



## Part III: The Challenges Ahead

The rule of law backsliding

# I. The problem

*‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’*



# Examples of measures adopted

## 1) Threats to judicial independence:

- Rules amending the retirement age of judges of the Supreme Court
- Rules concerning the appointment of the members of the Supreme Court's Disciplinary Chamber and of the Constitutional Tribunal
- Disciplinary proceedings against judges that refer questions for preliminary ruling to the ECJ



## 2) Threats to the freedom of the press

## 3) Amendments to immigration and asylum law



## II. The toolbox

1. *On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.*

2. *The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.*

3. *Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.*

*The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.*

4. *The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.*

5. *The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.*

# The Charter of Fundamental Rights

- Solemnly proclaimed on 7 December 2000;
- Lisbon Treaty (1 December 2009) granted it ‘the same legal value of the Treaties’ – Article 6(1) TEU
- Scope of application: Article 51(1)

*‘The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.’*

## Article 47

### *Right to an effective remedy and to a fair trial*

*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*

*Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*

‘The recognition of that right, in a given case, presupposes that the person invoking that right is relying on rights or freedoms guaranteed by EU law.’ (*Repubblika*, C-896/19, para 41)



# Article 19(1) TEU

*1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.*

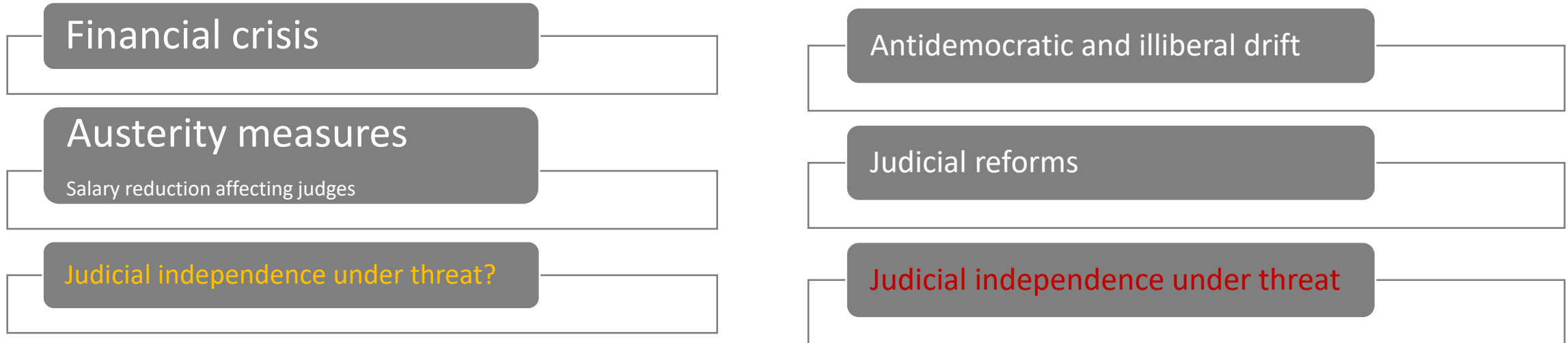
*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*

‘While Article 47 of the Charter helps to ensure respect for the right to effective judicial protection of any individual relying, in a given case, on a right which he or she derives from EU law, the second subparagraph of Article 19(1) TEU seeks to ensure that the system of legal remedies established by each Member State guarantees effective judicial protection in the fields covered by EU law.’  
(*Repubblika*, C-896/19, para 52)

# The conditionality mechanism

- Regulation 2020/2092, establishing the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States.
- Contains a definition of the principle of the ‘rule of law’ (Article 2 (a)):  
*‘refers to the Union values enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.’*
- If a breach of the principles of the rule of law occurs, on the basis of Article 4, payments or economic advantages from which the concerned MS should benefit can be suspended.
- The decision is proposed by the Commission and adopted by the Council. The MS concerned can present remedial measures and submit observations concerning the proportionality of the measures proposed by the Commission. The Parliament is informed at the various stages (Article 6).

# III. The intervention of the ECJ



→ Same legal principles apply

→ Different outcome due to the specific circumstances of each case

*‘Seen from the perspective of judicial independence, the effects of that limited and temporary salary reduction are in no way comparable to the effects of a measure which consists in lowering the retirement age of serving judges which, for its part, has the result of ending, prematurely and definitively, the judicial career of the persons concerned’. (Commission v Poland, C-619/18, para 93)*

‘...as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision relates 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.’ (para 29)

‘...every Member State must ensure that the bodies which, as “courts or tribunals” within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection’. (para 37)

‘... to the extent that the Tribunal de Contas (Court of Auditors) may rule, as a “court or tribunal”, (...) on questions concerning the application or interpretation of EU law, (...) the Member State concerned must ensure that that court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU.’ (para 40)

‘In order for that protection to be ensured, maintaining such a court or tribunal’s independence is essential...’ (para 41)

‘The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.’ (para 44)



# The aftermath of *ASJP*

- Preliminary rulings (around 20)
  - See, e.g., *A.B. and others*, C-824/18
- Infringement proceedings (around 10)
  - See, e.g., *Commission v Poland*, C-619/18
- The threat to the rule of law may cover branches other than the judiciary: example of the lack of independence of the Competition Authority in Poland
- ‘*Symbiotic*’ relationship between the case-law of the ECJ and of the ECtHR in the fight against the rule of law backsliding.



- 2016 constitutional amendment in Malta.
- National provisions conferring on the Prime Minister a decisive power in the process for appointing members of the judiciary, while providing for the involvement of the Judicial Appointments Committee, responsible for assessing candidates for judicial office and providing an opinion to that Prime Minister.
- The Court restated its case-law on judicial independence since *ASJP* but went a step further: connected Articles 2 and 19(1) TEU to Article 49 TEU (accession to the EU), establishing the so-called non-regression principle.
- Comparable judicial technique to the one used in *ASJP*: While *in casu* the ECJ found that the principle of judicial independence had not been violated, it still invoked the principle of non-regression in EU law.





