

# Case Note: Anything New under the Sun? An Exercise in Defence of the Reasoning of the CJEU in the *ASJP* Case

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## I. Introduction

Since 2018, in a new line of cases<sup>1</sup> the Court of Justice of the European Union (CJEU or the Court) was asked to interpret the principle of judicial independence in light of the value of the rule of law. This line of cases has a constitutional relevance in the architecture of the European Union (EU) legal order. In fact, it touches upon different constitutional principles related to the EU judicial system, such as: the principle of effective judicial protection of individual rights, the principle of judicial independence, and the principle of national procedural autonomy. Moreover, the inherent link between effective judicial review and the rule of law value has been underlined by the very same Court: effective judicial review has been deemed as the ‘essence of the rule of law’.<sup>2</sup>

Our analysis focuses on the 2018 *Associação Sindical dos Juizes Portugueses* (*ASJP*) case that inaugurated the aforesaid line of cases. In this judgment, the Court provided its first interpretation of art. 19(1) second subparagraph TEU in conjunction with the principle of judicial independence. The latter is well-established in the case law of the CJEU as inherent in the task of adjudication both at the EU and at the Member State level.<sup>3</sup> It is an essential guarantee for the functioning of the EU judicial system that is founded on the cooperation between the Court and the Member States’ courts and having its cornerstone in the preliminary ruling mechanism.<sup>4</sup>

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\* DOI 10.7590/187479819X158400660913211874-7981 2019 Review of European Administrative Law

<sup>1</sup> Case C-619/18 *Commission v Poland* [2019] EU:C:2019:531; Joined Cases C-508/18 *OG (Public Prosecutor’s office of Lübeck)* and C-82/19 *PPU PI (Public Prosecutor’s office of Zwickau)* [2019] EU:C:2019:456; Case C-509/18 *PF* [2019] EU:C:2019:457; Case C-49/18 *Carlos Escribano Vindel v Ministerio de Justicia* [2019] EU:C:2019:106; Case C-64/16 *Associação Sindical dos Juizes Portugueses* [2018] EU:C:2018:117 [Hereinafter *ASJP*]; Case C-216/18 *PPU* [2018] EU:C:2018:58.

<sup>2</sup> *ASJP*, para. 36; Case C-216/18 *PPU* [2018] EU:C:2018:58, para. 51.

<sup>3</sup> Case C-506/04 *Wilson* [2006] EU:C: 2006:587, para. 49 and case law thereby cited.

<sup>4</sup> K. Lenaerts, I. M. and K. Gutman, *EU Procedural Law* (Oxford University Press 2015) 3.

Legal scholars have been widely commenting and referring to the *ASJP* case as ‘ground-breaking’<sup>5</sup>, ‘surprising’<sup>6</sup>, ‘an act of judicial courage’<sup>7</sup>, and as ‘a potential constitutional moment’.<sup>8</sup> Nevertheless, we intend to cast doubts on the innovative contribution character of the *ASJP* judgment to the interpretation of art. 19(1) second subparagraph TEU and of the principle of judicial independence, taking into consideration the previous case law of the CJEU. Hence, this paper will answer the following question: how can the reasoning of the CJEU in the *ASJP* case be reconciled with its earlier case law?

The underlying hypothesis of this paper is that this line of reasoning of the CJEU does not have its genesis in the 2018 *ASJP* case. On the contrary, the inherent and inextricable link between the right to effective judicial protection, its requirement of judicial independence and the rule of law has been an indispensable characteristic of the EU judicial system, at least since 1986.<sup>9</sup>

This paper will proceed as follows. In the first part, the legal reasoning of the Advocate General (AG) and of the Court in the *ASJP* case will be analysed, focusing on the interpretation of art. 19(1) TEU and of the principle of judicial independence. In the second part, a brief review of the legal doctrine commenting the case and laying emphasis on its innovative contribution will be conducted. In this regard, we point out the elements presented as novelty. Finally, in the third part, the above-mentioned elements will be used as a benchmark of comparison of the reasoning of the CJEU in the *ASJP* case with the previous case law of the same Court, arguing that they do not actually constitute a novelty *per se*.

## 2. The CJEU’s ruling in *ASJP*

The *ASJP* judgment, decided on 27 February 2018 by the Grand Chamber of the Court, is a preliminary ruling procedure coming from the Portuguese Supremo Tribunal Administrativo. The Portuguese judges asked the CJEU to rule on the compatibility of a national measure with the principle of judicial independence under EU law. In particular, the national measure

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<sup>5</sup> L. Pech and S. Platon, ‘A Court of Justice. Judicial independence under threat: The Court of Justice to the rescue in the *ASJP* case’ (2018) 55 *CMLR* 1827, 1827.

<sup>6</sup> M. Bonelli and M. Claes, ‘Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical Dos Juizes Portugueses’ (2018) 14 *European Constitutional Law Review* 622, 622.

<sup>7</sup> M. Wendel, ‘Afraid of Their Own Courage? Some Preliminary Reflections on LM’ (*Verfassungsblog*, 26 July 2018) [verfassungsblog.de/afraid-of-their-own-courage-some-preliminary-reflections-on-lm/](http://verfassungsblog.de/afraid-of-their-own-courage-some-preliminary-reflections-on-lm/) accessed 21 October 2019.

<sup>8</sup> A. von Bogdandy and others, ‘GUEST EDITORIAL - A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines’ (2018) 55 *CMLR* 983, 983.

<sup>9</sup> Case C-294/83 *Les Verts v European Parliament* [1986] EU:C:1986:166 [Hereinafter *Les Verts*], para. 23.

concerned establishes a temporary reduction in the salaries paid to national judges and other members of the public sector in order to reduce the effects of the economic crisis in Portugal. The measure was adopted in the context of the excessive budget deficit procedure and financial assistance.

The applicant, ASJP, brought a special administrative action to the Supremo Tribunal Administrativo seeking the annulment of the national measure due to the alleged breach of the principle of judicial independence under EU law. Therefore, the Supremo Tribunal Administrativo referred the matter to the CJEU asking:

In view of the mandatory requirements of eliminating the excessive budget deficit and of financial assistance regulated by rules [of EU law], must the principle of judicial independence, enshrined in the second subparagraph of Article 19(1), second subparagraph TEU, in Article 47 of the [Charter] and in the case law of the Court of Justice, be interpreted as meaning that it precludes the measures to reduce remuneration that are applied to the judiciary in Portugal, where they are imposed unilaterally and on an ongoing basis by other constitutional authorities and bodies, as is the consequence of Article 2 of Law [No 75/2014]?<sup>10</sup>

### 2.1. The Opinion of the Advocate General

On 18 May 2017, the AG delivered his Opinion, addressing both procedural and substantial aspects of the case.<sup>11</sup> The AG argued that, first, the question is admissible and the CJEU has jurisdiction on the matter, and second, the national measure does not infringe the principle of judicial independence under EU law, as enshrined in art. 19(1) second subparagraph TEU and art. 47 of the Charter of Fundamental Right of the European Union (CFREU).

Regarding the admissibility, even admitting some *lacunae* in the materials submitted by the referring Court, the AG considers them sufficient for the CJEU to give a useful answer. Moreover, the AG confirms that the subject matter was under adjudication before the Supremo Tribunal Administrativo at the time of the reference to the CJEU.<sup>12</sup>

Furthermore, concerning the preliminary issue of the CJEU jurisdiction on the matter, differently from what the plaintiff claimed, the AG makes a distinction between the analysis of art. 47 CFREU and the one of art. 19(1) second subparagraph TEU. According to the AG, the former is applicable only in so far as Member States are implementing EU law, in accordance with art. 51(1)

<sup>10</sup> ASJP, para. 18.

<sup>11</sup> Case C-64/16 ASJP [2017] EU:C:2017:395, Opinion of AG Saugmandsgaard ØE.

<sup>12</sup> Ibid, para. 33.

CFREU, whereas the latter is applicable ‘in the fields covered by EU law’.<sup>13</sup> In fact, the different formulation of these articles is decisive in establishing their scope of application. The formulation of art. 19(1) TEU requires the Member States to ensure effective judicial protection in every situation in which *in abstracto* a national court is likely to exercise its judicial activity in areas covered by EU law, i.e. acting as an EU judge.<sup>14</sup> With regard to the scope of application of art. 47 CFREU, the AG maintains that:

I incline to the view that the adoption of the measures to reduce remuneration in the public sector provided for in Article 2 of Law No 75/2014, at issue in the main proceedings, constitutes an implementation of provisions of EU law, within the meaning of Article 51 of the Charter, and that the Court therefore also has jurisdiction to answer the request for a preliminary ruling in so far as it concerns Article 47 of the Charter.<sup>15</sup>

Secondly, regarding the substantive part of the Opinion, the AG advises the CJEU to answer negatively to the preliminary question asked. In order to construe art. 19(1) second subparagraph TEU, the AG adopts a contextual interpretation referring to other provisions in the same Title of the Treaty and to previous case law of the CJEU. Thus, the AG states that the purpose of this subparagraph is primarily procedural in nature since it imposes an obligation on the Member States to establish national procedural remedies that enable the protection of individuals’ rights under EU law.<sup>16</sup> To the understanding of the AG, the former enshrines the principle of effective judicial protection, but it does not enshrine a general principle of judicial independence according to which all judges in the Member States’ courts should be independent: ‘effective judicial protection within the meaning of art. 19(1), second subparagraph TEU, must not be confused with the principle of judicial independence’.<sup>17</sup> According to the AG’s Opinion, this interpretation is supported by the different title and wording of art. 47 CFREU in which the right to an effective remedy and the right to a fair trial are stated separately, and only the latter includes the right to a fair hearing by an independent tribunal.<sup>18</sup> It is worth noting that the CJEU takes a different stand on this point.<sup>19</sup>

In regards to art. 47 CFREU, the AG argues that the right to an independent and impartial tribunal is well enshrined in it. In order to interpret this article, the AG refers to the European Convention on Human Rights and the case law of its Court, as established by art. 52(3) CFREU. In light of this comparison,

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<sup>13</sup> Ibid, para. 43.

<sup>14</sup> Ibid, para. 41.

<sup>15</sup> Ibid, para. 53.

<sup>16</sup> Ibid, paras 57-63.

<sup>17</sup> Ibid, para. 64.

<sup>18</sup> Ibid, para. 65.

<sup>19</sup> See *infra*.

the national discretion of the State comes to be at stake in balancing the public interest and the particular interest in case of an economic crisis. Hence, the conclusion of the AG is that the national measure does not undermine the principle of judicial independence as enshrined in art. 47 CFREU since it does not target specifically the judges in the Member State and it is proportionate.<sup>20</sup>

## 2.2. The reasoning of the Court

In its judgment, the CJEU reaches the same conclusion as the AG, namely that the national measure does not infringe the principle of judicial independence as enshrined in art. 19(1) second subparagraph TEU and in art. 47 CFREU. Nonetheless, the reasoning of the Court differs from the one conducted by the AG.

At first, the CJEU highlights the foundational importance of the values contained in art. 2 TEU for the EU legal order (such as the principle of mutual trust and the rule of law) to which art. 19(1) second subparagraph TEU gives concrete expression, entrusting the responsibility to ensure effective judicial review to the CJEU and to the Member States' courts.<sup>21</sup> In this context, the Court underlines also the importance of the principle of sincere cooperation as enshrined in art. 4(3) TEU for the architecture of the EU system of legal remedies.

Afterwards, the CJEU analyses the general principle of effective judicial protection, reaffirmed in art. 19(1) second subparagraph TEU and in art. 47 CFREU. As regards the material scope of art. 19(1) second subparagraph TEU, the Court specifies that it relates to 'the fields covered by Union law' irrespective of whether the Member States act into the scope of application of the CFREU as framed in art. 51(1) CFREU.<sup>22</sup> Thus, it makes a clear distinction between the scopes of application of the two articles.

The Court interprets the obligation of the Member States to ensure effective judicial protection, stemming from art. 19(1) second subparagraph TEU, as meaning that every court or tribunal that comes within the EU judicial system needs to meet the requirements of effective judicial protection under EU law.<sup>23</sup>

Among these requirements, the principle of judicial independence is defined as essential and inherent in the task of adjudication.<sup>24</sup> The essential nature of the requirement of judicial independence for a court or tribunal under EU law is underlined and confirmed also by art. 47 CFREU. In fact, the CJEU states

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<sup>20</sup> Ibid, paras 81-82.

<sup>21</sup> ASJP, paras 30-32.

<sup>22</sup> Ibid, para. 29.

<sup>23</sup> Ibid, para. 37.

<sup>24</sup> Ibid, para. 42 and case law thereby cited.

that access to an independent tribunal is one of the requirements of the fundamental right to an effective remedy, i.e. art. 47 CFREU.<sup>25</sup>

Subsequently, the Court underlines the fact that the guarantee of judicial independence is required at the EU as well as the Member State level since it is essential to the functioning of the judicial cooperation system between the EU and the Member States, having its cornerstone in the preliminary ruling mechanism, enshrined in art. 267 TFEU.<sup>26</sup> In the following paragraphs, the Court describes the concrete meaning of the principle of judicial independence and its nature.<sup>27</sup>

On the substance, the Court states that the salary-reduction measure is not applied only to members of the Tribunal de Contas, but also to other public employees. In addition, this measure has a general nature and its rationale is to require every member of the national administration to contribute to the efforts for the reduction of the excessive budget deficit of Portugal. Lastly, the measure is temporary in nature.<sup>28</sup> Therefore, the Court concludes that the national measure cannot be considered as impairing the principle of judicial independence in the case at hand.

### 3. The academic responses to *ASJP*: the alleged elements of novelty

The literature has widely commented on the *ASJP* judgment,<sup>29</sup> linking it to the so called ‘rule of law crises’.<sup>30</sup> Different aspects of this judgment have been underlined as worthy of notice, nonetheless we will focus on three main elements presented as novelties, namely: first, the scope of application

<sup>25</sup> Ibid, para. 41.

<sup>26</sup> Ibid, para. 43.

<sup>27</sup> Ibid, paras 44-45.

<sup>28</sup> Ibid, paras 46-51.

<sup>29</sup> Bonelli and Claes (n 6); M. Wendel, ‘Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after *LM*’ (2019) 15 *European Constitutional Law Review* 17; L. Pech and S. Platon, ‘EU Law Analysis: Rule of Law Backsliding in the EU: The Court of Justice to the Rescue? Some Thoughts on the ECJ Ruling in Associação Sindical Dos Juizes Portugueses’ (*EU Law Analysis*, 13 March 2018) eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html accessed 22 October 2019; M. Krajewski, ‘Associação Sindical Dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma’ (2018) 3 *European Papers* 395, 395; M. Avbelj, ‘We Still Haven’t Found What We’re Looking For’ (*Verfassungsblog*, 27 July 2018) verfassungsblog.de/we-still-havent-found-what-were-looking-for/ accessed 22 October 2019; L. Pech and S. Platon, ‘Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP* Case’ (2018) 55 *CMLR* 1827; M. Ovádek, ‘Has the CJEU just Reconfigured the EU Constitutional Order?’ (*Verfassungsblog*, 28 February 2018) verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/ accessed 22 October 2019; M. Wendel (n 7).

<sup>30</sup> M. Wendel (n 7) pt 1-2.

of art. 19(1) second subparagraph TEU; second, the scope of application of the same provision in comparison with the scope of application of art. 47 CFREU and, third, the principle of judicial independence.

### 3.1 The scope of application of art. 19(1) TEU

According to Bonelli and Claes, the judgment of the CJEU was ‘as ground-breaking as it was surprising’.<sup>31</sup> To their understanding, the very fact that the CJEU assumed jurisdiction on the case is remarkable. Pech and Platon share the same view, pointing out that what makes the Court’s ruling particularly significant is the way the Court exclusively relies on art. 19(1) TEU.<sup>32</sup>

The abovementioned authors concur in noticing that the Court interpreted art. 19(1) TEU broadly by giving it the significance of a stand-alone provision that can be triggered in areas in which the link with EU law is indirect or almost inexistent.<sup>33</sup> In this way, the Court stretched the scope of EU law to bring potentially the entire national judicial organisation of every Member State under its jurisdiction. In fact, it is maintained that the key test thereby applied consists in whether the national court has virtually jurisdiction over EU related questions. In line with this view, Krajewski points out that the novelty of this case is represented by the hypothetical link between national and EU law grounded in art. 19(1) TEU that allows the application of EU law *in abstracto*.<sup>34</sup>

### 3.2 The scope of application of Art. 19(1) second subparagraph TEU vis-à-vis art. 47 CFREU

According to Bonelli and Claes, the judicial creativity of the Court lies in the creation of a new sphere of EU law under art. 19(1) TEU that has a broader application than art. 47 CFREU.<sup>35</sup> The different scope *ratione materiae* of the two articles brings the Court to affirm the existence of a functional new sphere of EU law. This new sphere is not substantive, since it does not require the link with matters regulated by Union law. However, it is triggered by the national courts functioning as European courts. Platon and Pech welcome

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<sup>31</sup> M. Bonelli and M. Claes (n 6) 622.

<sup>32</sup> L. Pech and S. Platon, ‘EU Law Analysis: Rule of Law Backsliding in the EU: The Court of Justice to the Rescue? Some Thoughts on the ECJ Ruling in Associação Sindical Dos Juizes Portugueses’ (n 29) 1831.

<sup>33</sup> M. Bonelli and M. Claes (n 6) 631. L. Pech and S. Platon, ‘EU Law Analysis: Rule of Law Backsliding in the EU: The Court of Justice to the Rescue? Some Thoughts on the ECJ Ruling in Associação Sindical Dos Juizes Portugueses’ (n 29) pt 2.

<sup>34</sup> M. Krajewski (n 29) 403-404.

<sup>35</sup> M. Bonelli and M. Claes (n 6) 631.

the ground-breaking interpretation of the CJEU that gives art. 19(1) TEU a much wider scope of application than art. 47 that is based on art. 51(1) CFREU.<sup>36</sup>

According to Wendel, however:

[T]he true novelty of ASJP, however, was that it created the possibility for the European Court of Justice to actually assess, by relying on Article 19(1), second subparagraph, TEU, whether a Member State was abiding by its obligation to ensure judicial independence at the national level.<sup>37</sup>

The scholars argue that the Court has therefore gone beyond the limited functional necessity of ‘national remedies sufficient to ensure the application of EU law’ and now requires Member States to guarantee and respect the fundamental requirements of justice as defined by EU law, failing which they can be sued directly on the basis of art. 19(1) TEU.<sup>38</sup>

It is worthy to mention that there is also a part of the literature which considers that the CJEU went too far already in stretching its jurisdiction and competences to the maximum for the protection of the rule of law value within the Member States.<sup>39</sup>

### 3.3. The principle of judicial independence

The reasoning of the Court has been considered ‘abrupt and not entirely logical’<sup>40</sup> with reference to the interpretation of the principle of judicial independence, due to the fact that the CJEU defined the requirement of judicial independence stemming from art. 19(1) TEU by reference to its case law on the preliminary ruling mechanism enshrined in art. 267 TFEU.

To the understanding of Bonelli and Claes, the principle of judicial independence has two different meanings: one in the context of the preliminary ruling mechanism, and another one in the context of the effective judicial protection.<sup>41</sup> In fact, under art. 267 TFEU, judicial independence is not a requirement imposed by EU law, but rather a condition that must be met for the referring body to be considered a court or a tribunal in the first place. However, in the *ASJP* case, the principle of judicial independence is transformed into a general obligation imposed on Member States under art. 19(1) second subparagraph TEU which applies to all courts and tribunals that may potentially act as

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<sup>36</sup> L. Pech and S. Platon, ‘EU Law Analysis: Rule of Law Backsliding in the EU: The Court of Justice to the Rescue? Some Thoughts on the ECJ Ruling in *Associação Sindical Dos Juízes Portugueses*’ (n 29) pt 3.

<sup>37</sup> M. Wendel (n 29) 31.

<sup>38</sup> L. Pech and S. Platon, ‘EU Law Analysis: Rule of Law Backsliding in the EU: The Court of Justice to the Rescue? Some Thoughts on the ECJ Ruling in *Associação Sindical Dos Juízes Portugueses*’ (n 29) pt 4.

<sup>39</sup> M. Avbelj (n 29) pt 3.

<sup>40</sup> M. Bonelli and M. Claes (n 6) 633.

<sup>41</sup> *Ibid.*, 638.

European judges.<sup>42</sup> In this regard, the Court has gone beyond the well-established previous case law assessing whether all courts of a Member State are independent despite comprehensive institutional changes, instead determining the judicial independence of a specific concrete body.<sup>43</sup>

#### 4. A comparison with the previous case law of the CJEU

In agreement with Krajewski, we maintain that the Member States' obligation provided for in art. 19(1) second subparagraph TEU could have been inferred from the pre-Lisbon case law on the general principle of effective judicial protection and/or on art. 47 CFREU.<sup>44</sup> Thus, the fact that this case law has been codified in art. 19(1) second subparagraph TEU is a reaffirmation of the importance of this legal principle in a legal order based on the rule of law.<sup>45</sup>

We argue that the contribution of the interpretation of art. 19(1) second subparagraph TEU in the *ASJP* case is procedural rather than substantive. Contrary to Bonelli and Claes, we consider that the Court is revealing – and not creating – a ground for checking the compliance of the Member States with EU general principles forming the essence of the rule of law, such as the principle of effective judicial protection and the principle of judicial independence. In this sense, we can agree with the literature pointing out that art. 19(1) second subparagraph TEU makes the enforcement of the rule of law standards before the Court easier and more straightforward.<sup>46</sup>

Nonetheless, the Court did not 'discover' a justiciable rule of law clause in the abovementioned provision. Although, art. 19(1) second subparagraph TEU was not in the Treaties before Lisbon, it is merely a codification of previous case law.<sup>47</sup> The article at stake provides for the obligation upon Member States to ensure effective judicial protection of EU rights, and thus entails the respect

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<sup>42</sup> Ibid, 633.

<sup>43</sup> Ibid, 639 and 642.

<sup>44</sup> M. Krajewski (n 29) 404.

<sup>45</sup> *Les Verts*, para. 23.

<sup>46</sup> M. Krajewski (n 29) 404.

<sup>47</sup> Case C-50/00 *UPA* [2002] EU:C:2002:462, paras 40-42. See proposed amendments in The European Convention, 'Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe' (*The European Convention*, 28 July 2003) european-convention.europa.eu/EN/amendments/amendmentso28c.html?content=420&lang=EN accessed 14 March 2019. See also The European Convention, 'Final report of the discussion circle on the Court of Justice' (*The European Convention*, 25 March 2003) european-convention.europa.eu/pdf/reg/en/03/cv00/cv00636.en03.pdf accessed 22 October 2019, CONV 636/03 para. 18; A. Rosas, 'The National Judge as EU Judge: Opinion 1/09' in P. Cardonnel, A. Rosas and N. Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing 2012) 107-108.

of the requirement of judicial independence as a *condicio sine qua non* in the EU legal order, based on the rule of law. The Member States assumed the obligation of ensuring sufficient remedies under EU law, being subject only to the condition that their courts would be likely to deal with EU law related cases.<sup>48</sup>

Starting from the assumption that the concept of effective judicial protection forms a logical and coherent whole with the rule of law principle and that the notion of ‘remedies sufficient to ensure effective judicial protection’ is inextricably linked to judicial independence,<sup>49</sup> the reasoning of the Court does not sound surprising to us.<sup>50</sup>

#### 4.1. The scope of application of art. 19(1) TEU

It is not a novelty that in a decentralized system of justice such as the EU judicial system,<sup>51</sup> national courts are the primary venue for the application of EU law and the protection of EU rights, as a result of the preliminary ruling procedure and of the direct effect of EU rights for the individuals.<sup>52</sup> Art. 19(1) TEU represents in its two paragraphs the source of the EU system of judicial remedies:<sup>53</sup> the first subparagraph provides for the jurisdiction of the CJEU, and the second subparagraph specifies the role of the Member States in this cooperative system.

The argument shared by Bonelli, Claes, Platon and Pech that the Court created for the first time a ‘new’ sphere of EU law and a ‘new’ hypothetical link between national law and EU law by interpreting broadly the scope *ratione materiae* of art. 19(1) second subparagraph TEU is not convincing. By affirming that ‘questions relating to EU own resources and the use of financial resource

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<sup>48</sup> M. Krajewski (n 29) 404.

<sup>49</sup> ‘The first necessary and inescapable desideratum of the rule of law is an independent judiciary’: Mortimer Sellers, ‘What Is the Rule of Law and Why Is It So Important?’ in Flora A.N.J. Goudappel and E.M.H. Hirsch Ballin (eds), *Democracy and Rule of Law in the European Union* (TMC Asser Press 2016) 10.

<sup>50</sup> See, *inter alia*, on the doctrine of Rechtsstaat and Rule of Law – formal and substantive understanding thereof: H. Kelsen, *Pure Theory of Law* (Lawbook Exchange 2002); A.Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1973); J. Habermas and W. Rehg, *Contributions to a Discourse Theory of Law and Democracy* (Reprinted, Polity Press 2010); J.R. Silkenat, J.E. Hickey and P.D. Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (vol 38, Springer International Publishing 2014); L. Ferrajoli, ‘The Past and the Future of the Rule of Law’ in P. Costa and D. Zolo (eds), *The Rule of Law History, Theory and Criticism* (Springer Netherlands 2007).

<sup>51</sup> T. Tridimas, ‘The ECJ and the National Courts’ in D. Chalmers and A. Arnall (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 404 and J.H.H. Weiler, ‘The Transformation of Europe’ (1990) 100 *Yale Law Journal* 2403, 2420.

<sup>52</sup> K. Lenaerts, I. Maselis and K. Gutman (n 4) 1-3.

<sup>53</sup> Opinion 1/09 [2011] EU:C:2011:123, para. 66 and C-583/11 P *Inuit* [2013] EU:C:2013:625, para. 101.

from the European Union may be brought before the Tribunal de Contas',<sup>54</sup> the CJEU confirms that the case at hand could concern questions 'in the fields covered by Union law'.<sup>55</sup> Thus, the Court links its own jurisdiction to the other courts of the EU judicial system only to the extent that they would deal with a substantive matter of EU law.<sup>56</sup> Moreover, the Court is reaffirming that the EU judicial system comprises the national courts of the Member States, which are entrusted with the protection of individuals' rights under EU law.<sup>57</sup>

In this regard, the formulation of a hypothetical link based on the possibility of national courts to judge upon matters of EU law in the exercise of their functions is not a novelty in the EU judicial system.<sup>58</sup> The reasoning of the Court derives from the assumption that the Treaties have created an autonomous legal system embodied in the national ones and based on independent sources of law. In this regard, the judicial system finds its *raison d'être* in the need to protect the effectiveness of EU law and EU rights for individuals. Therefore, it is built as a system that cannot be deprived from the national courts as they are essential to its functioning.<sup>59</sup>

The Court has recently clarified this passage in the subsequent judgment *Commission v Poland*.<sup>60</sup> In contrast with the claim brought by Poland and Hungary, the CJEU underlines that, in the *ASJP* case, the link with EU law was not represented by the measure taken in the context of the excessive budget deficit procedure, whereas the conclusion that art. 19(1) second subparagraph TEU was applicable to the case in question was reached

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<sup>54</sup> *ASJP*, para. 39.

<sup>55</sup> Art. 19(1), second subpara. TEU.

<sup>56</sup> *ASJP*, para. 40.

<sup>57</sup> Opinion 1/09 [2011] EU:C:2011:123, para. 68; J. Komárek, 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order' (2005) 42 *CMLR* 9, 10.

<sup>58</sup> *Nota bene*: Already in 1995 R. Caranta wrote: 'The influences exerted by the principle of effective judicial protection on the domestic legal order do not necessarily stop at matters to which Community law is applicable. The rules laid down by the Court of Justice have in many instances influenced the way in which domestic provisions are construed and applied by national courts even in cases to which Community law does not apply: [...] so that the *jus commune* prompted by the Court of Justice in the field of judicial protection has a scope wider than that usually proper to Community law'. See R. Caranta, 'Judicial Protection against Member States: A New Jus Commune Takes Shape' (1995) 32 *CMLR* 703, 717-718.

<sup>59</sup> Case C-26/62 *Van Gend & Loos* [1963] EU:C:1963:1, 12; Case C-6/64 *Costa/Enel* [1964] EU:C:1964:66, paras 597-598; Case C-33/76 *Rewe* [1976] EU:C:1976:188, para. 5; Case C-45/76 *Comet* [1976] EU:C:1976:191, para. 12; Case C-106/77 *Simmmenthal* [1978] EU:C:1978:49, para. 21; Case C-244/80 *Foglia/Novello* [1981] EU:C:1981:302, para. 20; *Les Verts*, para. 23; C-222/84 *Johnston* [1986] EU:C:1986:206, para. 17; Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci and Others* [1991] EU:C:1991:428, para. 32; Case C-50/00 *UPA* [2002] EU:C:2002:462, paras 40-42; Case C-506/04 *Wilson* [2006] EU:C: 2006:587, para. 45; Case C-268/06 *Impact* [2008] EU:C:2008:223, para. 42. Opinion 1/09 [2011] EU:C:2011:123, para. 68; Case C-583/11 P, *Inuit* [2013] EU:C:2013:625, paras 90 and 99 and Opinion 2/13 [2014] EU:C:2014:2454, para. 175.

<sup>60</sup> Case C-619/18 *Commission v Poland* [2019] EU:C:2019:531, para. 51.

[O]n the basis of the fact that the national body which that case concerned, namely the Tribunal de Contas (Court of Auditors, Portugal), could, subject to verification to be carried out by the referring court in that case, rule, as a court or tribunal, on questions concerning the application or interpretation of EU law and which therefore fell within the fields covered by EU law.<sup>61</sup>

This interpretation of the Court should be read as deriving from its long-standing understanding of the principle of effective judicial protection. In this regard, since the cases *Johnston*<sup>62</sup> and *Heylens*,<sup>63</sup> and arguably *Van Gend*<sup>64</sup> and *Simmenthal*,<sup>65</sup> via *UPA*<sup>66</sup> the CJEU considers sharing with the Member States' courts the responsibility of ensuring effective judicial protection of EU rights for the individuals. This responsibility is inherently characterized by the respect of specific requirements such as impartiality and independence.<sup>67</sup> This principle and its requirements have then acquired primary status in art. 47 CFREU and mostly in art. 19(1) TEU, second subparagraph.<sup>68</sup>

There is nothing surprising in reading the CJEU underlying its own exclusive jurisdiction in the interpretation of EU law and its mandate of cooperation with the Member States' courts in ensuring the full application of EU law and the effective judicial protection of individuals' rights.<sup>69</sup> This shared responsibility is particularly enshrined in the mechanism of the preliminary ruling procedure of art. 267 TFEU and is present in the EU legal order since its origins.<sup>70</sup> The alleged potential link to sustain the jurisdiction of the CJEU is the very essence of the jurisdiction itself in the EU judicial system: the extent of the power to make legal decisions and judgments which embraces the CJEU as well as the national courts.

In the *ASJP* case, in accordance with the previous case law of the CJEU, the national court falls under the jurisdiction of the CJEU and functions as an EU court when acting in the field of EU law. This link is inherently hypothetical. In fact, the CJEU assumes that it is for the referring court to verify the specific situation, considering that in every situation in which the national court could deal with EU law issues, it would become an EU court subject to the require-

<sup>61</sup> Ibid.

<sup>62</sup> Case C-222/84 *Johnston* [1986] EU:C:1986:206, para. 17.

<sup>63</sup> Case C-222/86 *Heylens* [1987] EU:C:1987:442, para. 14.

<sup>64</sup> Case C-26/62 *Van Gend & Loos* [1963] EU:C:1963:1, para. 12.

<sup>65</sup> Case C-106/77 *Simmenthal* [1978] EU:C:1978:49, para. 21.

<sup>66</sup> Case C-50/00 *UPA* [2002] EU:C:2002:462, paras 40-42.

<sup>67</sup> Case C-506/04 *Wilson* [2006] EU:C:2006:587, paras 51-53.

<sup>68</sup> See, for this view, S. Prechal and R. Widdershoven, 'Redefining the Relationship between "Rewe-Effectiveness" and Effective Judicial Protection' (2011) 4 *REALaw* 31 and A. Arnulf, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' (2011) 36 *European Law Review* 51.

<sup>69</sup> Opinion 1/17 [2019] EU:C:2019:341, para. 111 and Opinion 2/13 [2014] EU:C:2014:2454, paras 174-176 and 246.

<sup>70</sup> Case C-26/62 *Van Gend & Loos* [1963] EU:C:1963:1, 12.

ments of effective judicial protection, including the principle of judicial independence. These situations cannot be previewed *a priori*: hence the general obligation stemming from art. 19(1) second subparagraph TEU of the Member States' courts to respect EU law and its principles, such as the principle of judicial independence and the principle of effective judicial protection of individuals' rights, when judging in the framework of the EU judicial system.

In this regard, the principle of sincere cooperation enshrined in art. 4(3) TEU comes at stake, since it obliges the Member States to ensure the application and the respect of EU law.<sup>71</sup> Thus, it is for the Member States to establish a system of legal remedies and procedures that ensure the effective judicial protection of individuals' rights under EU law as provided for in art. 19(1) second subparagraph TEU.<sup>72</sup>

#### 4.2. The scope of application of art. 19(1) second subparagraph TEU vis-à-vis art. 47 CFREU

Concerning the wider scope of application of art. 19(1) second subparagraph TEU vis-à-vis the right to an effective remedy under art. 47 CFREU, the reasoning of the Court is in line with its (in)consistent case law on the scope of application of the CFREU as provided for in art. 51(1) CFREU. More than ten years ago, Tridimas already noticed that the principle of effective judicial protection has a wider scope of application than the right to an effective remedy under art. 47 CFREU, since it refers to any situation in which Member States are acting within the scope of application of EU law, while the latter is applicable only in so far as the Member States are 'implementing Union law' according to art. 51 CFREU.<sup>73</sup>

In addition, even without calling into question a teleological or contextual interpretation of art. 19(1) second subparagraph TEU, the literal interpretation should lead us to pinpoint the difference between the two formulations, meaning art. 47 CFREU is inevitably linked to the scope of art. 51(1) CFREU 'when Member States are implementing Union law', while art. 19(1) TEU is not, and it states 'within the fields of EU law'. Therefore, the requirement of implementing Union law, without entering in the discussion about what this exactly could mean, is not present in art. 19(1) TEU, hence the possibility of reading it in a broader way.<sup>74</sup>

<sup>71</sup> Opinion 1/09 [2011] EU:C: 2011:123, para. 68.

<sup>72</sup> *Les Verts*, para. 23; C- 583/11 P *Inuit* [2013] EU:C:2013:625, paras 100-101 and the case law cited.

<sup>73</sup> T. Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 420.

<sup>74</sup> See, for the possibility of a broad reading of the provision, A. Kornezov, 'Shaping the New Architecture of the EU System of Judicial Remedies: Comment on Inuit' (2014) 39 *European Law Review* 251; K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 *CMLR* 1625; T. Tridimas (n 73); S. Prechal and R. Widdershoven (n 68) and M. Krajewski (n 29).

The reasoning of the Court undoubtedly finds its source in art. 19(1) TEU as drafted after Lisbon, nonetheless it has its origin in the previous case law constructing the EU judicial system as a complete and coherent system of legal remedies. The fact that the national courts of the Member States are entrusted with the effective judicial protection of individuals' rights stemming from EU law is nothing new in the cooperative EU judicial system. Thus, *ASJP* reminds us that the scope of jurisdiction of the CJEU could not reasonably be more narrow than the extension of the EU judicial system itself, namely comprising the national courts.

#### 4.3. The principle of judicial independence

In light of the *ASJP* case, the principle of judicial independence acquires its significance in relation to the principle of effective judicial protection.<sup>75</sup> To the understanding of the CJEU, the source of the latter is clearly art. 19(1) TEU, nevertheless reading the *ASJP* judgment we cannot deduce that the source of the former is the very same article. In fact, the obligation upon the Member States is to ensure effective judicial protection of EU law and rights before their national courts and tribunals, whereas the judicial independence of these courts and tribunals is a general principle inherent in the task of adjudication.<sup>76</sup>

In line with the case law of the Court, where the principle of judicial independence as a general principle of EU law is used to interpret EU law, the *ASJP* case is not an exception. The creation of a complete and coherent system of legal remedies acquires even more significance in a legal order such as the EU built on the principle of primacy, direct effect and mutual trust. Even though the interplay among these principles as well as with the principle of effectiveness and national procedural autonomy is beyond the scope of this paper, we intend hereby to underline that they all influence the dynamics of the evolution of the EU judicial system.<sup>77</sup>

In the EU judicial system, the national courts are the first *forum* to secure EU citizens' rights.<sup>78</sup> In order to be considered as courts or tribunals under EU law and to ensure effectively their functions as EU judges, the national courts need to meet certain requirements. These requirements have been asserted

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<sup>75</sup> *ASJP*, para. 37.

<sup>76</sup> Case C-506/04 *Wilson* [2006] EU:C:2006:587, para. 49.

<sup>77</sup> See on this, inter alia, E. Muir, 'Of Ages in - And Edges of - EU Law' (2011) 48 *CMLR* 39 and L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union' J. Monnet Working Paper 4/2009 <http://jeanmonnetprogram.org/wp-content/uploads/2014/12/090401.pdf> accessed 22 October 2019.

<sup>78</sup> See K. Lenaerts and P. van Nuffel, *European Union Law* (Sweet & Maxwell 2011).

through the case law of the CJEU on the preliminary ruling mechanism, provided for in art. 267 TFEU:

The Court has jurisdiction to reply to a request for a preliminary ruling if that request emanates from a court or tribunal which has acted in the general framework of its task of judging, *independently* and in accordance with the law, cases coming within the jurisdiction conferred on it by law, even though certain functions of that court or tribunal in the proceedings which gave rise to the reference for a preliminary ruling are not, strictly speaking, of a judicial nature.<sup>79</sup>

The definition of a court or tribunal under EU law is 'a question governed by Community law alone'<sup>80</sup> and it stems from the *Vaassen* criteria established already in 1966 by the CJEU,<sup>81</sup> to which judicial independence has been added.<sup>82</sup> In the view of the CJEU, the notion of court or tribunal under EU law is inextricably related to the principle of judicial independence with regards to the functioning of the preliminary ruling mechanism.<sup>83</sup> Hence, the criticism moved to the CJEU regarding the fact that the context of the case law on art. 267 TFEU is different from the one in *ASJP* is not entirely convincing.

The principle interpreted by the Court is the same (the principle of judicial independence) and the constitutional issue at stake is the same too, for instance the role of national courts as EU judges in the EU judicial system to ensure the effective and uniform application of EU law and individuals' EU rights:

Access to the courts and 'procedural safeguards' therefore constitute an indivisible whole, and we may therefore say that there is no effective judicial protection without those safeguards, amongst the most important of which is that relating to the independence of the body giving judgment and the adversarial nature of the proceedings.<sup>84</sup>

Acknowledging that, according to EU law, a national court needs to meet certain requirements in order to refer a question to the CJEU under art. 267 TFEU, it is possible to logically deduce that the same court needs to meet the same requirements when judging upon a matter within a field covered by the very same EU law. Where this is not the case the court, falling outside of the EU judicial system, would not be a court and therefore would not have the possibility to refer a preliminary question to the CJEU. Similarly, same body would not be considered a court under art. 19(1) second subparagraph TEU. In

<sup>79</sup> Leading case: Case C-14/86 *Pretore di Salò v Persons unknown* [1987] EU:C:1987:275, para. 7 (*Emphasis added*). See, *inter alia*, Case C-54/96 *Dorsch Consult* [1997] EU:C:1997:413 and Case C-506/04 *Wilson* [2006] EU:C:2006:587.

<sup>80</sup> Case C-54/96 *Dorsch Consult* [1997] EU:C:1997:413, para. 23.

<sup>81</sup> Case C-61/65 *Vaassen* [1966] EU:C:1966:39, para. 273.

<sup>82</sup> Case C-14/86 *Pretore di Salò v Persons unknown* [1987] EU:C:1987:275, para. 7.

<sup>83</sup> Confirming this view: K. Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' [2019] *Yearbook of European Law* 1, 3-4; Case C-506/04 *Wilson* [2006] EU:C:2006:311, Opinion of AG Stix-Hackl, paras 43-44 and Case C-506/04 *Wilson* [2006] EU:C:2006:587, paras 47-49.

<sup>84</sup> Case C-17/00 *De Coster* [2001] EU:C:2001:651, Opinion of AG Ruiz-Jarabo Colomer, para. 88.

both cases, either because of not being independent under art. 267 TFEU or under art. 19(1) second subparagraph TEU, the effect is the same: the court is excluded from the EU judicial system.

We could argue that interpreting ‘judicial independence’ in art. 19(1) second subparagraph TEU in light of the jurisprudence on art. 267 TFEU could lead us to a *de facto* situation in which national courts are excluded from the EU judicial system and exempted from the judicial control of the CJEU. However, the issue at stake would be the extent of the scope of jurisdiction that the CJEU creates for itself in the EU judicial system, and not the interpretation of the principle of judicial independence.<sup>85</sup> The ‘paradoxical conclusion’<sup>86</sup> of leaving outside the Court’s judicial control the national courts could be solved *via* a different interpretation of the principle of judicial independence. Nonetheless, this interpretation would still entail stretching the limits of the scope of jurisdiction of the CJEU vis-à-vis the Member States. In conclusion, the question remains: how far could the Court go in order to protect the rule of law and the national courts within the Member States in accordance with the EU rule of law?

## 5. Conclusion: anything new under the sun?

In this paper we offer an alternative interpretation of the *ASJP* judgment. It could be argued that neither the scope of application of art. 19(1) second subparagraph TEU nor the interpretation of the principle of judicial independence as a requirement of the principle of effective judicial protection are surprising. The CJEU has reminded us that these are codifications of previous case law of the same Court and are indispensable to the functioning of a complete and coherent system of judicial remedies in the EU legal order.

The reasoning in the *ASJP* judgment is in line with the case law of the Court dating back to the beginning of the EU integration process, reasoning that has created a unique constitutional order integrated into the Member States’ ones and focused on the centrality of the individuals’ rights.

The label ‘rule of law cases’ for this line of cases of the Court derives from the fact that the scholars commenting upon it largely agree on its relevance as a step forward in the upholding of the EU rule of law within the Member States,

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<sup>85</sup> See on Case C-17/00 *De Coster* [2001] EU:C:2001:651, Opinion of AG Ruiz-Jarabo Colomer, para. 61: ‘The concept of national court or tribunal determines whether the Court of Justice has jurisdiction to expedite proceedings which, like the preliminary ruling procedure, have turned out to be essential to the gradual construction and consolidation of the Community legal order. *The Court of Justice cannot have control of its own jurisdiction. The ground rules must be clearly defined in a Community governed by the rule of law.*’ (Emphasis added).

<sup>86</sup> M. Bonelli and M. Claes (n 6) 637.

after its backslide in some of them.<sup>87</sup> In our view, the *ASJP* case does not focus solely on the rule of law value *per se*, but rather deals with the operational value of the rule of law principle into the functioning of the EU judicial system, thus conforming with previous case law. The alleged ‘shift from a functional reading to a structural reading of Article 19 TEU achieved in the name of the rule of law’<sup>88</sup> could be found already in the case law of the Court in *Les Verts*.<sup>89</sup>

In fact, since the aforementioned case,<sup>90</sup> the ‘interlocking system of jurisdictions’<sup>91</sup> between the CJEU and the Member States’ courts is aimed at upholding the rule of law by creating a ‘complete and coherent system of judicial remedies’:

[I]t must be emphasize [...] that the EEC is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. [...] The Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. [...] Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling.<sup>92</sup>

Even though the *ASJP* judgment is important, we wonder if it is affirming anything new in the EU constitutional order. In this ruling, the CJEU has

<sup>87</sup> See, with reference to the context of the rule of law crisis, Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland [2016] OJ L217/53; Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 [2016] OJ L22/65; Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146 [2017] OJ L228/19; ‘European Parliament resolution of 13 April 2016 on the situation in Poland (2015/3031(RSP))’ (*European Parliament*, 13 April 2016) [europarl.europa.eu/doceo/document/TA-8-2016-0123\\_EN.html?redirect](http://europarl.europa.eu/doceo/document/TA-8-2016-0123_EN.html?redirect) accessed 22 October 2019; 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 [2017] COM/2017/0835 final - 2017/0360 (NLE); ‘European Parliament resolution of 1 March 2018 on the Commission’s decision to activate Article 7(1) TEU as regards the situation in Poland (2018/2541(RSP))’ (*European Parliament*, 1 March 2018) [europarl.europa.eu/doceo/document/TA-8-2018-0055\\_EN.html?redirect](http://europarl.europa.eu/doceo/document/TA-8-2018-0055_EN.html?redirect) accessed 22 October 2019; ‘Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control’ (*European Commission*, 3 April 2019) [europa.eu/rapid/press-release\\_IP-19-1957\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1957_en.htm) accessed 22 October 2019; ‘Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court Brussels’ (*European Commission*, 2 July 2018) [europa.eu/rapid/press-release\\_IP-18-4341\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4341_en.htm) accessed 22 October 2019.

<sup>88</sup> ‘Editorial Comments: EU Law between Common Values and Collective Feelings’ (2018) 55 *CMLR* 1329, 1334.

<sup>89</sup> *Les Verts*.

<sup>90</sup> *Ibid.*

<sup>91</sup> K. Lenaerts, ‘The Rule of Law and the Coherence of the Judicial System of the European Union’ (2007) 44 *CMLR* 1625, 1626.

<sup>92</sup> *Les Verts*, para. 23.

strongly restated its role as guardian of the interpretation and effective application of EU law in the EU system as based on the founding value of the rule of law, as it has done since 1986.<sup>93</sup> The CJEU certainly made clear that the obligation embodied in art. 19(1) second subparagraph TEU is a constitutional constraint for the Member States and a ‘constitutional mandate’<sup>94</sup> for the national courts. Nonetheless, the CJEU did not create a new competence or sphere of EU law. Hence, the *ASJP* case could be inscribed among other examples of cases, such as Opinion 1/09, that constitute ‘contributions to a constitutional edifice which has been built up gradually, and in interaction with the evolution of primary law, including art. 19 TEU as modified by the Treaty of Lisbon’.<sup>95</sup>

The fact that the reasoning of the Court in the *ASJP* judgment is not ‘surprising’ in light of its previous case law does not make it unsusceptible to criticism. The *ASJP* case highlights the long-standing issue of the limits of the CJEU’s jurisdiction vis-à-vis the Member States in the EU integration process.<sup>96</sup> At the constitutional level, the issue at stake is a competence one: delimiting the scope of application of art. 19(1) second subparagraph TEU means delimiting the jurisdiction of the CJEU in the adjudication of fundamental rights violations in the Member States. In a legal order based on the rule of law, ‘Respect for the boundary between the competences of the EU, and those of the Member States, is as important as the protection of fundamental rights’.<sup>97</sup>

Therefore, the challenge for the Court appears to be the respect of the EU rule of law when addressing concerns on the rule of law within the Member States. The story did not start with the *ASJP* case, nor it will end with it.

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<sup>93</sup> *Les Verts*, para. 23 and *Lenaerts* (n 11) 1659.

<sup>94</sup> *A. Rosas* (n 47) 121.

<sup>95</sup> *Ibid.*

<sup>96</sup> *T. Tridimas* (n 51) 404: ‘A successful relationship between the ECJ and the national courts is the key that unlocks EU integration’.

<sup>97</sup> *Case C-192/18 Commission v Poland* [2018] ECLI:EU:C:2019:924, Opinion of AG Tanchev, para. 114.