THE ORGANIZATION OF THE NATIONAL JUDICIARY

A Competence *of the Member States within the* Scope *of EU Law*

BY

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I. Introduction

Recently, national reforms of the judiciaries have been scrutinized by the Court of Justice of the European Union ("ECJ" or "the Court") as to their compliance with Article 19(1), second subparagraph, TEU read in light of Article 47 Charter of Fundamental Rights of the EU ("Charter"). Article 19(1), second subparagraph, TEU affirms the Member States' obligation to provide remedies to ensure effective legal protection in the fields covered by EU law. Additionally, Articles 19(1), second subparagraph, TEU and 47 Charter are deemed to be a reaffirmation of the general principle of effective judicial protection of individuals' EU rights.

In safeguarding the essence of the rule of law in the Member States, the ECJ has called upon national courts as its first allies: the well-functioning of the EU judicial system and the guarantee that all the rights which individuals derive from EU law will be protected rest on these premises.

However, the extent to which the ECJ can undertake such a role vis-à-vis the Member States and their courts, especially with reference to the national organization of justice, is far from being clear.

More precisely, the ECJ stated: "Although the organization of justice in the Member States falls within the *competence* of the Member States, *the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law* and, in particular, from the second subparagraph of Article 19(1) TEU. Moreover, by requiring the Member States thus to comply with those obligations, the European Union is not in any way claiming to exercise that competence itself nor is it, therefore, [...] arrogating that competence[1]".

1 ECJ, 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, case C-619/18, ECLI:EU:C:2019:531, § 52 (emphasis added).

The former affirmation of the ECJ has been interpreted as an *ultra vires* intervention in Member States' competences[2]. The roots of this concern are embodied in the understanding that EU law is founded on limited sovereign rights transferred from Member States to the EU in preestablished fields[3], pursuant to the principle of conferral[4]. This principle governs the allocation of competences between the EU and its Member States. Hence, there is no doubt that the principle of conferral, as a corollary of the rule of law, binds the EU to refrain from exercising its competences as limitless.

Nonetheless, such an interpretation under-looks that the ECJ's statement, referred to above[5], is explicitly not discussing the allocation of competences with regards to the organization of the national judiciary. Rather, the Court acknowledges a misalignment between the *competences* and the *scope* of application of EU law[6]. It is undisputed that the Member States are exercising their competence in the organization of the national judiciary, however the Member States' obligations deriving from EU primary law, and in particular from Article 19(1), second subparagraph, TEU constraint the exercise of such a competence. More precisely, the scope of application *ratione materiae* of Article 19(1), second subparagraph, TEU, i.e. *within the fields covered by EU law*, is defined in accordance with the notion of *scope* of EU law rather than with the one of *competence*[7]. *The following question then becomes relevant: What is the difference between the notion of scope* and *competence* with regards to the organization of the national judiciary in light of the ECJ's case-law?

This contribution aims, primarily, to investigate these issues by focusing on the meaning of the terms *scope* and *competence* in the ECJ's line of cases concerning the compatibility of the organization of the national judiciary with the principle of effective judicial protection as enshrined in Article 19(1), second subparagraph, TEU. The present paper will attempt to address these questions by placing the dichotomy between *competence* and *scope* in the framework of

2 *Inter alia*: M. Bonelli, "Effective Judicial Protection in EU Law: An Evolving Principle of a Constitutional Nature" [2020] Review of European Administrative Law. 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 Juízes Portugueses" (2018) 14 European Constitutional Law Review 622.

3 ECJ, 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, case C-26/62, ECLI:EU:C:1963:1, p. 12.

4 Art. 5(1) and (2) TEU: "1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

5 ECJ, 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, case C-619/18, *supra*, § 52 (emphasis added).

6 See i.e.: R. Caranta, "Judicial Protection against Member States: A New Jus Commune Takes Shape" (1995) 32 703. S. Prechal, 'National Courts in EU Judicial Structures' (2006) 25 Yearbook of European Law 429. A. Torres Pérez, "From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence" (2020) 27 Maastricht Journal of European and Comparative Law 105. T. Tadeusz Koncewicz, "On the Rule of Law Turn on Kirchberg – Part I", *Verfassungsblog*, 3 August 2019, available online: https://verfassungsblog.de/on-the-rule-of-law-turn-on-kirchberg-part-i/ (accessed 1st July 2021).

7 ECJ, Grand Chamber, 27 February 2018, *Associação Sindical dos Juízes Portugueses*, case C-64/16, ECLI:EU:C:2018:117, § 40; ECJ, 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, case C-619/18, *supra*, § 51.

the EU judicial system where the tension between the need to ensure the effective legal protection of EU rights and the fact that these rights are procedurally enforced at the national level has always posed challenges to the ECJ. In this framework, a dichotomy between the notion of *competence* and *scope* under EU law is not something new in the case-law of the ECJ[8].

First, attention will be devoted to the *Commission v. Poland (Independence of the Supreme Court)* case, which represents the leading case in the infringement proceedings brought by the Commission against the Member States regarding the compatibility of national judiciaries' reforms with EU law, more precisely with the principles of judicial independence and irremovability of judges, essential requirements of effective judicial protection and the rule of law under Article 19(1), second subparagraph, TEU[9].

Second, after sketching the characteristics of the EU judicial system, the notions of *competence* and *scope* will be analyzed by reference to previous caselaw of the ECJ.

Third, some reflections will be put forward regarding the significance of the more recent caselaw interpreting Article 19(1), second subparagraph, TEU for the evolution of the notion of scope of EU law with reference to matters of national procedural law.

To anticipate some conclusions, the dichotomy between the *scope* and the *competence* appears to have long-standing roots in the case-law of the ECJ according to which the two concepts seem to have different meanings and to respond to different rationales. While the notion of competence is related to the vertical division of tasks between the EU and the Member States with reference to policy/law making, the notion of scope of EU law is intertwined with the extent of the ECJ jurisdiction in order to create a shared judicial space in which EU rights and the specific characteristics of EU law could be effectively protected. The intuition to be further developed in the present paper is that the critique of an *ultra vires* exercise of its competences by the ECJ in the line of cases on Article 19(1), second subparagraph, TEU misplaces the issue.

II. Setting the scene: *Commission v Poland (Independence of the Supreme Court)*

In *Commission v Poland (Independence of the Supreme Court)*, for the first time, a Member State was held in breach of Article 19(1), second subparagraph, TEU in an infringement proceeding brought by the Commission under Article 258 TFEU. In the case at stake, the ECJ stated that reforms of the Polish judiciary were incompatible with the principles of judicial independence and of

8 *Inter alia*: M. Dougan, "Judicial Review of Member State Action under the General Principles and the Charter: Defining the Scope of Union Law" (2015) 52 1201. M. Claes, *The National Courts' Mandate in the European Constitution*, Oxford, Hart Publishing, 2006, p. 119. D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "functionalized Procedural Competence" of EU Member States*, Berlin, Springer, 2010.

9 ECJ, 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, case C-619/18, *supra*.

irremovability of judges under EU law, principles which are interpreted to be part of the right to effective judicial protection and essential requirements of the rule of law. In order to reach such a conclusion, the Court had first to affirm its jurisdiction on the reviewability of the organization of the national judiciary reforms under EU primary law.

Moving on to a brief analysis of the case, on the one hand, the Commission brought two arguments in front of the ECJ. First, the Commission alleged that the Polish national measures lowering the retirement age of judges in the Supreme Court infringed the principle of irremovability of judges by applying the measure retroactively; second, it also argued that national measures granting the President of the Republic of Poland the discretion to extend the mandate of Supreme Court judges infringed the principle of judicial independence. On the other hand, Poland, with the support of Hungary, stated that the *ASJP* judgement[10] should not be read as recognizing a competence of the EU in the matter of the organization of the national judiciaries.

In April 2019, Advocate General ("AG") Tanchev delivered his opinion in the case at hand[11]. The opinion of the AG is structured as follows: first, an assessment of the admissibility of the action; second, the relationship between Article 258 TFEU and Article 7 TEU; third, the material scope of Article 19 TEU and Article 47 Charter respectively; fourth, the merits of the action, namely the test to perform in order to check the compatibility of national law with Article 19(1), second subparagraph, TEU. For the purposes of our analysis, we will only focus on the third issue since it is on the basis of the scope of application *ratione materiae* of Article 19(1), second subparagraph, TEU that the jurisdiction of the ECJ is affirmed on the organization of the national judiciary.

Firstly, as to the scope of application of Articles 19(1), second subparagraph, TEU and 47 Charter, the AG conducted a separate assessment of the two provisions in order to avoid a circumvention of the Charter limited scope of application under its Article 51(1)[12]. Secondly, in light of the previous *ASJP* case[13], the AG maintained that Article 19(1), second subparagraph, TEU constitutes an *autonomous standard for ensuring that national measures meet the requirements of effective judicial protection, including judicial independence*[14].

Article 19(1), second subparagraph, TEU gives concrete expression to the value of the rule of law by obliging every Member State to ensure *effective legal protection*. Such an obligation on the Member States has been held in *ASJP* to consist in respecting the requirements of effective judicial protection, including judicial independence, by every national court or tribunal, as defined under EU

10 ECJ, Grand Chamber, 27 February 2018, *Associação Sindical dos Juízes Portugueses*, case C-64/16, *supra*.

11 Opinion of AG E. Tanchev, delivered on 11 April 2019, in *Commission v Poland (Independence of the Supreme Court)*, case C-619/18, ECLI:EU:C:2019:325.

12 *Ibid*., § 56-57.

13 ECJ, Grand Chamber, 27 February 2018, *Associação Sindical dos Juízes Portugueses*, case C-64/16, *supra*., § 40.

14 Opinion of AG E. Tanchev, delivered on 11 April 2019, in *Commission v Poland (Independence of the Supreme Court)*, case C-619/18, *supra*, § 58.

law, which may rule on questions concerning the application or interpretation of EU law[15].

Following this reasoning the AG considered undisputed that the Polish Supreme Court may rule, as a court or tribunal under EU law, on questions concerning the application and interpretation of EU law. Accordingly, the national reforms of its organization were said to fall within the material scope of Article 19(1), second subparagraph, TEU[16], and thus within the jurisdiction of the ECJ which is invested with the task of ensuring that in the interpretation and application of the Treaties the law is observed[17].

In the opinion of the AG, the ECJ is acting within the competences conferred upon it by the Treaties to ensure that the foundations of the EU legal order remain intact. In fact, measures which prevent national courts from carrying out their tasks as EU courts, depriving them of their independence, for instance, jeopardize the structure and the functioning of the entire system. Such measures also hinder the ECJ from carrying out its own mandate[18].

Siding with the AG's opinion, the Court found Poland in breach of its obligations under Article 19(1), second subparagraph, TEU[19]. Notably, the Court founded its reasoning solely on this provision[20]. First and foremost, the ECJ started its reasoning by reminding the fundamental premise that each Member State shares with all the others and recognizes that those share with it the same values. To these common values, referred to in Article 2 TEU, the Member States have *freely and voluntarily* committed to since the moment in which they joined the EU legal order[21].

The premise *entails and justifies* the mutual trust that each Member State and its courts *recognize and implement* those values upon which the EU legal order is indeed founded, including the rule of law[22]. In order to safeguard the specific characteristics and autonomy of this peculiar legal order, the Treaties established a *judicial system*, having its *keystone* in the preliminary ruling procedure provided for in Article 267 TFEU which allows to set a judicial dialogue between the ECJ and the national courts[23]. Both levels of jurisdiction of this judicial system, the supranational and the national one, do share the same objective: to ensure the effect, the autonomy and the nature of EU law by providing a consistent and uniform interpretation of that law.

15 *Ibid*., § 61.

16 For the scope of application *ratione materiae* of Article 19(1), second subparagraph, TEU, see ECJ, Grand Chamber, 27 February 2018, *Associação Sindical dos Juízes Portugueses*, case C-64/16, *supra*, § 37-40.

17 Article 19(1), § 1, TEU.

18 Opinion of AG E. Tanchev, delivered on 11 April 2019, in *Commission v Poland (Independence of the Supreme Court)*, case C-619/18, *supra*, § 59.

19 ECJ, 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, case C-619/18, *supra*.

20 *Ibid*., § 50: "As regards the material scope of the second subparagraph of Article 19(1) TEU, that provision moreover refers to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter".

21 *Ibid*., § 42.

22 *Ibid*., § 43.

23 *Ibid*., § 44-45.

As anticipated above, the creation of such a judicial system entails *a fortiori* the creation of a shared judicial space between the ECJ and its national counterparts. Such an understanding requires that individuals have the right to challenge the legality of any decision or measure concerning the application to them of an EU act[24].

It is in this context that Article 19(1), second subparagraph, TEU acquires its significance as being the provision which gives *concrete expression to the value of the rule of law*, and which entrusts the full application of EU law and the judicial protection of individuals' EU rights to national courts and tribunals *and to* the Court of justice[25]. In the words of Article 19(1), second subparagraph, TEU: Member States have to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law; it is therefore their duty to establish a system of legal remedies and procedures[26]. In addition to this obligation stemming for the Member States from the provision at issue, the general principle of EU law of effective judicial protection of individuals' EU rights is enshrined in it too[27].

Whilst what we have seen so far has been already established in previous case-law of the ECJ,[28] the interpretation of the scope of application of Article 19(1), second subparagraph, TEU raised doubts among commentators. This is well expressed in the ECJ now famous formula: "That conclusion was reached on the basis of the fact that the national body [...] *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*[29]".

Such a passage of the ECJ's judgment has been read as the source of a "new sphere of EU law"[30], based on a "hypothetical link between national and EU law[31]". However, as I already maintained elsewhere[32], the foundation of the ECJ's jurisdiction on the possibility of national courts to judge upon matters of EU law in the exercise of their judicial functions is not entirely a novelty for the EU judicial system[33]. This system is indeed built on the assumption that the responsibility to ensure EU law and to effectively protect EU rights is shared between the ECJ and the national/EU courts.

24 *Ibid*., § 46. See notably ECJ, 23 April 1986, *Les Verts v Parliament*, case 294/83, ECLI:EU:C:1986:166, § 23.

25 *Ibid*., § 47 (emphasis added).

26 *Ibid*., § 48.

27 *Ibid*., § 49.

28 Menzione (n 6).

29 *Ibid*., § 51 (emphasis added).

30 M. Bonelli and M. Claes (n 4), p. 630.

31 Pech and Platon (n 38), p. 1829.

32 Menzione (n 6).

33 See *infra*.

Therefore, if national courts do fall within the jurisdiction of the ECJ when they act as EU courts in the *fields* covered by EU law, the relevant question becomes: which are the fields covered by EU law?

The subsequent paragraph of the ECJ judgment, however, is not much of assistance in answering this question. The Court sided with Poland and Hungary and stated that although the organization of justice in the Member States falls within the *competence* of those Member States, still, when exercising that competence, the Member States are required to comply with their *obligations deriving from EU law*, and in particular from the second subparagraph of Article 19(1) TEU[34]. The Court also specified that the respect of such obligations, the EU is not claiming or arrogating that *competence*[35].

The ECJ does not seem to shed much light on the distinction between the notions of fields and *competence* with reference to the organization of the national judiciary which is considered a Member States' *competence* within the *scope* of EU law, and thus within the ECJ's own jurisdiction.

III. A long-standing dichotomy in the EU system of judicial protection

According to a well-established narrative in the case-law of the ECJ[36], national courts have a special role in securing the effective judicial protection of EU rights in their domestic judicial system in accordance with the principle of sincere cooperation[37]. As a result of that duty, national courts ought to ensure

34 ECJ, 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, case C-619/18, *supra*, § 52.

35 *Ibid*.

36 ECJ, 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, case C-26/62, ECLI:EU:C:1963:1, p. 12; ECJ, 15 July 1964, *Costa v E.N.E.L.*, case C-6/64, ECLI:EU:C:1964:66, p. 597-598; ECJ, 16 December 1976, *Rewe v Landwirtschaftskammer für das Saarland*, case C-33/76, ECLI:EU:C:1976:188, § 5; ECJ, 16 December 1976, *Comet BV v Produktschap voor Siergewassen*, case C-45/76, ECLI:EU:C:1976:191, § 12; ECJ, 9 March 1978, *Amministrazione delle finanze dello Stato v Simmenthal*, case C-106/77, ECLI:EU:C:1978:49, § 21; ECJ, 16 December 1981, *Foglia v Novello*, case C-244/80, ECLI:EU:C:1981:302, § 20; ECJ, 23 April 1986, *Les Verts v Parliament*, case 294/83, *supra*, § 23; ECJ, 15 May 1986, *Johnston v Chief Constable of the Royal Ulster Constabulary*, case C-222/84, ECLI:EU:C:1986:206, § 17; ECJ, 19 November 1991, *Francovich and Bonifaci v Italy*, joined cases C-6/90 and C-9/90, ECLI:EU:C:1991:428, § 32; ECJ, 25 July 2002, *Unión de Pequeños Agricultores v Council*, case C-50/00 P, ECLI:EU:C:2002:462, § 40-42; ECJ, Grand Chamber, 19 September 2006, *Wilson*, case C-506/04, ECLI:EU:C: 2006:587, § 45; ECJ, Grand Chamber, 15 April 2008, *Impact*, case C-268/06, ECLI:EU:C:2008:223, § 42; ECJ, Full Court, 8 March 2011, Opinion 1/09, ECLI:EU:C:2011:123, § 68; ECJ, Grand Chamber, 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, case C-583/11 P, ECLI:EU:C:2013:625, § 90 and 99; ECJ, Full Court, 18 December 2014, Opinion 2/13, ECLI:EU:C:2014:2454, § 175; ECJ, Grand Chamber, 28 April 2015, *T & L Sugars and Sidul Açúcares v Commission*, case C-456/13 P, ECLI:EU:C:2015:284, § 49-50.

37 *Inter alia* M. Dougan, "The Vicissitudes of Life at the Coalface Remedies and Procedures for Enforcig Union Law before the National Courts", in P. Craig and G. De Búrca (eds), *The Evolution of EU law*, Second, Oxford, Oxford University Press, 2011. 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*, Oxford, Hart Publishing 2012. T. Tridimas, "The ECJ and the National Courts", in D. Chalmers and A. Arnull (eds), *The Oxford Handbook of European Union Law*, Oxford, Oxford University Press, 2015. N. Półtorak, *European Union Rights in National Courts,* Alphen aan den Rijn, Kluwer Law International, 2015. P. Aalto and others, "Right to an Effective Remedy and to a Fair Trial" in S. Peers and others (eds), *The EU Charter of Fundamental Rights A Commentary*, Oxford, Hart Publishing, 2014, p. 1212.

that individuals have the possibility of claiming their EU rights before independent and impartial courts: *ubi EU ius, ibi national remedium*. In particular, the ECJ has for a long time shaped national procedural law with regards to matters in which the EU does not have a *competence* but which are considered to be within the *scope* of EU law[38]. The Court has done so, *inter alia*, by means of the inclusion of a new remedy in the Member States[39], in the form of ensuring a remedy of last resort,[40] by obliging the Member States to construct a complete system of legal remedies[41], or through imposing the respect of the principle of judicial independence[42].

The "traditional analytical grid"[43] to examine procedural choices of the Member States, in the absence of harmonization of EU law, is designed by the limits of equivalence, effectiveness and effective judicial protection[44]. As formulated by the ECJ in its famous *Rewe* judgment: "[A]pplying the principle of cooperation laid down in Article 5 of the [EEC] Treaty, it is the *national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law*. Accordingly, *in the absence of Community rules on this subject*, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature [...] [I]n the absence of such measures of harmonization the right conferred by Community law must be exercised before

38 Caranta (n 8).

39 ECJ, 19 June 1990, *The Queen v Secretary of State for Transport, ex parte Factortame*, case C-213/89, ECLI:EU:C:1990:257.

40 ECJ, 19 November 1991, *Francovich and Bonifaci v Italy*, joined cases C-6/90 and C-9/90, *supra*, § 32.

41 ECJ, 25 July 2002, *Unión de Pequeños Agricultores v Council*, case C-50/00 P, *supra*, § 41.

42 ECJ, Grand Chamber, 19 September 2006, *Wilson*, case C-506/04, ECLI:EU:C:2006:587, § 47.

43 Opinion of AG M. Bobek, delivered on 30 April 2019, in *Torubarov*, case C-556/17, ECLI:EU:C:2019:339, § 65.

44 On national procedural autonomy *inter alia*: A.F.M. Brenninkmeijer, "The Influence of Court of Justice Case Law on the Procedural Law of the Member States", in J.A. Vervaele (ed), *Administrative Law Application and Enforcement of Community Law in the Netherlands*, Alphen aan den Rijn, Kluwer Law International, 1994. M. Hoskins, "Tilting the Balance Supremacy and National Procedural Rules", (1996) 21 European Law Review 365. C.N. Kakouris, "Do the Member States Possess Judicial Procedural 'Autonomy'?" (1997) 34 1389. F. G. Jacobs, "Enforcing Community Rights and Obligations in National Courts: Striking the Balance", in J. Lonbay and A. Biondi (eds), *Remedies for breach of EC law*, Hoboken, Wiley, 1997. S. Prechal, "Community Law in National Courts: The Lessons from Van Schijndel", (1998) 35 Common Market Law Review 681. J. S. Delicostopoulos, "Towards European Procedural Primacy in National Legal Systems", (2003) 9 European Law Journal 599. A. Biondi and R. Mehta, "EU Procedural Law" in D. Patterson and A. Södersten (eds), *A Companion to European Union Law and International Law*, Hoboken, Wiley, 2016, available online: http://doi.wiley.com/10.1002/9781119037712.ch11 (accessed 15 October 2019). M. Dougan, *National Remedies Before the Court of Justice Issues of Harmonisation and Differentiation*, Oxford, Hart Publishing, 2004. A. Arnull, *The European Union and Its Court of Justice*, Oxford, Oxford University Press, 2nd ed., 2006). Tridimas (n 15). Galetta (n 12). A. Arnull, "The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?", (2011) 36 51. S. Prechal and R. Widdershoven, "Redefining the Relationship between 'Rewe-Effectiveness' and Effective Judicial Protection", (2011) 4 Review of European Administrative Law 31. K. Kakouris. M. Bobek, "Why There is no Principle of 'Procedural Autonomy' of the Member States", in H.-W. Micklitz and B. De Witte (eds), *The European Court of Justice and the Autonomy of the Member States*, Cambridge, Intersentia, 2014.

the national courts in accordance with the conditions laid down by national rules. The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect[45]".

National procedural autonomy allows the Member States to set their national procedural law for safeguarding EU rights as far as it is no less favourable than national law (principle of equivalence), it does not render the exercise of rights conferred by EU law excessively difficult or practically impossible (principle of effectiveness), and it does not impair the effective judicial protection of individuals' EU rights (principle of effective judicial protection)[46]. This autonomy includes, *inter alia*, the competence to set detailed procedural rules, to designate the courts having jurisdiction and the remedies available to individuals in order to enforce EU rights. National procedural law that does not comply with such requirements is deemed to be in violation of EU law.

Therefore, the so-called *Rewe* test[47] sets three main points: first, national courts are entrusted, as a result of the principle of sincere cooperation, with ensuring the legal protection of individuals' EU rights; second, national law is applicable only in so far as there is no harmonized EU law in the field; third, national law has to designate the procedural aspects of the enforcement of EU rights before national courts. Hence, the process of Europeanisation of national procedural law necessarily implies a reduction of national procedural autonomy for the Member States[48].

Against this background, the debate on the allocation and limits of competences seems to offer a misleading framework to analyse the ECJ case-law dealing with the limits of national procedural autonomy under EU law. In this regard, it has been affirmed that the conferral, subsidiarity and proportionality principles in practice do not seem to constitute serious obstacles to possible EU interferences with national procedural law[49]. In addition, the principles of equivalence and effectiveness in the context of national procedural autonomy seem to have been encapsulated into a more complex "matrix of rules and principles which represent a considerable intrusion into fields formerly considered the prerogative of Member States[50]".

45 ECJ, 16 December 1976, *Rewe v Landwirtschaftskammer für das Saarland*, case C-33/76, *supra*, § 5 (emphasis added).

46 *Inter alia*: ECJ, 16 December 1976, *Rewe v Landwirtschaftskammer für das Saarland*, case C-33/76, *supra*, § 5. *Inter alia*: ECJ, 14 December 1995, *Peterbroeck, Van Campenhout & Cie v Belgian State*, case C-312/93, ECLI:EU:C:1995:437; ECJ, 16 December 1976, *Comet BV v Produktschap voor Siergewassen*, case C-45/76, *supra*, § 12; ECJ, Grand Chamber, 15 April 2008, *Impact*, case C-268/06, ECLI:EU:C:2008:223, § 47-48; ECJ, 27 June 2013, *Agrokonsulting-04*, case C-93/12, ECLI:EU:C:2013:432; ECJ, 18 March 2010, *Alassini and Others*, joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, ECLI:EU:C:2010:146, § 49; ECJ, 16 July 2009, *Mono Car Styling*, case C-12/08, ECLI:EU:C:2009:466, § 49.

47 *Ibid*.

48 R. Widdershoven, "National Procedural Autonomy and General EU Law Limits", (2019) 2 Review of European Administrative Law 5.

49 R. Widdershoven (n 26).

50 A. Arnull, "Article 47 CFR and National Procedural Autonomy", (2020) 45 681, 47.

In light of this perspective, the line of cases hereby analyzed arguably inscribes itself in the long-standing case-law of the ECJ attempting to find an appropriate balance between *the need for the national courts to provide a proper protection of EU rights and the importance of respecting, within appropriate limits, the procedural and organizational autonomy of the Member States*[51].

Before turning to the core question of the present analysis, a preliminary remark is needed concerning the notion of 'national procedural autonomy'. The meaning of national procedural autonomy is, indeed, far from uncontroversial. Such notion finds its origin in the academic debate with reference to the evolution of EU law concerning national remedies and procedural rules in the decentralized enforcement of EU rights and obligations. Over time, scholarly works have taken different views on its meaning[52]. National procedural autonomy is not a general principle of EU law, nor is it a specific *competence* of the EU or of the Member States listed in the Treaties catalogue. Clearly, it is not a *field* of EU law *per se*.

It is hereby submitted that this expression is a 'lucky formula' to describe the space left to the Member States in the EU shared judicial space in order to provide procedural rules which can ensure the effective application and safeguarding of EU rights in the field of judicial remedies. Undoubtedly, the ECJ had a pivotal role in the progressive development of a 'complete system of legal remedies'[53]. The landmark *Van Gend en Loos* judgment laid the foundations for this ongoing process in the well-known formula: "the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community[54]".

In a nutshell, on the basis of a teleological interpretation, the ECJ affirmed one of the specific characteristics of EU law, namely the direct effect of its provisions. For the *effet utile* of such characteristic, the ECJ called upon national

51 Jacobs (n 22).

52 *Inter alia*: M. Hoskins (n 22). Delicostopoulos (n 22). K. Kakouris (n 22). Brenninkmeijer (n 22). Jacobs (n 22). Biondi and Mehta (n 22). M. Dougan, *National Remedies Before the Court of Justice Issues of Harmonisation and Differentiation* (n 22). Tridimas (n 15). Galetta (n 12). A. Arnull, "The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?", (2011) 36 51. Prechal and Widdershoven (n 22). S. Prechal (n 22). A. Arnull, *The European Union and Its Court of Justice* (n 22).

53 ECJ, 23 April 1986, *Les Verts v Parliament*, case 294/83, *supra*, § 23.

54 *Ibid*.

courts to secure the uniform interpretation of EU law. This passage of *Van Gend en Loos* is, arguably, at the origin of effective judicial protection[55].

Therefore, it is the peculiar EU 'interlocking system of jurisdictions'[56] between the ECJ and the national courts which requires the Member States to contribute with their national judicial systems to the effective application and enforcement of EU law. In the ECJ's words, "in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law"[57]. In establishing that EU law was capable of conferring rights upon individuals which the national courts are bound to protect, the ECJ wrote only the first sentence of a long and complex story still unfinished[58].

The development of the case-law has already been tracked elsewhere in the literature, and there appears to be an overall consensus on categorizing the cases in different phases during time[59]. These phases represent the changing attitude of the ECJ towards the Member States concerning the above-mentioned quest for a balance between the need to enforce EU rights at the national level and the respect of a space of national procedural autonomy. To put it briefly, a first phase is characterized by a greater deference of the ECJ to national procedural autonomy[60]; the second one is branded by a more activist attitude of the ECJ focusing on effective remedies for breaches of EU law[61]; and third one is described as *selective deference* since the ECJ sets minimum standards of effective judicial protection leaving at the same time discretion to the Member States to design national remedies and procedural rules[62].

In light of this narrative, by virtue of the principles of sincere cooperation and of the rule of law, national legal systems have never been completely immune

55 For this view, see *inter alia* : W. van Gerven, "Toward a Coherent Constitutional System within the European Union", [1996] European Public Law 81-101. S. Prechal, "National Courts in EU Judicial Structures", (2006) 25 Yearbook of European Law 429, 429-430. T. Eilmansberger, "The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link", (2004) 41 Common Market Law Review 1199.

56 K. Lenaerts, "The Rule of Law and the Coherence of the Judicial System of the European Union", (2007) 44 1625.

57 ECJ, 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, case C-619/18, *supra*, § 44.

58 A. Arnull, "Remedies before National Courts", in T. Tridimas and R. Schutze, *The European Union Legal Order*, Oxford, Oxford University Press, 2018.

59 *Inter alia*: T. Tridimas, "Enforcing Community Rights in National Courts: Some Recent Developments", in C. Kilpatrick, T. Novitz and P. Skidmore (eds), *The Future of Remedies in Europe*, Oxford, Hart Publishing, 2000. M. Dougan, "The Vicissitudes of Life at the Coalface Remedies and Procedures for Enforcig Union Law before the National Courts" (n 15).

60 ECJ, 16 December 1976, *Rewe v Landwirtschaftskammer für das Saarland*, case C-33/76, *supra*, § 5; ECJ, 16 December 1976, *Comet BV v Produktschap voor Siergewassen*, case C-45/76, *supra*, § 12.

61 ECJ, 9 March 1978, *Amministrazione delle finanze dello Stato v Simmenthal*, case C-106/77, *supra*; CJ, 15 May 1986, *Johnston v Chief Constable of the Royal Ulster Constabulary*, case C-222/84, *supra*; ECJ, 19 June 1990, *The Queen v Secretary of State for Transport, ex parte Factortame*, case C-213/89, *supra*; ECJ, 19 November 1991, *Francovich and Bonifaci v Italy*, joined cases C-6/90 and C-9/90, *supra*.

62 ECJ, 14 December 1995, *Peterbroeck, Van Campenhout & Cie v Belgian State*, case C-312/93, *supra*.

from the Community's judicial oversight[63]. It is not entirely surprising then that in regulating national procedural law Member States are required to comply with their obligations under EU primary law[64], and in particular with the principles of equivalence, effectiveness and effective judicial protection. Observance of such principles is rooted in the principle of sincere cooperation (Article 4(3) TEU) which is instilled in the long-standing relationship between the ECJ and the national/EU courts.

Characteristic for *Commission v Poland (Independence of the Supreme Court)* is instead the use of Article 19(1), second subparagraph, TEU as the benchmark provision of EU primary law under which conducting the analysis of the respect by the Member States of such principles in the organization of their judicial systems. This case could be considered as the latest development in the evolution of a long-standing trend of ECJ's case-law dealing with defining the limits of national procedural autonomy under EU law represented by the general principles of equivalence, effectiveness and effective judicial protection.

IV. What lesson about the scope of EU law from the ECJ case-law on Article 19(1), second subparagraph, TEU?

As anticipated above, in *Commission v Poland (Independence of the Supreme Court)* the ECJ referred by way of analogy to its previous case-law in order to reaffirm that Member States are obliged to respect EU primary law even when exercising their *competence* in matters in which there is no EU legislation, such as procedural law and the organization of the national judiciaries[65]. The cases to which the ECJ referred to are cases concerning criminal matters[66]. More precisely, the ECJ affirmed that: "Although in principle criminal legislation and the rules of criminal procedure are *matters for which the Member States are responsible*, it does not follow that this branch of the law cannot be *affected by Community law*[67]".

The ECJ poses limits to the powers of Member States also in matters for which the authors of the Treaties have ascribed only limited powers to the

63 Opinion of AG E. Sharpston, delivered on 30 November 2006, in *Unibet*, case C-432/05, ECLI:EU:C:2006:755, § 35.

64 ECJ, 16 December 1976, *Rewe v Landwirtschaftskammer für das Saarland*, case C-33/76, *supra*, § 5. ECJ, 11 July 1991, *Verholen and Others v Sociale Verzekeringsbank Amsterdam*, joined cases C-87/90, C-88/90 and C-89/90, ECLI:EU:C:1991:314, § 24; Opinion of AG M. Bobek, delivered on 30 April 2019, in *Torubarov*, case C-556/17, *supra*, § 65. Leading cases: ECJ, 16 December 1976, *Rewe v Landwirtschaftskammer für das Saarland*, case C-33/76, *supra*; ECJ, 14 December 1995, *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten*, case C-430/93, ECLI:EU:C:1995:441, § 19; ECJ, 14 December 1995, *Peterbroeck, Van Campenhout & Cie v Belgian State*, case C-312/93, *supra*, § 14.

65 ECJ, 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, case C-619/18, *supra*, § 52.

66 ECJ, Grand Chamber, 13 November 2018, *Raugevicius*, case C-247/17, ECLI:EU:C:2018:898, § 45; ECJ, Grand Chamber, 26 February 2019, *Rimšēvičs v Latvia*, joined cases C-202/18 and C-238/18, ECLI:EU:C:2019:139, § 57.

67 ECJ, 16 June 1998, *Lemmens*, case C-226/97, ECLI:EU:C:1998:296, § 19 (emphasis added).

Union. Such limits are set by EU primary law, including fundamental rights[68]. Thus, the contradiction between the fact that the Member States are exercising their competences and the fact that they have to respect EU primary law is only apparent[69]. A crucial element for determining the powers of the ECJ is the concept of *scope of application of EU law* which is different from the scope of EU *competences*[70].

To my understanding the allocation of competences sets the limits to the actions of national or supranational institutions by indicating which level should act in the vertical division of powers. By contrast, the scope of EU law designs a shared judicial space in which the specific characteristics of EU law, namely autonomy, primacy and direct effect, and the effective judicial protection of EU fundamental rights are to be safeguarded by the ECJ and the national courts. Thus, the term competences refers to the legal capacity of Union institutions to adopt legal acts within the framework of the EU Treaties; however, matters within the scope of EU law are not in principle matters in which the EU may act through legislative acts[71]. The scope of EU law is not linked to the existence of Treaty provisions conferring powers to the EU. Hence, the dichotomy between the scope of EU law and the competences attributed to the EU.

The ECJ uses a number of techniques to assess whether a matter is within the scope of EU law and it links its jurisdiction to this assessment rather than to the division of competences framework. In this regard, the principle of conferral appears to be of little help to stop the expansion of the scope of EU law. From the foregoing, it is unlikely that the complete realm of situations within the scope of EU law could be detected *a priori*.

General principles of EU law, especially, tend to frame the contours of the powers retained by the Member States. Not necessarily, however, such a function of the general principles has to be understood as in contrast with the principle of separation of powers[72].

The principle of effective judicial protection is particularly significant in this context, it governs in fact the relationship between the individuals and the public authorities in the multi-level architecture of fundamental rights' protection in the EU. It concretizes every other fundamental right being at a crossroad between substance and procedure. The intertwinement between substance and procedure is characteristics of the field of rights: the substantive content of

68 ECJ, 2 February 1989, *Cowan v Trésor public*, case C-186/87, ECLI:EU:C:1989:47, § 19; ECJ, 11 November 1981, *Casati*, case 203/80, ECLI:EU:C:1981:261, § 27.

69 See: B. De Witte, "Exclusive Member State Competences – Is There Such A Thing?", in S. Garben and I. Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future*, Oxford, Hart Publishing, 2017.

70 J. Bast and K. Wetz, "System of Competences", in P. Jan Kuijper and others (eds), *The law of the European Union*, Alphen aan den Rijn, Kluwer Law International, 5th ed., 2018.

71 S. Prechal, S. de Vries and H. van Eijken, "The Principle of Attributed Powers and the Scope of EU Law", in L.F.M. Besselink, F. Pennings and S. Prechal, *The Eclipse of the Legality Principle in the European Union*, Alphen aan den Rijn, Wolters Kluwer, 2011.

72 K. Lenaerts and J. A. Gutiérrez-Fons, "The Constitutional Allocation of Powers and General Principles of EU law", 41.

each right would be deprived of its meaning without the provision of its procedural justiciability and enforceability before a court. Rights and remedies go hand in hand, at least in a legal order based on the rule of law such as the EU[73]. Hence, the aforesaid general principle is grounded in the conviction that every individual wronged by a measure which deprives him/her of his/her EU rights must have access to a remedy in order to obtain judicial protection[74].

The principle of effective judicial protection has shown to be a powerful tool in the hands of the ECJ in order to assert its jurisdiction on matters concerning the law of remedies in the Member States, and accordingly to bring these matters within the scope of EU law.

In the words of Caranta: "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 ECJ have in many instances influenced the way in which domestic provisions are construed and applied by national courts even in cases to which the Community law does not apply; [...] so that the *jus commune* prompted by the ECJ in the field of judicial protection has a scope wider than that usually proper to Community law[75]".

It is hereby submitted thus that the EU law of remedies, as procedural law, is nowadays confirming its potentiality in expanding the scope of EU law towards national procedural autonomy by means of the ECJ interpretation of the scope of Article 19(1), second subparagraph, TEU, and, consequently, of its own jurisdiction. This tendency, as anticipated above, has deep roots in the EU legal order which inherently entails the maxim *ubi EU ius, ibi national remedium*. There is an ontological link between rights and remedies in the sense that a right necessarily give rise to a remedy which allows the right to be enforced through judicial process[76].

In the absence of EU legislation, the EU system of judicial protection is meant to rely on national procedural legislation and on the organization of the national judiciaries. With the Lisbon Treaty, the evolution of the EU law of remedies, as a main feature of the EU judicial system, has found an express codification in the second subparagraph of Article 19(1) TEU.

The question of how national procedural law is organized or whether it has to be adapted to EU law is no longer a purely internal matter[77], most probably

73 Notably ECJ, 23 April 1986, *Les Verts v Parliament*, case 294/83, *supra*, § 23.

74 Opinion of AG F. Jacobs, delivered on 21 March 2002, in *Unión de Pequeños Agricultores v Council*, case C-50/00 P, ECLI:EU:C:2002:197, § 38-39.

75 Caranta (n 8).

76 W. Van Gerven, "Of Rights, Remedies and Procedures", (2000) 37 Common Market Law Review 501.

77 S. Prechal, "Europeanisation of National Administrative Law", in J.H. Jans, S. Prechal and R. Widdershoven, *Europeanisation of Public Law*, Zutphen, Europa Law Publishing, 2015, p. 71.

it never was[78]. In this context, there is the possibility of a "judicial creep"[79], arguably, rather than a "competence creep"[80]. The mandate of the ECJ under Article 19(1), first subparagraph TEU to ensure that in the application and interpretation of the Treaties the law is observed represents the gateway for the expansion of the scope of EU law and of its jurisdiction. As already affirmed by AG Mancini in his Opinion in *Les Verts*, it appears that *whenever required in the interests of judicial protection, the Court is prepared to correct or complete rules which limit its powers in the name of the principle which defines its mission* [i.e. the principle of effective judicial protection][81].

The potential to correct and to complete the EU system of legal remedies seems to be rooted in the origins of the EU legal order itself, and its link with the jurisdiction of the ECJ continues to raise interesting questions. It is still unclear what are the possible implications of the notion of *scope of EU law* as interpreted under Article 19(1), second subparagraph, TEU on the extent of the scope of the ECJ jurisdiction, especially with regards to EU law of remedies. In this sense, a reflection put forward by Arnull already in 1990 represents food for thoughts: could the common law doctrine of inherent jurisdiction[82] be an appropriate framework to analyze the scope of the ECJ jurisdiction as intertwined to the scope of EU law[83]?

V. Concluding remarks

The present paper has attempted to delineate the dichotomy between the concept of *competence* and the one of *scope* in the case-law of the ECJ, in particular with reference to matters concerning national procedural autonomy. In this framework, the ECJ case-law interpreting and applying Article 19(1), second subparagraph, TEU as a benchmark to test the compatibility of national procedural law with EU primary law has brought again to light a long-standing issue of EU law.

It is hereby submitted that the notion of *competence* and the one of *scope* are not synonyms and they respond to two different rationales. The first one is narrower and related to the vertical division of tasks between the EU and its Member States regarding the legislative making power in specific pre-estab-

78 For this view see: M. Bobek, "Why There Is No Principle of 'Procedural Autonomy' of the Member States", in B. De Witte and H.-W. Micklitz, *The European Court of Justice and the Autonomy of the Member States*, Cambridge, Intersentia, 2012.

79 Prechal, de Vries and van Eijken (n 76).

80 S. Garben, "Competence Creep Revisited: Competence Creep Revisited", [2017] JCMS: Journal of Common Market Studies, available online: http://doi.wiley.com/10.1111/jcms.12643 (accessed 13 December 2018).

81 Opinion of AG F. Mancini, delivered on 4 December 1985, in *Les Verts v Parliament*, case 294/83, ECLI:EU:C:1985:483, p. 1350.

82 Jurisdiction is deemed to be "inherent" since it derives exclusively from the nature of the body exercising it, and to be part of procedural law invoked in connection with litigation rather than of substantive law. A. Arnull, "Does the ECJ Have Inherent Jurisdiction?", (1990) 27 Common Market Law Review 683, at 702.

83 *Ibid*.

lished areas of law; whereas the second one is broader and finds its origin in the safeguarding of the specific characteristics of the EU legal order, namely primacy, direct effect, autonomy, and the effective judicial protection of individuals' EU rights.

Moreover, the scope of EU law appears to be closely intertwined with the scope of jurisdiction of the ECJ[84]. Such a notion indeed acquires a special significance in the architecture of the EU system of judicial protection which appears to be complicated by the absence of a uniform code of EU procedural law, notwithstanding the presence of a *corpus* of substantive EU rights.

As the first two subparagraphs of Article 19 TEU illustrate[85], the ECJ cannot uphold to its role without the cooperation of the national courts and their national procedural law. Nevertheless, the term "autonomy" is probably misleading in this framework due to the fact that it embraces the assumption that the Member States are free to set their rules. However, since the *Rewe* formula, the ECJ assumption seems to be a different one: *in the absence of EU legislation in the matter*, Member States are required to set the remedies which can allow individuals to enforce their EU rights by judicial means within the limits set by EU primary law. The assumption of the ECJ rests on the idea that the EU judicial space is one and that it is shared between the EU and the Member States' courts; hence, the very idea of an intrusion of EU law into national procedural law sounds confusing.

The shaping of the EU law of remedies brings with it the necessity of balancing the functioning of two levels of jurisdiction in one shared judicial space. Such a balance has for a long time been assessed in light of the general principles of equivalence, effectiveness and effective judicial protection as benchmarks to test the compatibility of national procedural law with EU primary law. With the entry into force of the Lisbon Treaty, the principle of effective judicial protection has acquired the status of codified primary law under Article 19(1), second subparagraph, TEU, making the Member States' obligation more evident and the unwritten general principle as a written provision. However, recent ECJ cases interpreting this provision do not seem to introduce a novel understanding of the dichotomy scope/competence under EU law, rather they inscribe themselves in a long-standing trend which designs the EU law limits for national procedural law. Hence, critics of the ruling *Commission v. Poland (Independence of the Supreme Court)* arguably mistakenly confused the two concepts and misplaced the issue by accusing the ECJ of acting *ultra vires*.

84 Notably: ECJ, Grand Chamber, 7 May 2013, *Åkerberg Fransson*, case C-617/10, ECLI:EU:C:2013:105, § 2.

85 Article 19(1), first subparagraph, TEU: "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Treaties the law is observed." Article 19(1), second subparagraph, TEU: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."