can find examples of such a contextual approach in infringement proceedings, as well as in preliminary references. As to the infringement proceedings, the clearest example can be found in the case about the disciplinary regime for judges in Poland.[35] In that case, the Court had to decide, among other things, whether Poland had infringed Article 19(1)(2) TEU, since the new Disciplinary Chamber in the Supreme Court was allegedly not independent and impartial. At the

[30]*LM*, Case C-216/18 PPU at paras. 61–67; ECJ, Case C-158/21, Puig Gordi (Jan. 31, 2023), para. 103, https://curia.europa.eu/juris/liste.jsf?num=C-158/21.

[31]*See* Opinion of Advocate General de la Tour, Case C-158/21, Puig Gordi, para. 132 (July 14, 2022) (arguing that it should reach a high level of seriousness).

[32]*Id.*, at para. 108; *see also* Minister for Just. & Equal. v. Celmer [2018] IEHC 639 (H. Ct.) (Ir.). This judgment ultimately led to the ECJ's *LM* judgment. In its judgment, the Irish High Court—without any real difficulties—concluded to the presence of systemic and generalized deficiencies in the Polish judicial system.

[33]In fact, there are already cases pending before the Court that focus on this first step. See in particular *Puig Gordi*, Case C-158/21. In that case, one of the questions raised was rather whether an executing authority could refuse to surrender a person when the second limbs of the test, the individual assessment, may be fulfilled, but the first, systemic assessment is not. In his opinion, Advocate General Richard de la Tour answered this question in the negative, stating that there should always be both systemic and generalized deficiencies and an individual risk. See in the same sense, Opinion of Advocate General Ćapeta, Case C-514/21. Subsequently, the ECJ confirmed that position in the *Puig Gordi* judgment. *See* Puig Gordi, Case C-158/21, at paras. 90–120. However, as rightly pointed out elsewhere, one can wonder whether such an approach is compatible with the individual right to a fair trial under Article 6(1) ECHR. *See also* Johan Callewaert, *Two-Step Examination of Potential Violations of Fundamental Rights in the Issuing Member State: Towards "Systemic or Generalized" Differences with Strasbourg?*, PROF. DR. IUR. JOHAN CALLEWAERT (Sept. 13, 2022), https://johan-callewaert.eu/two-step-examination-of-potential-violations-of-fundamental-rights-in-the-issuing-member-state-towards-systemic-or-generalised-differences-with-strasbourg/.

[34]Ondřej Kadlec & David Kosař, *Romanian Version of the Rule of Law Crisis Comes to the ECJ: The AFJR Case is Not Just About the Cooperation and Verification Mechanism*, 59 COMMON MKT. L. REV 1823, 1843 (2022); Madalina Moraru & Raluca Bercea, *The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația 'Forumul Judecătorilor din România, and Their Follow-Up at the National Level*, 18 EUR. CONST. L. REV. 82, 102 (2022); Armin von Bogdandy, *Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States*, 57 COMMON MKT. L. REV. 705, 735 (2020).

[35]*See Comm'n v. Poland*, Case C-791/19; *see also Comm'n v. Poland*, Case C-204/21.

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start of its assessment, the Court recalled that the creation of that chamber took place in a wider context of major reforms to the judicial system in Poland. It then spent over 20 paragraphs pointing to such contextual factors as the lowered retirement age of Supreme Court judges, the autonomous position of that chamber within the Supreme Court, the dismissal of the members of the Polish judicial council and the appointment of its new members under new rules, and the timing between all those various measures.[36] Later in the judgment, the Court also discussed the fourth complaint by the Commission, regarding the rights of defense of the Polish judges in the disciplinary proceedings and concluded that the national procedural rules may

> especially where ... they are applied in the context of a disciplinary regime displaying the shortcomings referred to [above], prove to be such as to increase still further the risk of the disciplinary regime applicable to those whose task is to adjudicate being used as a system of political control of the content of judicial decisions.[37]

A similar style of reasoning can be found in several other judgments concerning preliminary references. In cases such as *A.K., CP and DO*,[38] *A.B.*,[39] *W. Ż.*,[40] *Prokuratura Rejonowa*,[41] and *AFJR*,[42] the Court clearly frames its response to the questions by the referring courts in the broader institutional and legislative framework. In doing so, it indicated to the referring courts that they as well should take such contextual factors into account when ultimately deciding on the case.[43]

This contextual approach is also relevant for the topic of this article. By drawing in the surrounding factors, the Court shows, by virtue of its reasoning, that the issue in front of it may indeed be part of a wider, more structural and systemic narrative, without necessarily using any of those words. By doing so, it may show how one circumscribed question relating to judicial independence, may become problematic or all the more problematic when assessed in light of the entirety of changes made to the judicial system,[44] and may ultimately affect how the judicial operates as a whole, which is something that comes close to a cumulative effect doctrine.[45] As mentioned quite explicitly by the Court in *A.K.* "[a]lthough any one of the various facts referred to ... above is indeed not capable, per se and taken in isolation, of calling into question the independence of a chamber such as the Disciplinary Chamber, that may, by contrast, not be true once they are taken together."[46]

This contextual approach by the Court in cases relating to judicial independence is convincing. It acknowledges that judicial governance is a difficult system of often interrelating checks and balances, in which one can hardly see the true impact that a certain measure may have without properly placing it within the broader institutional context of formal—and perhaps informal—

[36]*See Comm'n v. Poland*, Case C-791/19, at paras. 89–110.

[37]*Id.* at para. 213.

[38]*See A.K.*, Case C-585/18, at para. 131.

[39]*A.B.*, Case C-824/18, at para. 98.

[40]ECJ, Case C-487/19, W. Ż., ECLI:EU:C:2021:798 (Oct. 6, 2021), para. 119, https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-487/19&jur=C.

[41]ECJ, Case C-748/19, Prokuratura Rejonowa, ECLI:EU:C:2021:931 (Nov. 16, 2021), para. 76, https://curia.europa.eu/juris/liste.jsf?num=C-748/19.

[42]ECJ, Case C-83/19, Asociaţia, ECLI:EU:C:2021:393 (May 18, 2021), para. 216, https://curia.europa.eu/juris/liste.jsf?num=C-83/19. *See similarly* ECJ, Case C-817/21, Inspecţia Judiciară, ECLI:EU:C:2023:391 (May 11, 2023), https://curia.europa.eu/juris/liste.jsf?num=C-817/21.

[43]*Id.* at para. 206.

[44]*Id.* at para. 204. ("Indeed, even though a given provision may be considered to be correct when viewed in isolation, it may be highly problematic when considered in relation with other relevant elements of the system.").

[45]*See id*. at para. 222. *Compare* Moraru & Bercea *supra* note 34, at 102 *with* Grzęda v. Poland, App. No. 43572/18 (Mar. 15, 2022), https://hudoc.echr.coe.int/fre?i=001-216400.

[46]*See A.K.*, Case C-585/18, at para. 152.

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power relationships. In somewhat more colloquial language: it allows to take on board the forest through the trees.

Yet, that strength may simultaneously also be one of its sore points. In preliminary reference procedures it is ultimately the referring court that, with the guidance provided by the ECJ, will have to decide on the case at hand. It will then fall to the domestic judge to put the Court's contextual approach into practice, which may require them to have an intimate understanding of the whole system and its working, even at the highest and partly invisible level and assess its impact. As pointed out by others, that is a daunting task.[47] Moreover, it has the drawback of leaving the potentially politically very sensitive decision to the domestic court, without much more backing from the Court besides the requirement to take all contextual factors into account.[48]

E. Towards a Greater Use of the Systemic Criterion: The ECJ Tying Itself to the Mast

As mentioned, the contextual approach essentially allows the Court to show that a certain issue may be more structural or systemic than may appear from the case before it, by drawing in surrounding factors. Yet, that approach in itself still tells us very little about how Article 19(1)(2) TEU is actually to be operationalized. It does not give us any clear indications of when that provision applies, what its scope of application is, or when it is violated. In fact, those questions, and others surrounding the use of Article 19(1)(2) TEU, have animated the Court for some time now.

One of the first points of discussion concerned the material scope of Article 19(1)(2) TEU. Several Advocates General were rather quick to stress that it should be limited. Advocate General Tanchev argued that that provision should be confined to correcting problems with respect to a "structural infirmity"[49] or "a structural breach"[50] in a given Member State, meaning that the measure in question should affect entire tiers of the judiciary, and thereby also making a link to the systemic or generalized deficiencies as mentioned in the test set out in *LM*.[51] Advocate General Bobek in turn held that Article 19(1)(2) TEU only applied to "issues of *transversal*, *structural changes* to the national judicial function," which would be "indiscriminately applicable to *any and all functions* exercised by national judges."[52] Nevertheless, the Court quickly showed that it understood the material scope of Article 19(1)(2) TEU broader and did not confine the scope of application of that provision to breaches of a structural, transversal nature.[53] As later mentioned by Advocate General Bobek, as the case law stands now, the material scope of Article 19(1)(2) TEU seems to be essentially limitless,[54] both institutionally and substantively.[55] Institutionally, since it covers all courts which may potentially apply EU law, and substantively, because it

[47]*See* Kadlec & Kosař, *supra* note 34, at 1849.

[48]Mathieu 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, A.K., CP and DO*, 16 Eur. Const. L. Rev. 145, 157 (2020).

[49]*See* Opinion of Advocate General Tanchev, Case C-192/18, Comm'n v. Poland (June 20, 2019), para. 115; *see also* Opinion of Advocate General Tanchev, Case C-585/18, A.K. v. Najwyższy (June 27, 2019), para. 78.

[50]Opinion of Advocate General Tanchev, Case C-558/18, Łowicz v. Państwa (Sept. 24, 2019), para. 125.

[51]Opinion of Advocate General Tanchev, Case C-192/18.

[52]Opinion of Advocate General Bobek, Case C-556/17, Torubarov v. Hivatal (Apr. 30, 2019), para. 54.

[53]*See* Piotr Bogdanowicz & Maciej 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 Eur. Const. L. Rev. 306, 320 (2020).

[54]*See also* Sacha Prechal, *Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?*, in Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective 1, 20 (2022).

[55]The only real limit that can be found in the case law so far is procedural in nature in the sense that there must be a connecting factor between the case pending before the referring court and the question regarding Article 19(1)(2) TEU. *See* Case C-558/18, Łowicz v. Państwa, ECLI:EU:C:2020:234 (Mar. 26, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-558/18. Later case law has clarified that this link must be direct. *See Prokurator Generalny*, Case C-508/19, at para. 71.

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captures any and all rules or practices that may negatively affect the obligation of Member States to set up effective—and thus independent—remedies.[56] Advocate General Tanchev also stated in his opinion to the case of *A.B.* that in view of the Court's case law, he no longer defended the view that the material scope of Article 19(1)(2) TEU was confined to correcting problems with respect to a structural infirmity in a given Member State.[57]

The Court moreover seems to draw increasingly on Article 19(1)(2) TEU as the main legal basis in its judgment. Perhaps the clearest example in this regard is the *AFJR* judgment. Advocate General Bobek was adamant in urging the Court to rely on the CVM decisions and Article 47 of the Charter as they provided a more concrete provision than Article 19(1)(2) TEU.[58] The Court, nevertheless, used Article 19(1)(2) TEU as the main framework of assessment, with the CVM decisions and Article 47 of the Charter playing almost no role in its reasoning.[59] For another example, one could compare the Court's approach in the *A.K.* judgment with that in the later judgment in *Euro Box Promotion*. In both cases, both Article 19(1)(2) TEU and Article 47 of the Charter were applicable. Yet, whereas in the former the Court held that it did not appear necessary to conduct a distinct analysis under Article 19(1)(2) TEU, since it could only reinforce that under Article 47 of the Charter,[60] in the latter it took the complete opposite approach, stating at the end that a separate examination of Article 47 of the Charter appeared unnecessary, since it could only substantiate the finding already set out under Article 19(1)(2) TEU.[61]

Thus, as matters stand now, the Court has shown a willingness towards the use of Article 19(1)(2) TEU,[62] a provision that is universally applicable to the judicial system of all Member States and which has an apparently limitless material scope. In such circumstances, the need clearly increases for a clearer picture of where exactly the substantive limits of Article 19(1)(2) TEU are, and what yardstick is used to assess whether it is violated.[63] So far, the Court's case law has not taken any clear stance in this regard.[64]

It is argued here that this is where the systemic criterion can and should play a fundamental role in the Court's case law concerning issues of judicial independence. Article 19(1)(2) TEU should be interpreted in such a way that it is only violated when a specific measure creates systemic issues, meaning—as will be elaborated further in this article—that it implies a threat for the proper functioning of the judiciary as a system.[65] The systemic criterion would thus be used as imposing a substantive threshold for finding a breach. The main advantage of such an approach would be to limit the impact that Article 19(1)(2) TEU—and the ECJ as its interpreter—have on

[56]*See Asociația*, Case C-83/19, at paras. 207–08.

[57]Opinion of Advocate General Tanchev at para. 90, Case C-824/18, A.B. v. Sądownictwa (Mar. 2, 2021).

[58]*See* Opinion of Advocate General Bobek, Case C-83/19, Asociația, paras. 212–20 (Sept. 23, 2020); *see also* Opinion of Advocate General Bobek, Case C-357/19, Euro Box, para. 79 (Mar. 4, 2021) (saying that the same reasoning applies in that case).

[59]See Aleksejs Dimitrovs & Dimitry Kochenov, *Of Jupiters and Bulls: The Cooperation and Verification Mechanism as a Redundant Special Regime of the Rule of Law*, 61 EU L. LIVE 1, 8 (2021) for the same conclusion.

[60]*See A.K.*, Case C-585/18, at paras. 167–69.

[61]ECJ, Case C-357/19, Euro Box, ECLI:EU:C:2021:1034 (Dec. 21, 2021), para. 243, https://curia.europa.eu/juris/liste.jsf?num=C-357/19.

[62]One author has suggested, on the basis of the *Randstad Italia* judgment, that the Court seems to rely on Article 19(1)(2) TEU when the case concerns rule of law issues, whereas it relies on Article 47 of the Charter in cases where the rule of law is not at issue. *See* Orlando Scarcello, *Effective Judicial Protection and Procedural Autonomy Beyond Rule of Law Judgments: Randstad Italia*, 59 COMMON MKT. L. REV. 1445 (2022). *But see* the later judgment of Case C-261/21, F. Hoffmann-La Roche v. Autorità ECLI:EU:C:2022:534 (July 7, 2022), https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-261/21. The *Hoffman-La Roche* case does not seem to fully align with that position.

[63]*See* Rizcallah & Davio, *supra* note 4, at 178–81, 185. (arguing that Article 19(1)(2) TEU should be limited to measures that threaten the essence of the right to an effective remedy, understood in its institutional meaning).

[64]*See* Kadlec and Kosař, *supra* note 34, at 1841; *see also* Opinion of Advocate General Bobek at para. 145, Case C-748/19, Prokuratura Rejonowa w Mińsku Mazowieckim (May 20, 2021), http://curia.europa.eu.

[65]*Id.* at paras. 147–48. *See also* Opinion of Advocate General Emiliou, Case C-216/21, Asociația "Forumul Judecătorilor din România", paras. 27-31 (Feb. 16, 2023).

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the domestic judicial organization, and to find a balance between the protection of judicial independence and the rule of law on the one hand, and respect for national autonomy on the other. It would, moreover, make sure that the application of Article 19(1)(2) TEU does not allow to simply circumvent the limits that Article 51 of the Charter imposes on Article 47 of the Charter. While not necessarily wanting to go as far as Advocate General Bobek, who argued that Article 19(1)(2) TEU should be an extraordinary remedy for extraordinary situations,[66] there are cogent reasons for such a more limited understanding of that provision.

A first argument is textual in nature. Article 19(1)(2) TEU mentions that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. It thus imposes an abstract, general obligation to establish a functioning system of effective remedies. As the Court held itself, "it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law."[67] That would indicate that Article 19(1)(2) TEU is concerned by the effectiveness and the functioning of the system as a whole, meaning that, in order to fall foul off that provision, a domestic measure should be systemic, in the sense that it is liable to affect the proper functioning of the system.

A second argument is more normative in nature. The application of Article 19(1)(2) TEU will almost automatically intervene with the organization of domestic judiciaries and as such the institutional autonomy of the Member States.[68] By indicating what is and is not acceptable under that provision, the Court inevitably intervenes in institutional and perhaps constitutional issues, inextricably linked to questions of separation of powers and checks and balances. Those are areas deeply rooted in issues of national sovereignty or constitutional tradition,[69] where the argument to intervene only when it is absolutely necessary becomes all the more weighty.[70] Decisions of (constitutional) institutional organization should have a particularly strong claim to national autonomy.[71]

To be clear, the ECJ does indicate that it is aware of this. It consistently holds—following the case law of the ECHR in this regard[72] that neither Article 2 TEU, nor Article 19(1)(2) TEU, nor any other provision of EU law requires Member States to adopt a particular constitutional model governing the relationships and interaction between the various branches of the State.[73] Yet, that point is then followed by the statement that Member States must, nevertheless, comply with the requirements of judicial independence stemming from those provisions of EU law.[74] The Court's case law thus inevitably draws certain reds lines as to how the Member States can—and more

[66]*Id.* at para. 147; Opinion of Advocate General Bobek, Case C-132/20, BN v. Getin Noble Bank, para. 39 (July 8, 2022).

[67]*See generally BN*, Case C-132/20 at para. 89; *Euro Box*, Case C-357/19, at para. 219; *W. Ż.*, Case C-487/19, at para. 102. It is, however, not fully consistent in its phrasing. In other judgments it drops this idea of "system of legal remedies" and says that that provision "obliges Member States to provide remedies sufficient to ensure effective judicial protection." For example, *see Hoffmann-La Roche*, Case C-261/21, at para. 43 and *Łowicz*, Case C-558/18, at para. 32.

[68]*See also* Matteo Bonelli, *Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States*, in ARTICLE 47 OF THE EU CHARTER AND EFFECTIVE JUDICIAL PROTECTION, VOLUME 1. THE COURT OF JUSTICE'S PERSPECTIVE 81, 94 (2022).

[69]*See* Mugemangango v. Belgium, App. No. 310/15 (July 10, 2020), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-203885%22]}.

[70]*See* Von Bogdandy, *supra* note 34, at 714. *See also* Nina Le Bonniec, *L'Appréhension du Principe de la Séparation des Pouvoirs par la Cour Européenne des droits de l'Homme*, 116 REV. FR. DE DROIT CONST. 335, 337 (2016).

[71]Dimitri Spieker, *The Conflict Over the Polish Disciplinary Regime for Judges—an Acid Test for Judicial Independence, Union Values and the Primacy of EU Law: Commission v. Poland*, 59 COMMON MKT. L. REV. 777, 792 (2022). More recently, the Court has used Article 19(1)(2) TEU explicitly in terms of procedural autonomy. *See Randstad Italia*, Case C-497/20 and *Hoffman La-Roche*, Case C-261/21; *see also* Opinion of Advocate General Sánchez-Bordona, Case C-289/21, Varhoven (June 16, 2022), paras. 31–32.

[72]The first time the court used this phrase it was with explicit reference to the ECtHR. *See A.K.*, Case C-585/18, at para. 130.

[73]*See* ECJ, Case C-430/21, RS, ECLI:EU:C:2022:99 (Feb. 22, 2022), para. 43, https://curia.europa.eu/juris/liste.jsf?num=C-430/21.

[74]*Id.*

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importantly cannot—organize their institutional judicial architecture.[75] That case law also has forward-looking effects that extend far beyond the confines of the case at hand.[76]

There is, moreover, not much that the Member States can do to resist such effects. Since Article 19(1)(2) TEU is endowed with direct effect,[77] it has primacy over any provision of national law, including those of a constitutional nature. A claim based on respect for national or constitutional identity as enshrined in Article 4(2) TEU also seems an unlikely avenue. While the Court already seemed rather unreceptive to such arguments in earlier case law,[78] it took it one step further in its judgment on the Rule of Law Conditionality Mechanism. It held that while the Member States under Article 4(2) TEU enjoy a certain degree in discretion in implementing the principles of the rule of law, it in no way follows that that obligation may vary from one Member State to another as to the result to be achieved.[79] On the contrary, the values under Article 2 TEU define the "very identity of the European Union" as a common legal order, and the Union cannot be criticized for implementing the necessary means in defense of that identity.[80] While that "already iconic"[81] statement by the full court marks yet another step in the Court's clear efforts in protecting the Union's foundational values, it also suggests that identity-related arguments will not easily persuade the Court in cases that concern issues of judicial independence.

In such circumstances, there is a rather strong normative argument to limit the finding of a violation of Article 19(1)(2) TEU to situations that reach a certain level of gravity and are liable to affect the functioning of the judicial system as such. Such an approach would have a less intrusive impact on the various systems of separation of powers and checks and balances that exist throughout the Member States and thus better respect the constitutional pluralism in the European Union.[82] To be clear, it must again be pointed out that the ECJ does not seem unaware of such considerations. It is rather commonly accepted that the fact that the Court adopts a test based on the appearance of reasonable doubts,[83] instead of imposing clear-cut institutional requirements, is meant to mitigate the far-reaching effects on the Member States' constitutional autonomy.[84] The Court rather provides a procedure for finding a violation, and one which allows different institutional set-ups to coexist.[85] However, two caveats should be made here. First, the appearance test is not always used by the Court. In certain judgments it does assess the domestic legal framework and quite directly indicates what is and what is not allowed under Article 19(1)(2)

[75]One could raise the point that the Court already brought about such effects via its earlier case law under Article 267 TFEU and Article 47 of the Charter. Indeed, any provision that addresses issues of judicial independence or the right to a tribunal established by law, can be understood to have certain structural effects. For more on this, *see* Mathieu Leloup, *The Concept of Structural Human Rights in the European Convention on Human Rights*, 20 HUM. RTS. L. REV. 480 (2020). Yet, the consequences are completely different under Article 19(1)(2) TEU, since it is undeniably applicable to each court in the Member States, whereas Article 47 of the Charter only applies when the requirement under Article 51 of the Charter is fulfilled. Moreover, Article 267 TFEU does not bring about any requirement to make any changes in order to better safeguard the independence of domestic courts, but only excludes those courts from the preliminary reference procedure.

[76]*See* Mathieu Leloup & David Kosař, *Sometimes Even Easy Rule of Law Cases Make Bad Law: ECtHR (GC) 15 March 2022, No. 43572/18, Grzęda v Poland*, 18 EUR. CONST L. Rev. 753, 775 (2022).

[77]*A.B.*, Case C-824/18, at para. 146.

[78]*Id.* at paras. 78, 148.

[79]ECJ, Case C-157/21, Poland v. Parliament, ECLI:EU:C:2022:98 (Feb. 16, 2022), para. 264, https://curia.europa.eu/juris/liste.jsf?num=C-157/21.

[80]*Id.* at paras. 145, 268.

[81]See Marco Fisicaro, *Protection of the Rule of Law and "Competence Creep" via the Budget: The Court of Justice on the Legality of the Conditionality Regulation*, 18 EUR. CONST. L. REV. 334, 347 (2022).

[82]*See* von Bogdandy, *supra* note 34.

[83]*See A.K.*, Case C-585/18; *see Repubblika*, Case C-896/19.

[84]Michał Krajewski, *The EU Right to an Independent Judge: How Much Consensus Across the EU?*, in ARTICLE 47 OF THE EU CHARTER AND EFFECTIVE JUDICIAL PROTECTION, VOLUME 1. THE COURT OF JUSTICE'S PERSPECTIVE 61 (2022); Michał Krajewski & Michal Ziólkowski, *EU Judicial Independence Decentralized: A.K.*, 57 COMMON MKT. L. REV. 1107, 1116 (2020).

[85]*See* Spieker, *supra* note 71, at 789.

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TEU, without leaving any room via the appearance of reasonable doubt.[86] Second, the substantive scope of Article 19(1)(2) TEU now also covers certain aspects—in particular the right to a tribunal established by law—for which the appearance test is less appropriate than for the right to an independent tribunal, or simply cannot be used at all.[87] In other words, the case law under Article 19(1)(2) TEU still entails a potential of a far-reaching impact on the constitutional autonomy of the various Member States.

All of this ties into a third and closely related argument. Article 19(1)(2) TEU only provides a thin legal foundation for such far-reaching effects. As mentioned above, that provision requires Member States to establish a system of legal remedies and procedures to ensure effective judicial protection. It thus only imposes a requirement of effectiveness, unlike, for example Article 47 of the Charter, which explicitly mentions that a court should be independent, impartial and established by law. Compared to the latter, the effectiveness requirement in Article 19(1)(2) TEU creates a very vague framework of assessment,[88] as also became clear from the diverging points of view in the legal literature on what exactly should be understood to fall within the material scope of that provision.[89] Such an open norm creates a void that leaves a lot to—perhaps overly eager—judicial interpretation.

On the basis of the above, this article argues that the Court should limit the finding of a violation of Article 19(1)(2) TEU to breaches that have a systemic impact. As such, the material scope of the provision would remain very broad—in line with the Court's case law—but there would be a substantial threshold before it is violated. At this point, it is time to discuss how the notion of 'systemic' should then exactly be understood. In other words, at what point does a measure that affects the independence of the judiciary reach the threshold of systemic? For this, it is useful to look at the opinions of the various Advocates General. While they rarely discuss the concept of systemic explicitly as such,[90] those opinions do offer an insight in how exactly they understand the notion. In some opinions it was used to point to measures that affected entire tiers of the judiciary, meaning that several courts were affected.[91] In another opinion it was used rather to describe any problem that arises in a larger number of cases.[92] In other opinions the notion of systemic is used rather as a synonym for serious difficulties, without any further qualifiers.[93] Finally, that same notion has also been used to refer to a single, important institution within the judicial system, namely the Polish Supreme Court.[94]

While these various opinions refer to the notion of systemic in ways that may perhaps conceptually be distinguished from each other, they do have a common core; they refer to situations that go beyond mere isolated and particular instances and concern the way in which the judiciary, as an institution, can robustly perform its role.[95] Systemic issues are thus those problems

[86]*See Prokuratura*, Case C-748/19; *Comm'n v. Poland*, Case C-619/18; *Euro Box*, Case C-357/19, at para. 238.

[87]Look, for example, at the third complaint in *Comm'n v. Poland*, Case C-791/19. This complaint was about the fact that the president of the disciplinary chamber of the Supreme Court had the discretionary power to designate the competent disciplinary tribunal.

[88]This was in essence also the reason why Advocate General Bobek urged the Court to rely on the CVM Decisions and the Charter instead of on Article 19(1)(2) TEU in his opinion in the *AFJR* case. *See also* Krajewski, *supra* note 84, at 62–63.

[89]*See* Leloup, *supra* note 4; Rizcallah & Davio, *supra* note 4; *see* Aida Torres Pérez, *From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence*, 27 MAASTRICHT J. OF EUR. & COMPAR. L. 105 (2020).

[90]*See exceptionally* Opinion of Advocate General Bobek, Case C-748/19, Prokuratura (May 20, 2021).

[91]Opinion of Advocate General Tanchev, Case C-192/18, *Comm'n v. Poland*; Opinion of Advocate General Tanchev, Case C-585/18, A.K. v. Najwyższy (June 27, 2019), para. 146; Opinion of Advocate General Tanchev, Case C-558/18, *Łowicz*; Opinion of Advocate General Bobek, Case C-556/17, *Torubarov*.

[92]Opinion of Advocate General Bobek, Case C-811/19, FQ (Mar. 4, 2021), para. 134; Opinion of Advocate General Emiliou, Case C-58/22, Parchetul de pe lângă Curtea de Apel Craiova (Jun. 8, 2023), para. 34.

[93]*See* Opinion of Advocate General de la Tour, Case C-158/21, *Puig Gordi*; Opinion of Advocate General Szpunar, Case C-501/20, M P A (Feb. 24, 2022), para. 114. *See also* TEU arts. 7(1) and 7(2) (referring to a serious breach, or a serious and persistent breach).

[94]Opinion of Advocate General Tanchev, C-824/18, A.B. v. Sądownictwa (Dec. 17, 2020), para. 129.

[95]*See* von Bogdandy, *supra* note 34, at 718.

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that threaten the proper functioning of the judiciary in a domestic system of checks and balances.[96] It denotes those problems that either reflect on, or reverberate throughout the judicial system as an operative body of separate, yet interrelated institutions.[97] As correctly pointed out by the various Advocates General, that may be the case because the measure in question affects the entire judiciary—for example the Polish muzzle law—or a substantial part of it— for example the lowering of the retirement age for judges in Poland—or because it affects an institution that is crucial for the proper functioning of the judiciary—for instance the Polish National Council for the Judiciary, or a disciplinary institution.

It is certainly possible that the Court—or at least some of its judges[98]—already understand Article 19(1)(2) TEU in a sense that it only precludes such systemic deficiencies in the domestic judiciary. Yet, even if that would be the case, it is important to make this explicit as it would entail some important advantages. Some of those advantages are a logical extension of the arguments that were raised above in favor of an understanding of Article 19(1)(2) TEU that is only violated in case of systemic problems. First, the case law would more clearly reflect the text and purpose of Article 19(1)(2) TEU. Second, and more importantly, it would strike a balance between, on the one hand, the protection of the independence of the domestic judiciary, something which is absolutely crucial for the proper functioning of the EU,[99] and on the other, respect for the institutional choices of the Member States as to the organization of their judiciary. By explicitly introducing the systemic criterion as a qualifier in its case law under Article 19(1)(2) TEU, the Court would, like Odysseus, tie itself to the proverbial mast so it steers clear from overly specific and detailed issues of institutional architecture or domestic judicial governance, thereby also running the risk of incrementally pushing the boundaries of Article 19(1)(2) TEU further and further. This does not mean that breaches of the principle of judicial independence or the right to a tribunal established by law that do not reach the required seriousness are to be allowed under EU law, but rather that Article 19(1)(2) TEU is not the proper legal basis to challenge them. Such issues could still be brought before the Court, but via the more specific and detailed Article 47 of the Charter, in the understanding that the requirement within Article 51(1) of the Charter is fulfilled. Of course, such issues could also still be raised in front of the domestic (constitutional) courts, and ultimately the European Court of Human Rights.[100]

Beyond those two advantages, one could point out two more reasons why such an explicit use of the systemic criterion would be beneficial to the jurisprudence. A first reason is that it would lead to greater consistency in the Court's case law. As mentioned above, in cases concerning

[96]*See* Opinion of Advocate General Bobek, Case C-748/19, *Prokuratura*, at para. 148. *See also Communication from the Commission to the European Parliament and the Council A New EU Framework to Strengthen the Rule of Law*, COM (2014) 158 (final) (Nov. 3, 2014) (referring to "cases where the mechanisms, established at national level to secure the rule of law cease to operate effectively").

[97]While mention is made here of the judiciary as a whole, I do not necessarily want to exclude the possibility that certain measures may also be concerned as systemic in nature when they only affect a certain type of cases, for example competition cases or public procurement cases. In such circumstances, while the judiciary in general may function properly, the measures in question may still be systemic, since the judicial system does not function properly for those subsets of cases. However, the cases that have so far been brought before the Court concerned measures that affected the judiciary as a whole, which is why the definition here has been kept broad.

[98]*See* Lucia Rossi, *La Valeur Juridique des Valeurs. L'article 2 TUE: Relations Avec d'Autres Dispositions de droit Primaire de l'UE et Remèdes Juridictionnels*, 56 Rev. Trim. Dr. Eur. 639, 657 (2020). For the Advocates General there can be no doubt (in particular Bobek, but also Tanchev). *See also* Opinion of Advocate General Hogan, Case C-497/20, Randstad Italia v. Umana SpA (Sept. 9, 2021), para. 60:

> [A]s it is not disputed that a procedure of review before independent courts exists in Italy and that the debate is not about the establishment of a remedy but about the way that remedy is implemented by the competent courts, Articles 4(3) and 19(1) TEU do not seem to be useful either.

[99]*See* ECJ, Case C-272/19, Land Hessen, ECLI:EU:C:2020:535 (July 9, 2020), para. 45, https://curia.europa.eu/juris/documents.jsf?num=C-272/19.

[100]Opinion of Advocate General Tanchev, Case C-192/18, *Comm'n v. Poland*, at para. 114.

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judicial independence, the systemic criterion has so far been used virtually exclusively in the so-called two-step test, in cases concerning the surrender of a person on the basis of a European Arrest Warrant where doubts arise about his or her right to a fair trial.[101] If the Court were to introduce the systemic criterion under Article 19(1)(2) TEU, it would create a degree of conformity between those "horizontal" cases of rule of law protection and the more "vertical" cases stemming from infringement proceedings or preliminary references coming from the country itself. It would further also provide guidance to the domestic courts on how this first step of the *LM* test should actually be conducted. Moreover, a systemic understanding of Article 19(1)(2) TEU would be in line with the Court's current contextual approach and would actually help to make it more concrete. As mentioned above,[102] by drawing in the surrounding factors, the Court shows, by virtue of its reasoning, that the issue in front of it may indeed be part of a wider, more structural and systemic narrative, without necessarily using any of those words. That contextual approach would thus help to provide the necessary building blocks in the Court's reasoning for the potential finding of a systemic deficiency under Article 19(1)(2) TEU as described above. In other words, the contextual considerations would help inform the assessment of the finding of a breach of Article 19(1)(2) TEU, which in turn could be seen as an operationalization of the Court's current contextual approach.

Finally, the use of the systemic criterion is compatible with, or can potentially even replace, the Court's current reliance on the appearance test. As mentioned earlier, that test seems to be used by the Court to mitigate overly far-reaching effects on the institutional pluralism within the Member States. Yet, by limiting the finding of a violation of Article 19(1)(2) TEU to systemic deficiencies, the bar is set higher, which protects such institutional pluralism and allows to intervene only in situations where there are powerful reasons to do so. Generally speaking, the introduction of a systemic criterion could thus be seen as providing a degree of harmonization, tying together the various aspects that can now be found in the overall body of jurisprudence.

A second reason why it would be beneficial to introduce the systemic criterion explicitly in the case law is that it provides more clarity for the national courts that wonder whether they should introduce a request for a preliminary reference. If those courts see that Article 19(1)(2) TEU will only be breached in case of systemic deficiencies, it is likely to prevent them from bringing smaller issues that are connected to the principle of judicial independence, without however jeopardizing the functioning of the judicial system, before the Court. Moreover, it will urge those courts to provide the ECJ with sufficient information and explain why the issue that is the topic of the preliminary reference may have systemic consequences. This information, in turn, will help the Court in providing a contextually sensitive judgment and will make it easier to provide a helpful response to the referring court.[103]

The main argument in this section has been that the systemic criterion, despite currently not being used a lot in the Court's case law on issues of judicial independence, could and in fact should play a more significant role. While several arguments have been given on exactly why that is the case and what would be the benefits of such an approach, the crucial point is one of balance. By limiting Article 19(1)(2) TEU to breaches of a systemic nature, which affect the proper functioning of the judiciary in a domestic system of checks and balances, the Court strikes a balance between, on the one hand, the necessary respect for its founding values, and on the other, the necessary respect towards the Member States regarding issues of domestic institutional design. Understood that way, Article 19(1)(2) TEU gives teeth to the principle of the rule of law and offers the EU institutions a legal basis to effectively act and intervene when necessary, but does not allow this provision to be (ab)used in order to challenge every minute detail of judicial organization and governance that can be linked to the principle of judicial independence. Or, to put it differently,

[101] *See* Sec. C.
[102] *See* Sec. D.
[103] *See* Kadlec & Kosař, *supra* note 34, at 1843.

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respect for the rule of law within the EU equally means that the Court does not overstep the limits of its jurisdiction by encroaching upon the competences retained by the Member States.[104]

F. Conclusion

It is, all things considered, not surprising that the EU and its institutions have started to take action to defend its founding values—and with it, its very identity[105]—when certain Member States no longer want to follow the rules of the game.[106] Article 19(1)(2) TEU, as interpreted since *ASJP*, gives some teeth to the value of the rule of law and has become, especially in combination with penalty payments,[107] one of the more effective instruments to challenge measures in the Member States that attack the independence of the judiciary. In this light, the Court has been hailed as the last soldier standing in the fight against rule-of-law backsliding,[108] with the *ASJP* judgment being described as groundbreaking,[109] a judgment belonging to the Pantheon of the most significant ECJ rulings, on par with *Van Gend and Loos* and *Costa/ENEL*,[110] and the key legacy of Lenaert's presidency.[111]

Yet, if one moves beyond those superlatives, one cannot lose sight of the fact that the Court has gotten—or perhaps more aptly: given itself—a very far-reaching power and one which it should use with caution.[112] While there may be strong, normative arguments in favor of acting to safeguard the independence of the domestic judiciary, there are also strong, normative arguments that urge such action only be taken in rather exceptional circumstances.[113] It is that idea of balance between competing interests, that may be understood as underlying the final part of this article.

This article set out to describe the use of the systemic criterion in the ECJ's case law on judicial independence. Its starting point was that, since *ASJP*, questions of domestic judicial organization have been brought within the purview of the Court. The cases before the Court have therefore evolved towards a more systemic, abstract assessment of issues of judicial independence. However, despite that evolution, when one delves into the case law, it quite quickly becomes apparent that the systemic criterion is barely used explicitly by the Court in its judgments. Only two strands of case law can be found, neither of which tell us particularly much about how the Court understands that criterion in cases concerning judicial independence. This article then pointed to the Court's contextual approach. Indeed, by drawing in the relevant contextual factors, the Court may indirectly show the systemic nature of the case before it, without necessarily explicitly relying on that word. Nevertheless, that contextual approach, while a useful argumentative tool, tells us little about the operationalization of Article 19(1)(2) TEU. This article argues that the systemic criterion can and indeed should play a much more important role to play in the Court's case law

[104]*See* Koen Lenaerts, *On Checks and Balances: The Rule of Law Within the EU*, 29 COLUM. J. EUR. L. (forthcoming 2023). *See also* the very powerful dissenting opinion in Grosam v. Czech Republic, App. No. 19750/13, para. 26 (June 23, 2022), (Eicke, J., Koskelo, J., and Wennerström, J., dissenting), https://hudoc.echr.coe.int/fre?i=001-217806.

[105]*See Poland*, Case C-157/21, at paras. 78, 148.

[106]*See* Koen Lenaerts, *New Horizons for the Rule of Law Within the EU*, 21 GERMAN L. J. 29 (2020).

[107]Think, for example, of the daily 1.000.000 Euro penalty payments issued in *Comm'n v. Poland*, Case C-204/21.

[108]Dimitry Kochenov and Petra Bárd, *The Last Soldier Standing? Courts Versus Politicians and the Rule of Law Crisis in the New Member States of the EU*, in EUR. YEARBOOK OF CONST. L. 243 (2019).

[109]*See* Bonelli & Claes, *supra* note 2, at 622.

[110]LAURENT PECH & DIMITRY KOCHENOV, RESPECT FOR THE RULE OF LAW IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE: A CASEBOOK OVERVIEW OF KEY JUDGMENTS SINCE THE PORTUGUESE JUDGES CASE 12 (2021). *See also* Armin von Bogdandy & Dimitri Spieker, *Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges*, 15 EUR. CONST. L. REV. 391, 412 (2019).

[111]Aleksejs Dimitrovs and Dimitry Kochenov, *Solving the Copenhagen Dilemma*, VERFASSUNGSBLOG, https://verfassungsblog.de/solving-the-copenhagen-dilemma/. *But see* O'Neill, *supra* note 12, at 260 (arguing that the case law under Article 19(1)(2) TEU is just the consequence of the codification of well-established principles in the Lisbon Treaty).

[112]*See* Opinion of Advocate General Tanchev, Case C-192/18, *Comm'n v. Poland*.

[113]*See* von Bogdandy, *supra* note 34.

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on judicial independence. It suggests that a violation of Article 19(1)(2) TEU should be limited to systemic issues, meaning that the measure in question threatens the proper functioning of the judiciary in a domestic system of checks and balances. It is argued that such an understanding of Article 19(1)(2) TEU corresponds most with the text and purpose of that provision and, more importantly, limits interventions by the EU in the domestic judicial organization to those instances where it is most imperative. In other words, an explicit use of the systemic criterion in the Court's case law, could help to strike the abovementioned balance between defending the values of the EU, on the one hand, and respect for domestic institutional decisions on the other.

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