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THE ASSOCIACÃO SINDICAL DOS JUIZES PORTUGUESES JUDGMENT: WHAT ROLE FOR THE COURT OF JUSTICE IN THE PROTECTION OF EU VALUES?

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On 27 February 2018 the Court of Justice of the European Union (hereafter CJEU or “the Court”) delivered a Grand Chamber judgment in the *Associação Sindical dos Juizes Portugueses v Tribunal de Contas Case (C-64/16)* where it demonstrated a proactive attitude as regards the protection of EU values.

It is well known that, as far as European values are concerned, the Court’s hands are bound with respect to Article 7 TEU. Yet, the Court has full justiciability over Article 2 TEU, although for a long time it has avoided the use of such provision in supporting its legal reasonings. Things have recently started to change. Considering the hesitancy of other EU institutions and the difficulties the EU is experiencing in enforcing EU values, the stance of the CJEU in this judgment certainly deserves a close analysis.

Facts are as follows. The *Associação Sindical dos Juizes Portugueses* (hereafter “ASJP”), acting on behalf of the judges of the Court of Auditors (*Tribunal de Contas*), challenged the Portuguese measures introduced by the Law 75/2014 before the Portuguese Supreme Administrative Court

(*Supremo Tribunal Administrativo*). Such measures were adopted on the basis of the Portuguese Law No. 75/2014 which temporarily reduced the remuneration of the personnel working in the public sector, including the judges of the Court of Auditors. The case was then brought before the CJEU through a preliminary reference procedure made by the *Supremo Tribunal Administrativo*, which envisaged a breach of the principle of judicial independence as a consequence of the restrictions imposed on the guarantees attached to the justices' status. Therefore, the referring court asked the CJEU whether the principle of judicial independence, as stated in Article 19(1) TEU and Article 47 of the EU Charter of Fundamental Rights (hereafter "the Charter") as well as in the case-law of the Court, has to be interpreted as precluding salary-reduction measures such as those applied to the judiciary in Portugal.

The CJEU ruled that the principle of judicial independence does not preclude measures like the ones at issue. It found that, since the reduction of the salary was temporary and broadly addressed to the employees of the public sector, this could not impair the independence of the judges of the Courts of Auditors. Hence, once again the Court stroke down an attempt to challenge national measures adopted as a consequence of sovereign debt programmes (Kilpatrick, 2017: 335-336). Nonetheless, the reasoning adopted is particularly significant as it goes well beyond the practical conclusion. There are two main points on which the CJEU relied that we should pay attention to: the jurisdiction of the Court to rule on the case and the strong reference to European values.

First of all, the CJEU chose to rely on a very weak material link, not embracing the reasoning expressed by the Advocate General (hereafter "AG") in its [Opinion](#). Indeed, AG Saugmandsgaard Øe highlighted that the Court had jurisdiction to interpret Article 19(1) TEU because the effective judicial protection should be guaranteed when, in cases such the one at issue, national courts apply EU law (para 40-42 of the Opinion). As far as the Charter is concerned, the AG stated that the application of Article 47 was possible because the implementation of EU law required by Article 51(1) of the Charter was provided by the fact that the Portuguese law at issue was adopted to enforce the objectives posed by the Council

Implementing Decision 2014/234 (para 52 of the Opinion).

The Court decided to follow a different path. It relied exclusively on Article 19(1) TEU (second paragraph) by ruling that such a provision relates to “the fields covered by Union law”, regardless of whether the Charter is applicable (para 29 of the Judgment).

This raised a key and potentially ground-breaking question: has the Court made Article 19(1) TEU a stand-alone provision? Such a situation would broaden the number of cases that applicants can bring before the CJEU as a failure by a Member State to uphold a court’s independence can be challenged directly on the basis of Article 19(1) TEU. The discriminating circumstance would be the jurisdiction of the national judicial body over EU law matters. The CJEU would thus have *de facto* jurisdiction in all future cases in which applicants will complain about the violation of article 19(1) TEU ([Pech, Platon: 2018](#)).

Yet, in this case a weak reference to a link between the circumstances at issue and EU law is still identifiable (Lazzerini, 2018: 267). Indeed, according to the referring court, the measures were “European in origin” since they were adopted on the basis of the compulsory requirements imposed on Portugal for reducing its excessive budget deficit in the framework of an EU decision granting it financial assistance (para 14 of the Judgment). Moreover, both at paragraph 46 and in the final ruling the Court presented the Portuguese law at issue as linked to the requirements to be adopted in the context of the EU financial assistance programme to Portugal.

Nevertheless, the reasoning adopted by the CJEU in this case is remarkable as it provided for an expansion of the value of Article 19(1) TEU. The above interpretation could also represent a future incentive for the European Commission to rely solely on that Article when building infringement actions aimed at tackling violations of the principle of effective judicial protection.

Secondly, the CJEU constructed the substance of its reasoning with a strong reference to Article 2 TEU. It decided to use the homogeneity clause as a pillar to strengthen its analysis, stressing that compliance with those values is the “fundamental premiss” of which mutual trust between

the Member States and their courts is founded upon (para 30 of the Judgment).

Moreover, the CJEU affirmed that Article 19(1) TEU “gives concrete expression to the value of the rule of law stated in Article 2 TEU” (para 32). Such a statement was further reinforced by the reference to the principle of sincere cooperation entrenched in Article 4(3) TEU (para 34).

After having laid down the foundations of its reasoning, the Court stated that in order for the effective judicial protection to be safeguarded, Member States shall guarantee the independence of their courts as long as they are bodies which may rule “on questions concerning the application or interpretation of EU law” (paras 40-41). Thus, the CJEU departed from what was suggested by the AG, according to whom Article 19(1) second paragraph imposes an obligation of procedural nature to the Member States, that is, the establishment of a system of judicial remedies capable of guarantee an effective judicial protection to the individuals (paras 63-66 of the Opinion). The latter was therefore found to be different from the right to independent courts (para 66 of the Opinion).

Before adjudicating on the substance of the practical case at issue in only six paragraphs, the Court restated its previous case-law on the criteria of independence. It also emphasised the pivotal connection between the independence of the judiciary and the proper working of the preliminary ruling system as expressed in Article 267 TFEU (para 43 of the Judgment).

As emerged throughout the analysis, the greatest part of the CJEU’s reasoning is dedicated to the recognition of the importance of EU values as a premise for the mutual trust among the Member States, the rule of law, judicial independence and effective judicial protection (paragraphs 29-46). If it was not for the narrow reasoning devoted to the pending issue in the very last paragraphs, one could reasonably wonder if this case was still about the salary reduction measures against Portuguese judges.

In order to understand the Court’s message, it is necessary to put it into the general context of rule of law backsliding situations ongoing in some EU countries (Pech; Scheppele, 2017). On the one hand, the CJEU has indirectly sent a clear message to countries such as Poland and Hungary that judicial independence is a must in the EU legal order and also

supported the [Commission's initiative](#) to trigger the Article 7(1) TEU procedure against the former.

On the other hand, such judgment confirms the change of attitude of the CJEU as regards the use of Article 2 TEU that started with the order for interim measures against Poland in the Białowieża forest case ([C-441/17 R](#)). When asked to rule over the matter of effective judicial protection, the CJEU decided to seize this opportunity and took a stance against violations of the rule of law, relying also on Article 2 TEU to support its reasoning ([Sarmiento, 2017](#)). Thus, the CJEU is supporting the view that rule of law and value-related issues cannot be limited to situations covered by EU law.

Besides, by reading Article 2 TEU in conjunction with Article 19(1) and 4(3) TEU, the Court has started to clarify the substance of such provision. Some authors already recognised that the Court attempted a first “operationalization” of Article 2 TEU ([Ovádék, 2018](#)). Such an effort of the Court is welcomed as the future enforcement of the rule of law in the EU eventually depend on a key and preliminary step, that is, the disentanglement of the substance of Article 2 TEU. As the CJEU has started to include Article 2 TEU in its toolbox, we may expect further clarification on the matter in future judgments.

In this judgment the CJEU has opened a door to the conversion of EU values as standards for the organization of the national judiciary, thanks to both the creative interpretation of Article 19(1) TEU and the strong reference to Article 2 TEU and judicial independence.

Thinking about which actors have to play a role in dealing with the rule of law crisis, one may imagine, in the first instance, that political institutions are the only actors to be taken into account. Yet, if the CJEU will continue in its judicial activism, this will represent one of the main features of the current rule of law crisis. Indeed, the CJEU is more and more showing its willingness to have a role in the picture of EU values enforcement, despite the limits that Article 7 TEU poses to its competence.

Article 269 TFEU limits the role of the CJEU under Article 7 TEU to

procedural issues only.

An opportunity the Court did not seize was the one in the Case C-286/12. See for further analysis: A. Vincze, *The ECJ as the Guardian of the Hungarian Constitution: Case C-286/12 Commission v. Hungary*, *European Public Law*, No. 19, Issue 3, 2013, 489–500.

The Commission actually seized this opportunity in building the infringement procedure against Poland for the Polish Law on the Supreme Court. According to the Commission, the new retirement age regime introduced by the Law would force 40% of judges to retirement and thus breach the principle of judicial independence as acknowledged by Article 19(1) TEU read in connection with Article 47 of the Charter. The case has recently been referred to the CJEU. See: [European Commission, Press release - Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court, Brussels, 24 September 2018.](#)

For the distinction between internal and external aspects of independence see: CJEU, Case C-506/04, *Wilson*, ECLI:EU:C:2006:587 and Joined Cases C-58&59/13, *Torresi*, ECLI:EU:C:2014:2088.

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