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The Principle of the Rule of Law From Article 2 of the Treaty on European Union as a Value of the European Union and Its Components as Requirements Imposed on Member States, on the Example of a Judgment of the Court of Justice of the European Union Regarding Portuguese Judges, Rendered on the Basis of a Preliminary Ruling Referred by a National Court

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Abstract. The rule of law principle is mentioned in article 2 of Treaty of European Union. This provision states, that it is one of fundamental principles of European Union. The text below is an attempt to answer the question of way of interpretation of this principle and its definition on the ground of judicial decisions of the Court of Justice of the European Union. Judgment of 27 February 2018 in case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* is starting point for broader reflection on principle of the rule of law in verdicts of the Court of Justice of the European Union.

Keywords: The Court of Justice of the European Union, the rule of law, independence of judges, fundamental principles of European Union.

JEL Classification: K39, K49.

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1. INTRODUCTION

The economic integration of the European Communities[1], aimed at rebuilding Europe after World War II[2] and focusing (based on the idea stemming from the Schuman Declaration[3]) on the primary elements of the market, such as coal and steel at that time, indicating the degree of industrialization of the state, became the starting point for political integration. It is precisely on the basis of the latter that the European Union, established under the Maastricht Treaty[4] (hereinafter referred to as "EU"), was equipped with axiological elements, thereby initiating the process of its constitutionalising. Consequently, EU values based on the cultural, religious and humanistic heritage of Europe[5], as well as common to the Member States in a society based on pluralism, non-discrimination, tolerance, justice, solidarity and gender equality[6], have gained particular significance, thus constituting the foundation upon which the functioning of the current form of a unified international organization equipped with supranational elements, namely the European Union, became possible. This fact is confirmed by the content of Article 2 of the Treaty on European Union (hereinafter referred to as "TEU"). The aforementioned provision contains a catalogue of values classified in the light of the Treaties and case law as the minimum necessary for integration (Govaere, 2022, p. 3) (a condition sine qua non during EU accession - Article 49 TEU[7]) and as the basis for the principle of loyal cooperation (Article 4 (3) TEU) and the principle of mutual trust between Member States. The axiological element is also included within the Union's objectives (Article 3 (1) and (5) TEU). Therefore, since "EU values" appear in so many contexts, it is important to understand what falls within this concept. In light of the topic of this paper, it should be pointed out that in the catalogue of overarching axiological components, such as respect for human dignity, freedom, democracy, equality, respect for human rights, including the rights of persons belonging to minorities[8], there is a principle of the rule of law (rule of law) that is frequently mentioned in scientific texts, publicist writings and public debate. This principle and its defining components will be the subject of this article and will be characterized using the example of the preliminary questions posed by a national court and a judgment rendered on 27 February 2018, by the Court of Justice of the European Union (hereinafter referred to as "CJEU") in the case concerning Portuguese judges (C-64/16). First, general issues (such as terminology, provenance and content of the principle, the position of the principle, and its significance in EU law) will be presented. Then, the factual and legal context of the mentioned judgment will be presented in order to approximate the characteristics of the structural components of the principle as requirements imposed on Member States. Finally, conclusions will be

[1] European Communities – organizations which formed the basis for the European Union as an "overlay" on the existing pillars; on 18 April 1951, by the Treaty of Paris, the European Coal and Steel Community was established; on 25 March 1957, by the Treaties of Rome, the European Economic Community and EURATOM were created.

[2] This is confirmed by the objectives of establishing the European Coal and Steel Community, namely the aim to "ease the lack of trust and tensions post-World War II" and "to create interdependence in the coal and steel market so that one country could not mobilize military forces without the knowledge of other countries" [https://european-union.europa.eu/principles-countries-history/principles-and-values/founding-agreements_pl], so that the previously divided states could strive to achieve common goals.

[3] This ties back to the declaration by French Foreign Minister Robert Schuman, in which he popularized the idea of pooling basic productions and establishing a new High Authority, which was intended to lay the foundations of the European Federation necessary for maintaining peace: "By pooling basic production and by instituting a new High Authority (...), this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace". See Schuman Declaration of 9 May 1950, https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en).

[4] Treaty on European Union, OJ C 191, 29.7.1992, p. 1–112.

[5] Preamble to the Treaty on European Union, OJ EU C 326 of 26.10.2012, p. 13.

[6] Article 2 TEU

[7] States acceding to the EU are required to uphold the values from Article 2 TEU, including the principle of the rule of law – see Article 49 TEU. Additionally, concerning EU accession, the Copenhagen criteria (adopted at the European Council summit in Copenhagen in 1993, and subsequently tightened at the European Council summit in Madrid in 1995) must be met by the candidate state before joining the EU. Among them, one finds the "stability of institutions guaranteeing democracy, the rule of law, human rights, as well as respect for and protection of minorities" [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:accession_criteria_copenhague]. Therefore, the rule of law is an essential element for initiating accession negotiations.

[8] Article 2 TEU

drawn from the considerations conducted. The aim of the article is to present subject of "rule of law" principle on the context of one of the most significant judgements of the Court of Justice of the European Union, which has its consequences for members of European Union. The thesis of the Author is that case concerning Portuguese judges is one of the most important for notion of "rule of law" principle. For this aim, the Author analyses fundamental treaties and most important judgements and opinions of scholars.

2. THE SIGNIFICANCE OF THE RULE OF LAW AS ONE OF THE EU VALUES

It is worth noting at the outset that "law and order", "the state of law", or "the rule of law" are terms often used interchangeably, so they should be considered equivalent (Holocher & Naleziński, 2022, p. 328-330). The diversity of nomenclature does not affect the designation of the obligations imposed on the Member States under Article 2 TEU (Marcisz & Taborowski, 2017, p. 101) since the most important thing is the content arising from the principle in question, not just its name.

The first reference to a principle of the rule of law appeared in the judgment of the Court of Justice in 1986 in Case C-294/83, *Parti écologiste "Les Verts" v European Parliament*. The Court noted at that time that the European Union (then the European Economic Community) is "a community based on the rule of law, which means that both Member States and institutions are subject to control of the compliance of their acts with the basic constitutional charter, which is the treaty" (C-294/83, Taborowski, 2019, p. 21; Węcławska-Misiurek, 2023; Grzelak, 2018, p. 216; Bungenberg & Hazarika, 2019, p. 387). However, treaty references were created much later - the first clear reference to "the rule of law" appeared in the preamble to the Maastricht Treaty of 1992, in which representatives of the specified states "determined to move to a new stage of the European integration process initiated by the establishment of the European Communities"[9] decided to establish the European Union, previously "reaffirming their attachment to the principles of freedom, democracy, respect for human rights and fundamental freedoms, and the rule of law"[10] (Taborowski, 2019, p. 30; Douglas-Scott, 2011, p. 646). Subsequent references appeared in Article 6(1) of the Amsterdam Treaty[11]. It laid the foundation for the later enactment in the Lisbon Treaty of what is now Article 2 TEU (Góralski, 2020, p. 91), which only became subject to the jurisdiction of the Court of Justice with the entry into force of the treaty. Based on this provision, an axiological foundation was built (Kenig-Witkowska, 2017, p. 72), within which respect for the rule of law became the basis for mutual trust among the Member States (which was expressed, among others, in Opinion 2/13 of the Court of Justice[12]), and consequently a necessary condition for the functioning of the EU as an "area of freedom, security and justice without internal borders"[13] (i.e., the achievement of one of the EU's objectives). Thus, the effectiveness (*effet utile*) of EU law was ensured, and effective cooperation between Member States was enabled. Moreover, the principle of the rule of law has been made an integral part of the preamble to the Charter of Fundamental Rights[14].

Currently, this principle is widely invoked by the Court of Justice of the European Union in its case law - which does so either directly (explicitly referring to it or its components) or indirectly (referring in a general way to the overriding treaty values). Furthermore, special importance is also attributed to it by the European Commission,

[9] Preamble to the Maastricht Treaty of 1992, OJ C 191, 29.7.1992, p. 1.
[10] Ibidem.
[11] The wording of the provision at the time: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, which are common to the Member States".
[12] Opinion 2/13 of the Court of Justice of 18 December 2014 on the Accession of the European Union to the European Convention on Human Rights and Freedoms, para. 168. See also: Council (EU) Position No. 16/2020 at first reading on the adoption of the regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget, OJ EU.C.2020.441.1, para. 5 (hereinafter: "Council (EU) Position No. 16/2020"). Adopted by the Council on 14 December 2020.
[13] Article 3(2) TFEU..
[14] Preamble to the Charter of Fundamental Rights, OJ C 326 of 26.10.2012.

which, due to the lack of a treaty definition, made the rule of law the subject of separate discussion in the Communication from the Commission to the European Parliament and the Council "A New EU Framework to Strengthen the Rule of Law"[15] and in Annex 1 to the Communication[16].

In light of the fundamental importance of the rule of law as a fundamental principle of the European Union[17], the question arises: what exactly should be understood by this concept?

The Commission, in its Communication, notes that the rule of law is one of the fundamental principles arising from the common constitutional traditions of all EU Member States and constitutes the foundation of every modern constitutional democracy[18]. Furthermore, it emphasizes the inseparable connection of this principle with respect for democracy and fundamental rights[19] (as general principles forming part of EU law - judgment in *Stauder vs. Stadt Ulm* (Case 29-69)). A similar reference appears in Council Position (EU) No 16/2020, which indicates that: "the rule of law requires all public authorities to act within the limits set by the law, in accordance with the values of democracy and respect for fundamental rights - in accordance with the Charter of Fundamental Rights of the European Union (...) and other applicable instruments - and under the control of independent and impartial courts (...)"[20]. It is worth noting here that the treaty regulation itself, i.e., Article 2 TEU, does not specify the content of the concept of "the rule of law", and therefore cannot be an independent basis for imposing specific obligations on Member States or transferring certain powers to individuals (Taborowski, 2019). Therefore, it takes the form of a so-called umbrella clause[21] (Pech, 2009; Marshall, 1993, p. 43; Węcławska-Misiurek, 2023), which is a superstructure over the component elements that have autonomous significance within the supranational legal order (Taborowski, 2019) and consequently requires their detailed determination. The European Commission has done this by compiling, in the aforementioned Communication, a catalogue of key components shaping the content of the discussed principle. It is also noted that it may vary slightly at the national level depending on the constitutional system of each Member State[22].

The European Commission has created this, albeit not exhaustive, but constitutive, list of component elements based on the case law of the Court of Justice. Key in this context is the judgment referred to in the title of the CJEU ruling of 27 February 2018, in Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, as well as solutions (i.e., *a checklist*) developed by the so-called The Venice Commission, or the European Commission for Democracy through Law within the Council of Europe[23].

[15] European Commission Communication to the European Parliament and the Council *New EU Framework to Strengthen the Rule of Law*, COM/2014/0158 final.
[16] Annex No. 1 to the Commission Communication "Rule of Law as a Fundamental Principle of the Union".
[17] Ibidem.
[18] Commission Communication… p. 2.
[19] Ibidem, p. 4.
[20] Council (EU) Position No. 16/2020..., pt. 3.
[21] Umbrella principle/clause, see L. Pech, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper, 04/09, New York University School of Law, New York, 2009 and G. Marshall, *The Rule of Law. Its Meaning, Scope and Problems*, 1993/24, Cahiers de philosophie politique et juridique, p. 43. See M. Węcławska-Misiurek (2023). In her work, M. Węcławska-Misiurek described the umbrella clause, characterizing it in a vivid way: "It consists of many elements, which are compared to puzzles, building blocks, pillars, or the foundations of a building, which must be properly matched and complete. The absence of one of these elements would cause the destruction of the entire structure. Similarly, in the case of the rule of law – it is necessary to guarantee and observe all its elements in order to speak of a lawful state or the rule of law in the European Union".
[22] See Commission Communication…
[23] European Commission for Democracy through Law (Venice Commission), Rule Of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016). The Venice Commission prepared a list of questions necessary to assess whether the rule of law is indeed being observed in a given member state. In its report published in 2011, it defined the rule of law as an "integral part of every democratic society"; see Venice Commission Report of 4 April 2011, study no. 512/2009.

3. THE FACTUAL AND LEGAL BACKGROUND OF THE CASE OF PORTUGUESE JUDGES (C-64/16) – I.E. THE JUDGMENT OF THE CJEU OF 27 FEBRUARY 2018 IN CASE C-64/16 ASSOCIAÇÃO SINDICAL DOS JUÍZES PORTUGUESES V TRIBUNAL DE CONTAS

The Supreme Administrative Court in Portugal (*Supremo Tribunal Administrativo*) referred a request to the Court of Justice for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (hereinafter referred to as "TFEU")[24]. The request was made in the context of a dispute between the Professional Association of Portuguese Judges (*Associação Sindical dos Juízes Portugueses* - hereinafter referred to as "ASJP") and the Portuguese Court of Auditors (*Tribunal de Contas*) and concerned the interpretation of Article 19(1) second paragraph of the TFEU and Article 47 of the Charter of Fundamental Rights of the European Union.

The factual background of the case related to the issue of temporary reduction of salaries of individuals holding positions and performing functions in the public sector introduced by Law No 75/2014. The aim of the introduced regulation was to implement the state's budget policy aimed at meeting the requirements of reducing excessive budget deficit (C 64/16). ASJP argued in its justification of the complaint, that the provisions regarding salary reductions infringed the principle of judicial independence, expressed both in the Portuguese Constitution and in EU law (in Article 19(1) second paragraph of the TEU and Article 47 of the Charter of Fundamental Rights).

The referring court, in formulating the question to the Court of Justice, on the one hand, relied on the fact that the requirements for reducing the excessive budget deficit had been imposed on the Portuguese government by decisions of the Union (including in connection with the granting of financial assistance to this Member State), and on the second hand, it pointed to the need to comply with the general principles of Union law, including the principle of judicial independence. In view of these circumstances, the Supreme Administrative Court (*Supremo Tribunal Administrativo*) decided to stay the proceedings and refer to the Court of Justice with a preliminary question of the following content:

"Should the principle of judicial independence, arising from Article 19(1) second paragraph of the TEU and Article 47 of the Charter, and from the case law of the Court, be interpreted in such a way that it opposes provisions reducing the remuneration applied to judges in Portugal on the grounds that they have been unilaterally and continuously established by the other organs of power, as follows from Article 2 of the law [No 75/2014] in the view of the requirements to eliminate the excessive budget deficit and in view of the financial assistance regulated by European provisions?" (C 64/16).

When responding to the questions raised by the national court, the Court pointed out several absolutely crucial issues for ensuring the proper functioning of the rule of law in the Member States. These have immense significance not only from the perspective of the case at hand but also for many subsequent cases. The CJEU referred to the values on which the Union is based, indicating that Article 19 of the TEU is a specification of the rule of law value affirmed in Article 2 of the TEU (C 64/16). The Court emphasized the importance of "judicial independence" as an integral element of adjudication (essential both at the EU and Member State levels), significant for the proper functioning of the preliminary reference mechanism, and an inherent element of the principle of effective judicial protection, which is a general principle of EU law and an inherent feature of the rule of law (C 64/16). The CJEU in its judgment also confirmed its competence to assess guarantees of the independence of judges and the independence of national courts. Furthermore, in the context of the Portuguese *Tribunal de Contas*, it indicated the conditions that an entity must meet to be considered a "court" under EU law. Among these elements were: the statutory basis of the entity, its permanent nature, the obligatory nature of its jurisdiction, adversarial proceedings, the application of legal provisions by the entity, and its independence[25]. In this case, the Court noted that the provisions providing for a reduction in salaries had a general nature and covered not only members of the

[24] Treaty on the Functioning of the European Union of 13 December 2007, OJ C 202 from 7.6.2016, p. 47.
[25] Ibidem, pt. 38. Compare with the judgment of 16 February 2017, Margarit Panicello, C-503/15, pt. 27 and the case law cited therein.

Court of Auditors but the entire broad circle of individuals performing tasks in the public sector, including representatives of all branches of government - legislative, executive and judicial (C 64/16). It also added that the salary reduction was only temporary (C 64/16). Ultimately, the Court held that the regulations introduced could not be seen as specifically targeting members of the *Tribunal de Contas* (C 64/16). It deemed that these measures in this case did not violate the independence of the members of the Court of Auditors. The Court's response to the preliminary question was as follows:

"Article 19(1) second paragraph TEU should be interpreted as meaning that the principle of judicial independence does not preclude the application of general provisions on salary reduction to members of the Tribunal de Contas (court of auditors), such as the provisions at issue in the main proceedings, relating to the requirements for eliminating an excessive budget deficit and the EU financial assistance programme" (C 64/16).

Despite the fact that in the discussed factual situation the provisions regarding the reduction of salaries did not result in a violation of the principle of judicial independence, this case should nevertheless be seen as one of the breakthroughs due to the key theses presented, crucial for ensuring the proper functioning of the principle of rule of law in the Member States and its elements.

4. THE ELEMENTS OF THE PRINCIPLE OF RULE OF LAW AS REQUIREMENTS IMPOSED ON THE MEMBER STATES

The Communication and Annex 1 to this Communication present six key principles shaping the concept of the rule of law from Article 2 of the TEU. These components stem from the case law of the Court of Justice and belong to the general principles of EU law, originating from constitutional traditions common to the Member States.

Some of them are also protected under the Charter of Fundamental Rights[26]. However, it is worth emphasizing that the rule of law itself, as an "umbrella clause", is not a general principle of EU law. It is solely a European value from Article 2 of the TEU (C 64/16), concretized[27] on the basis of relevant treaty provisions (including general principles of EU law). The following elements constitute this meta-principle[28] (Węclawska-Misiurek, 2023):

1) legality (including a transparent, accountable, democratic, and pluralistic legislative process);
2) legal certainty;
3) prohibition of arbitrariness in the actions of executive authorities;
4) access to justice before independent and impartial courts, effective judicial control, including the control of respect of fundamental rights;
5) separation of powers;
6) equality before the law[29].

These elements are invoked in many EU documents. They can also be found in Council Position (EU) No 16/2020:

[26] In this context, for example, Articles 20, 21, and 47 of the Charter of Fundamental Rights.
[27] For instance, the value of the rule of law from Article 2 TEU is concretized in Article 19 TEU.
[28] The author of the cited publication also notes that the term "meta-principle" is used interchangeably with the term "meta-clause": "In the literature, the concept of 'meta-clause' is also pointed out. For example, by P. Tuleja, M. Zubik, W. Sokolewicz".
[29] Commission Communication…, p. 4 and Annex No. 1 to the Commission Communication… Sometimes there are proposals to classify, as components of the rule of law principle from Article 2 TEU, other elements besides those listed in the Communication. However, to truly recognize them as components of the rule of law principle, they must be confirmed by the Court of Justice, e.g., the principle of effective application of EU law (see the Order of the Court of Justice in the Białowieża Forest case of 20.11.2017, C-441/17 R, *Commission v. Poland*, pt. 102).

"(…) The principle of rule of law requires, in particular, compliance with the principle of legality, which means a transparent, accountable, democratic, and pluralistic legislative process, the principle of legal certainty, the prohibition of arbitrariness in the actions of executive authorities, the principle of effective judicial protection, including access to justice provided by independent and impartial courts, and the principle of separation of powers"[30].

As rightly observed by the Commission based on the statements adopted by the Court of Justice and the European Court of Human Rights, the aforementioned principles serve as "a tool to ensure compliance with and respect for the principles of democracy and human rights" [31]. Due to their particular importance in the EU legal system, they may be enforced judicially.

5. PRINCIPLES OF LEGALITY AND LEGAL CERTAINTY

The juxtaposition of the principles of legality and legal certainty, for a closer examination of their significance as components of the rule of law, is not accidental; it is a deliberate approach applied by me for the purposes of this work. This is fundamentally important, especially in light of the judgment in case C-42 and 49/59 *SNUP A.T.* (C-42 and 49/59), in which the Court noted the functional correlation of the mentioned principles (Kornobis-Romanowska, 2018, p. 8) albeit associating legal certainty with the dominance of private interest, while public interest was linked with the principle of legality.

The Court established that the principle of legal certainty, along with the protection of legitimate expectations, "requires, in particular, that regulations be clear and precise, so that the legal subjects subject to them can unambiguously determine their rights and obligations and take appropriate steps accordingly" (C-308/06, Kornobis-Romanowska, 2018, p. 5).This general principle of law is also linked to the prohibition of retroactive changes in legal provisions (217/80, Kornobis-Romanowska, 2018, p. 5) and the creation of norms impossible to fulfil. Furthermore, this principle imposes the obligation of promulgating enacted legal acts and avoiding any inconsistencies within them, as well as ensuring consistency between the enactment and application of the law. Alongside legal certainty, the principle of legality(101/78, Węcławska-Misiurek, 2023) has also been solidified as a requirement directed at the Member States. It encompasses a transparent, accountable, democratic and pluralistic legislative process and has become one of the fundamental principles of the Union[32], within which the law has been recognized as the foundation and limit of the actions of public authority.

6. PROHIBITION OF ARBITRARINESS IN THE ACTIONS OF EXECUTIVE AUTHORITIES

The starting point for the discussed issue is the separation of powers, which will be further elaborated in the subsequent part of the paper and largely includes ensuring the independence of the judiciary from the executive power. As indicated by the Court:

"In all legal systems of the Member States, the intervention of public authorities in the sphere of private activity of any person, whether natural or legal, must, however, have a legal basis and be justified by reasons provided for by the law, and therefore these systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognized as a general principle of [Union] law. [...]" (46/87 and 227/88; Węcławska-Misiurek, 2023).

Arbitrary actions by the executive authority can lead to very serious consequences, which may weaken, and in extreme cases even prevent, the functioning of other elements of the rule of law. They may diminish the significance of stable legal provisions created by democratically elected representatives of the legislative body, and

[30] Council (EU) Position No. 16/2020…, pt. 3.
[31] Commission Communication…, p. 4.
[32] Annex to the Commission Communication…

consequently cause uncertainty among addressees, who will remain unconvinced about the stability of their legal situation or even about the real basis of their actions. Furthermore, their situation may not improve when arbitrary actions by the executive branch spill over into the administration of justice, which should be distinct from others, demonstrating the independence of the courts and the impartiality of the judges. As a result, the protection of human rights and fundamental freedoms may also be jeopardized.

7. ACCESS TO JUSTICE BEFORE INDEPENDENT AND IMPARTIAL COURTS, EFFECTIVE JUDICIAL CONTROL, INCLUDING THE CONTROL OF RESPECT OF FUNDAMENTAL RIGHTS

The establishment of an autonomous legal order, separate from international law and the legal systems of the Member States, and functioning based on the core principles derived from the case law of the Court of Justice, such as the principle of direct effect (Case C-26/62) and the principle of primacy (Case C-6/64), has made national courts the courts of the Union with general competence, competent to adjudicate on matters of disputes over EU law not reserved for the Court of Justice of the European Union. It is precisely this latter institution that has been granted special competence to exclusively settle certain matters, among which are the following issues: examining complaints brought against a Member State for failure to fulfil its obligations under the treaties (Articles 258 and 259 TFEU), actions for annulment of acts of EU law (Articles 263 and 264 TFEU), complaints about the inaction of institutions (Article 265 TFEU), or claims for damages (Article 340 TFEU), as well as providing answers to questions referred to the Court by courts of Member States concerning the interpretation of the Treaties or the validity and interpretation of acts adopted by Union institutions, bodies, or entities (Article 267 TFEU) [33].

The actions of the Court aim to ensure the uniform application of EU law in all Member States, where the role of national courts is to guarantee the full effectiveness of EU law (*"effect utile"),* including refusing to apply national norms that contradict EU norms (judgment in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*). Since "the European Union is a union based on law, in which the acts of the institutions are subject to review for compliance with, among other things, the treaties, the general principles of law, and fundamental rights" (C-583/11), the proper functioning of the mechanisms described above requires the fulfilment by the Member States of certain requirements, among which the principle of effective judicial protection deserves particular attention. It constitutes an integral element of the rule of law as a value affirmed in Article 2 TEU and concretized (C 64/16)[34] in Article 19 TEU, as already indicated in the earlier part of the paper in relation to the judgment concerning Portuguese judges. The latter provision indicates that "Member States shall establish the remedies necessary to ensure effective legal protection in areas covered by Union law" [35]

Thus, it imposes on those states the obligation to shape procedures in such a way as to enable the provision of effective judicial control in areas covered by Union law. Moreover, the discussed principle is a part of the general principles of EU law (which arise from the constitutional traditions common to the member states and constitute—alongside the founding, amending, and accession treaties, and the CFR—one of the components of primary law.) Additionally, it is affirmed in Article 47 of the CFR, guaranteeing the right to an effective remedy and access to an impartial tribunal. A crucial issue—necessary to ensure effective judicial protection—is the realization of judicial independence (Taborowski, 2019, p. 32)[36] as an inherent element of this principle in the legal systems of the Member States. Its implementation is a necessary requirement both at the Union level (regarding judges and Advocates

[33] All in reference to Article 19(3) of the Treaty on European Union.
[34] See similarly Opinion 1/09 (Establishment of a unified system for settling patent disputes) of 8 March 2011, pt. 66.
[35] Treaty on European Union.
[36] "Judicial independence" is a collective concept that, in the Polish legal system, has been divided into two separate aspects: "independence" of courts and "impartiality" of judges..

General of the Court of Justice – see Article 19(2) third paragraph TEU) and at the Member State level in relation to national courts (C 64/16). As pointed out by the Court in the case concerning Portuguese judges, this concept means, among other things, that "the body fulfils its judicial duties fully autonomously, not being subject to any hierarchical superiors or subordination to anyone, nor receiving orders or guidelines from any source, and is thus protected against external interference and pressures that could threaten the independence of its members' judgment and influence their decisions" (C 64/16). Consequently, Member States are obliged to establish principles ensuring the guarantee of judicial independence, such as those concerning the composition of the body, appointment and dismissal of members, and the duration of their terms, etc.

In the case C-216/18 PPU, LM (concerning Artur Celmer), the Court observed that the independence of judges, which is part of the essential content (C-216/18) of the fundamental right to a fair trial (i.e., the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law – Article 47 paragraph two of the CFR) and an integral element of adjudication, includes two aspects—external and internal (C-216/18). The first "requires that the body performs its tasks fully autonomously, free from subordination within any service hierarchy, not subordinate to anyone, free from orders or directives from any source, and remains protected from outside interference and pressures that may threaten the independence of its members' judgment and influence their decisions" (C-216/18). To fully realize this external aspect, it is necessary to have manifestations of guarantees of judicial independence, including the issue of non-removability of members and a level of remuneration commensurate with the importance of their tasks (C-216/18)[37]. The second aspect (internal) "is associated with the concept of impartiality and concerns maintaining equal distance from the parties to the dispute and their respective interests concerning its subject. This aspect requires adherence to objectivity and a lack of any interest in the resolution of the dispute beyond the strict application of the law" (C-216/18; C-506/04).

The principle of judicial independence is also crucial "for the proper functioning of the judicial cooperation system in the form of the preliminary ruling mechanism provided for in Article 267 TFEU" (C-64/16). This issue is particularly significant from the perspective of the EU system of protection, primarily in relation to courts from whose judgments no appeal is provided, and therefore, in case of doubts concerning the interpretation or validity of an EU law act, are obligated to refer questions for a preliminary ruling (Article 267, third paragraph). Moreover, it significantly influences the interpretation adopted by lower instance courts. However, it is worth emphasizing here that this process can function properly only if the independence of the courts is guaranteed in the Member State. Only in such a case it is possible for states sharing common values to cooperate effectively (principle of loyal cooperation – Article 4(3) TEU), based on mutual trust (principle of mutual trust), and for EU law to be applied effectively and uniformly. Furthermore, the issue of judicial independence, and consequently, the right to a fair trial before an independent and impartial tribunal, also has fundamental importance in the execution of the European Arrest Warrant (hereinafter: "EAW" (C-216/18, C-399/11), and thus significantly impacts the functioning of the principle of mutual recognition[38] within the area of freedom, security, and justice without internal borders[39]. Effective judicial control as one of the elements of the rule of law is a necessary condition for the proper functioning of an autonomous legal order. Thus, since individuals can invoke rights derived from EU law before national courts, it is crucial for the protection of their rights that these courts demonstrate independence and judges maintain impartiality.

[37] Also: judgment of 27 February 2018 in case *Associação Sindical dos…*, pt. 45.
[38] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). See also: opinion of Advocate General Paolo Mengozzi of 20 March 2012 in case *C-42/11 Lopes Da Silva Jorge*.
[39] Reference to Article 3 TEU

8. RESPECT FOR FUNDAMENTAL RIGHTS CONTROL

During the discussion of the principle of effective judicial protection, one cannot fail to mention the issue of control of the respect for fundamental rights[40], the protection of which as general principles of EU law[41] has been developed in the case law of the Court of Justice since the early 1970s and was also guaranteed in the Charter of Fundamental Rights, hereinafter "CFR" (initially adopted as an interinstitutional agreement, and after the Treaty of Lisbon as a binding act with the same legal status as the treaties). Given that it was insufficient that the Member States are parties to the European Convention on the Protection of Human Rights and Fundamental Freedoms and that not only the states but also the Union itself and its institutions should adhere to fundamental rights, a decision was made to introduce regulations at the EU level. The scope of application of the Charter is regulated by Article 51 of the CFR, which indicates that its provisions apply to EU institutions, bodies, offices, and agencies, as well as to Member States, but only insofar as they implement EU law[42]. Thus, the obligation to ensure the protection of these rights is inseparably linked to the principle of effective judicial control, which is one of the elements of the rule of law and thus constitutes one of the requirements resting on the Member States.

A good summary of this issue is the statement recorded in the Commission Communication, which indicates that "there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa"[43] and these rights are only effective when they can be pursued through judicial recourse[44].

9. SEPARATION OF POWERS

For the realization of the rule of law, it is necessary to ensure the separation of powers within the legal systems of Member States. Already in the Enlightenment era, several centuries before the very idea of forming a supranational organization like the current European Union, the French philosopher and lawyer Montesquieu, inspired by the works of John Locke, observed in his treatise *"The Spirit of the Laws"* that:

> *"When legislative power is united with executive power in a single person or in a single body, there is no freedom because there is reason to fear that the same monarch or senate will enact tyrannical laws to be executed tyrannically. There is also no freedom if the judicial power is not separated from the legislative and executive powers. If it were joined with legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be a legislator. If it were joined with executive power, the judge could have the force of an oppressor"* (Montesquieu, 1957, p. 244).

Despite the passage of time, these words remain relevant and continue to apply to the discussed principle, providing a precise characterization of it. Thus, the key issue is the separation of legislative, executive, and judicial functions among three distinct authorities, each equipped with its own organs and a system to balance and check each other. As noted by the Commission in Annex 1 to the Communication, this principle may take different forms due to various parliamentary models and the degree of its application at the national level[45]. However, as the Court notes in the DEB case judgment: "EU law does not preclude a Member State from performing simultaneously the roles of legislator, administrator, and judge, provided all these functions are performed with respect for the principle

[40] The protection of fundamental rights is multi-dimensional – regulated in the CFR and developed in the CJEU's case law. The issue of fundamental rights was also referenced by the German Federal Constitutional Court in its *Solange I* and *Solange II* decisions.
[41] Confirmed in the judgment in case *29/69 Stauder v. City of Ulm*.
[42] The phrase "only to the extent that they implement Union law" raises interpretative issues regarding in which cases the provision can be applied. It is recognized, however, that this includes all cases where a European element is present, (e.g., judgment of 8 March 2011 in case *C-34/09 Zambrano*). Moreover, fundamental rights also apply in horizontal relations (e.g., judgment of 17 April 2018 in case *C-414/16 Egenberger*).
[43] Commission Communication..., p. 4.
[44] Ibidem.
[45] Annex No. 1 to the Communication.

of the separation of powers, characterizing the functioning of a rule-of-law state" (C-279/09)[46]. The issue of the separation of powers is largely focused on demonstrating the independence of the judiciary from the executive power. This is emphasized by the Court, among others, in the judgment of the joined cases C-174/98 P and C-189/98 P, *Kingdom of the Netherlands and Gerard van der Wal against the Commission*, which states that "[...] the general principle of [Union] law, inspired by Article 6 ECHR, [...] includes the right to a court that is independent particularly from the executive power [...]" (C-174/98 P and C-189/98). Similar statements regarding the separation of these two powers are made in the cases of Kovalkovas (C-477/16) and Poltorak (C-452/16) focusing on the bodies comprising them. It highlights that those involved in the administration of justice belong to the judicial authority, in contrast to ministries, other governmental bodies, administrative agencies, or police services, which are categorized as part of the executive power (C 477/16; C-452/16).

Consequently, the requirement placed on Member States within this discussed element of the rule of law principle concerns ensuring an unquestionable separation of powers.

10. EQUALITY BEFORE THE LAW

The last element that constitutes a component of the principle of the rule of law is equality before the law. This is a general principle of EU law and is codified (Lenaerts, Gutiérrez-Fons, 2013, p. 40)[47] in Articles 20 and 21 of the Charter of Fundamental Rights (C-550/07). The first of these articles emphasizes that everyone is equal before the law. The second refers to the prohibition of all discrimination, particularly on grounds such as: gender, race, skin colour, ethnic or social origin, genetic features, language, religion or beliefs, political or any other opinion, membership of a national minority, wealth, birth, disability, age (C 144/04) or sexual orientation. According to these provisions and based on established case law, it is highlighted that "this principle requires that similar situations not be treated differently and different situations not be treated the same unless such treatment is objectively justified" (C-550/07, C 127/07). Moreover, within the scope of the Treaties and without prejudice to their special provisions, it reserves a prohibition against any discrimination based on nationality. This principle, confirmed in a directly effective provision, Article 18 TFEU, is expressed in many very specific issues of the internal market and lies beneath the EU freedoms (e.g., freedom to provide services – Article 56 TFEU, freedom of establishment – Article 49 TFEU). Furthermore, Article 19 TFEU, which provides a normative basis for the Council and the European Parliament in terms of adopting necessary measures to combat the specified types of discrimination, also refers to the aspects mentioned in Article 21(1) of the CFR.

Thus, the principle of equality before the law constitutes a requirement whose implementation rests not only on the EU but primarily on the Member States. To ensure the proper functioning of freedoms within the internal market, they must not allow situations where there would be direct discrimination based on citizenship or indirect discrimination based on other criteria than nationality, but producing the same or similar effect. The observance of the principle of equality by the Member States can be reflected in the principle of national treatment.

11. SUMMARY

The above considerations lead to the conclusion that the implementation of the elements that make up the principle of the rule of law, discussed in this paper based on the provisions of EU law, including the Treaties and the CFR, and exemplified by the case law of the Court of Justice, particularly the judgment in the case of the Portuguese judges, is essential for ensuring the coherence and effectiveness of the autonomous legal order that

[46] In the mentioned case, the state (Federal Republic of Germany) assumed a dual role: defendant (in connection with the damage caused) but also as a guarantor of effective judicial protection.
[47] Even Chapter III of the CFR is titled "Equality" and is dedicated to addressing this issue.

constitutes the order of the European Union. The judgement is crucial for interpretation of Article 2 of Treaty on European Union and its conclusions will have an impact on next judicial decisions. This is especially important conclusion from the point of view of significance of "rule of law" principle, which is a condition of accession of new members to European Union.

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