Protecting the rule of law in the EU

Goran Selanec, Constitutional Court of Croatia
27 June 2025

EXCELLENCE IN EUROPEAN LAW

Co-funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the Academy of European Law. Neither the European Union nor the granting authority can be held responsible for them.

european.law

RULE OF LAW

- When the Law rules, who doesn't?
  - a model of ordered society
  - organised around set of normative ideals
    - Safety, wellbeing
    - Restrained will
    - Checked arbitrariness, capriciousness, volatility
    - Fairness (in application of the law, procedural justice)
    - Freedom (to escape)
    - [Reasonableness]
    - [Equality]

  - " to provide protection and recourse against the arbitrary exercise of power through the instrumentality of distinctive features of law" (Postema 2014,).

Competing Conceptions of the Rule of Law

Thick rule

- System of constraint mechanisms
  - Democracy – Fair Elections
  - Separation of State Power
  - Fundamental Rights
  - Constitutional supremacy

  - Law can rule if
    - properly enacted through instituted procedure
    - by a democratically elected and properly constituted legislator
    - in compliance with fundamental substantive principle
    - and then publicly promulgated through official well-know sources
    - so it could be faithfully and consistently enforced through accessible enforcement mechanisms
    - that act through procedures designed to provid fair trial

Thin rule

- Notion of “internal legitimacy”
  - Publicly enacted
  - Publicised/Accessible
  - General
  - Comprehensible
  - Non-retroactive
  - Stable
  - Common Sense rationality
  - Consistently and impartially enforced

Public Character of the Rule of Law

The law must be known - transparency

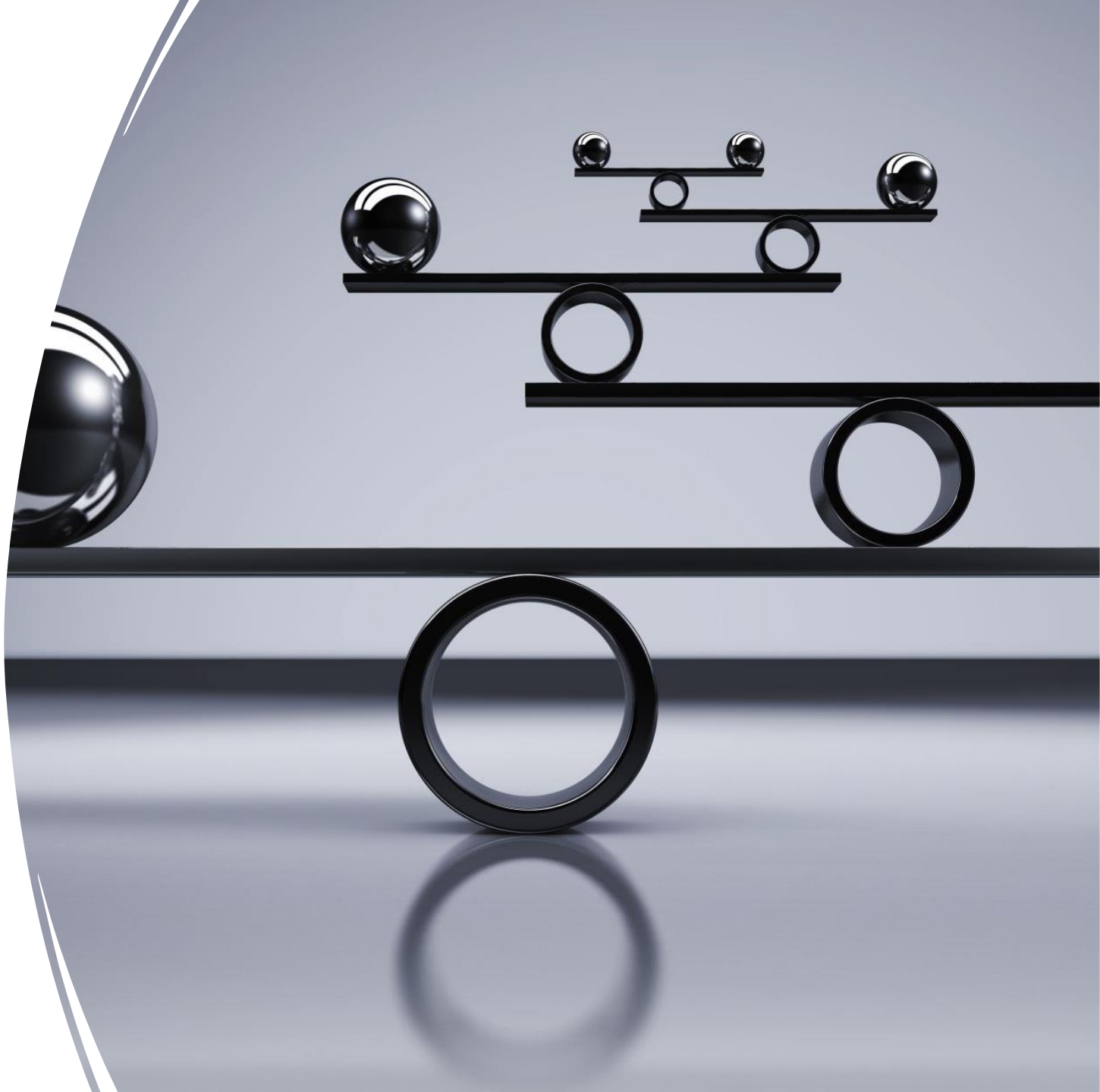
- Accessible (public)
- Intelligible
- Predictable

Freedom (to chose) presupposes rationality – one must understand what is asked from her to chose how to respond

Generality of the Law

- The laws of the land should apply equally to all,
  - equality as consistency of rule application
  - differences in treatment allowed if
    - justified by objective (material) reasons
    - proportional
    - properly stipulated in law

  - Formal (basic) Equality



To Rule is to be Respected

- For the law to rule institutional means (mechanisms) must be provided
  - for resolving disputes about rights, privileges duties and responsibilities prescribed by the law on paper
  - without excessive cost or undue delay

  - legal justice must be accessible and effective

To Rule is to Secure Conditions of Institutional Loyalty

Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion

enforcement (adjudication) powers cannot be used for imposing personal views on society in the name of interpreting the law but ought to remain faithful to the meaning of the enacted law

the right to appeal

Unjust laws rule too?

- Albert Dicey (1835–1922) - thin conception of the rule of law
  - any statutes enacted properly in the Parliament and made know to public are valid law and ought to be consistently enforced by courts, regardless of the question of their fairness, desirability or soundness

The Anti-LGBTI+ law

- adopted by the Hungarian Parliament on 15th June 2021, and it prohibits
  - minors from accessing content, advertising and media services that promote or portray diverse gender identities or homosexuality.
  - professions related to sexual culture, sexual life, sexual orientation and sexual development from being aimed at informing about transgender identities or homosexuality.

Substantive Constraints

State bodies must act within the limits of the powers conferred on them - separation of power

State bodies must act in a rational fashion for the purposes for which the powers were conferred – proportionality

The law must afford adequate protection of fundamental (human) rights

Democracy

- To be legitimate the legislative body must be properly constituted (basic constitutional rules)
- The composition of the legislative body ought to be representative of the popular will
- Fair election process

A COMMUNITY BASED ON THE RULE OF LAW

- **C-294/83 *"Les Verts"***

INASMUCH AS NEITHER ITS MEMBER STATES NOR ITS INSTITUTIONS CAN AVOID A **REVIEW** OF THE QUESTION WHETHER THE MEASURES ADOPTED BY THEM ARE IN **CONFORMITY WITH THE BASIC CONSTITUTIONAL CHARTER** , THE TREATY . ...

THE TREATY ESTABLISHED A COMPLETE **SYSTEM OF LEGAL REMEDIES** AND PROCEDURES DESIGNED TO PERMIT THE COURT OF JUSTICE TO REVIEW THE LEGALITY OF MEASURES ADOPTED BY THE INSTITUTIONS .

- **C-583/11 *P Inuit Tapiriit Kanatami***

91 Further, the European Union is a union based on the rule of law in which the acts of its institutions are subject to review of their compatibility with, in particular, **the Treaties, the general principles of law and fundamental rights**.

92 To that end, the FEU Treaty has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union.

Constitutional ABC

Constitutional supremacy

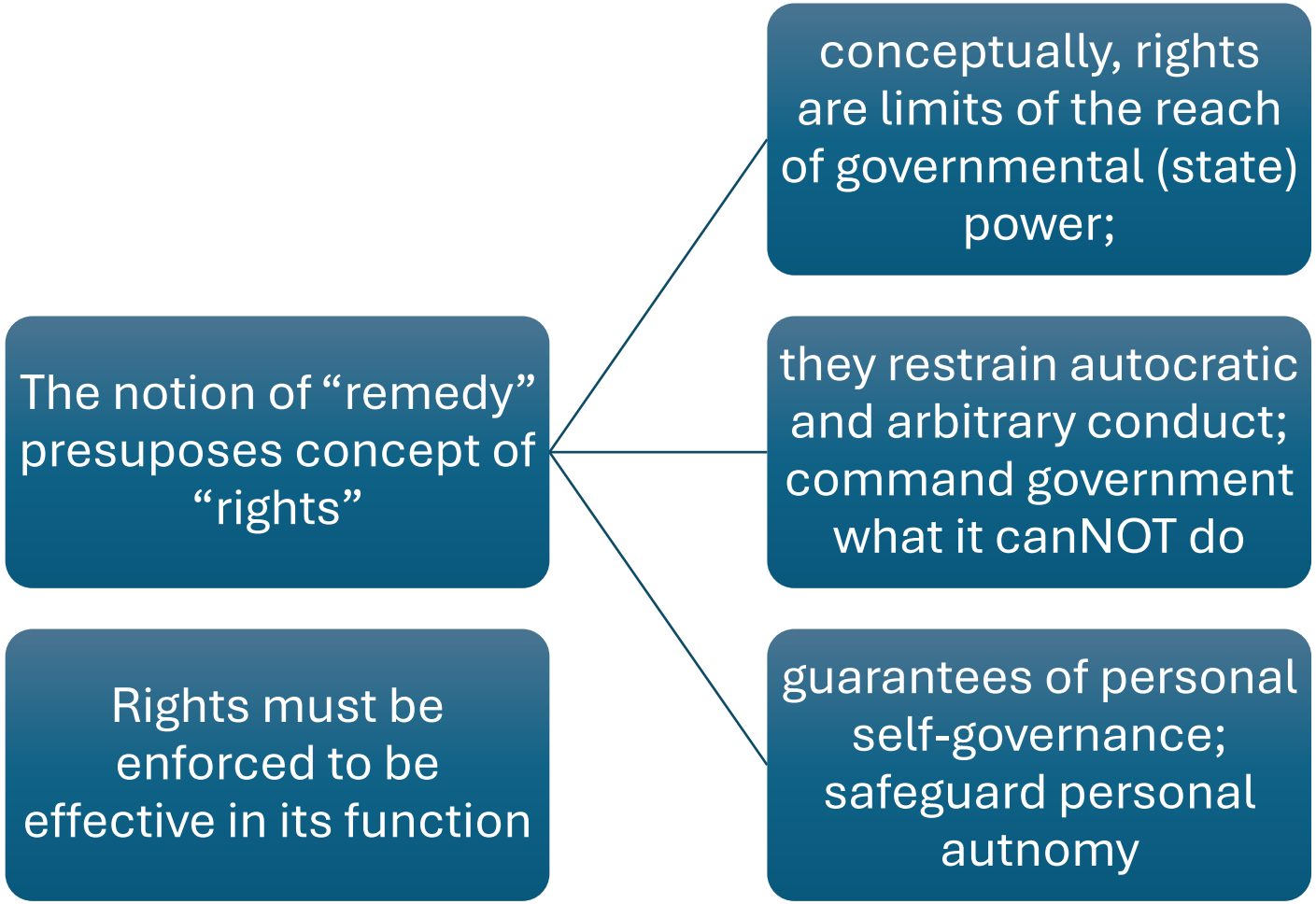
Separation of powers

- enacted measures must confirm to the limits of granted power
  - institutional limits – competence
  - substantive limits – respect for rights and privileges granted to others

Effective legal protection (Remedy)

- Judicial review
  - Direct complaint to the CJEU
  - Indirect complaint – Art 267 TFEU

Rule of Law - Rule of Rights



Rights violated: Remedy

- The right to remedy itself is restrain on the state power telling a government what it cannot do: a government cannot *leave rights* granted to individuals *being not carried out effectively* (positive right – command to take action)
  - commands the government to establish procedural mechanism for enforcement of all other substantive rights recognized to individuals
  - presupposes separation of state power (another structural restrain of power) with its accompanying notion of checks and balances
  - more fundamentally it presupposes that state power always remains within the control of the people from whom it originates and whose common interests it serves
    - legitimacy of state power is contingent on effective respect of rights of individuals

Effective Remedy – the Fundamental Right and the General Principle

- C-50/00 P - *Unión de Pequeños Agricultores v Council*

"38 The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the **compatibility of their acts** with the Treaty and with the general principles of law which include fundamental rights.

39 Individuals are therefore **entitled to effective judicial protection of the rights they derive from the Community legal order**, and **the right to such protection is one of *the general principles of law*** stemming from the constitutional traditions common to the Member States.

That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

Effective Judicial Protection

- Case 222/84 *Johnston*

„...it must be borne in mind first of all that article 6 of the Directive requires Member States to introduce into their internal legal systems ***such measures as are needed*** *to enable all persons who consider themselves wronged by discrimination '* ***to pursue their claims by judicial process****'.*

It follows from that provision that the ***Member States must take measures which are sufficiently effective to achieve the aim*** *of the Directive and that* ***they must ensure that the rights thus conferred may be effectively relied upon before the national courts*** *by the persons concerned .*

The requirement of judicial control stipulated by that article ***reflects a general principle of law which underlies the constitutional traditions common to the member states****. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."*

Impossible or Excessively Difficult

- C-312/93 *Peterbroeck*

  For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law ***impossible or excessively difficult*** must be ***analysed*** by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.

  In the light of that analysis the basic principles of the domestic judicial system, such as protection of the *rights of the defence*, the principle of *legal certainty* and the *proper conduct of procedure*, must, where appropriate, be taken into consideration.

Limited Procedural Autonomy: Equivalance and Minimal Effectivness

- **C-33/76 REWE-ZENTRAL**

  „The prohibition laid down in Article 13 of the Treaty ...have a **direct effect and confer on citizens rights** which the national courts are required to protect .

  Applying ***the principle of cooperation*** laid down in article 5 of the 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...

  In the absence of such measures of harmonization the right conferred by Community law must be exercised before 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 .

  This is not the case ***where reasonable*** periods of limitation of actions are fixed .

  The laying down of such time-limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the tax-payer and the administration concerned .”

Separation of Powers does not undermine the Effectiveness of EU legal order

- (Conditional) Procedural Autonomy of Member States:
  - procedural law falls within the competence of MS – preserved regulatory power to establish systems of national courts and judicial jurisdictions, legal remedies and procedures to ensure respect for the right of individuals, including rights granted by EU law
  - national procedural law cannot undermine the effectiveness of EU law
    - Art 5 TEU – loyalty clause
  - ***the condition of effectiveness*** - national legal order must provide a procedural mean to enforce EU substantive rights
  - ***the condition of equivalence*** – procedural conditions relating to claims arising from EU law are not less favourable than those relating to similar actions of a domestic nature
  - **Indirect effect** – national courts must interpretet national law in a manner providing procedural privilege
  - **the condition of proportionality** – balance between harm and redress

Application of the Principle - System of Remedies

- ***Effective judicial protection*** to be provided
  - when national courts interpret national law
    - that is implementing EU law
    - to provide effective remedies and procedures when dealing with rights under Union
    - Art 267 TFEU mechanism
  - when the CJEU interprets Treaty provisions as applied by EU bodies;
    - direct actions and Art 267 action
  - when the CJEU reviews the validity of secondary law, eventually entailing also disapplication
    - direct actions and Art 267 action

Dual Role of the Rule of Law Principles

Fundamental Right - the Shield

works to prevent an application of any legal measure – *provision of procedural law* – on the concerned party in judicial proceeding

horizontal aspect of the separation of powers

General Principle - a Sword

- works to provide a means – *procedural right or a privilege* - needed to ensure that substantive right provided by EU law be enforced (protected)

- vertical aspect of the separation of powers

The Key Procedural Right of the EU Legal Order

- Article 47 of the Charter of Fundamental Rights of the European Union lays down the **'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***.

Access to Protetction: Procedural Aspects

- **Types of action within national legal oredr** (222/84 Johnston; C-583/11 P Inuit)
  - **claim against the State** before national courts (C-46/93 Factortame; C-224/01 -Kobler)
  - **review over the legislative act** before national courts (C-128/09 Boxus)
  - **collective redress/class action** (C-54/07 Firma Feryn; C-81/12 Accept)
- **Conditions of proceedings initiation** ((C–97/91 Oleificio; C–13/01 Safalero; C–63/08 Pontin; C-181/16 Gnandi;)
  - **locus standi** (C-432/05 Unibet; C-214/16 King)
  - **amicable settlements**; **arbitration pretrial investigations**; (C-284/16 Achmea)
  - **time limitations; value caps/ceilings** (C-63/08 Pontin 489/07 Pia Messner; C-418/11 Texdata Software; C-19/13 Fastweb; C-651/19 JP)
  - **suspension order** (C-181/16 Gnandi)
  - **disclosure of information** necessary for claim evaluation (226/86 Heylens; Schrems; C-437/13 Unitrading)
    - Art 41: good governance
    - Interventions of independent bodies

Access to Protection: Institutional Aspects

availability of courts within relevant jurisdiction

geographical location (C-567/13, Nóra Baczó)

EU cross-border issues: regulations addressing jurisdiction and regulation and enforcement of judgments

availability of interpretation

removal of barriers to people with disability

information about relevant procedural requirements/ legal advice

- court fees
- appeal options

access to relevant of the case-law

Fair Trial

- Equality of Arms (C–305/05 Ordre des barreaux francophones)
  - Right to be heard/Right of defence (C–199/99 P Corus UK; C-283/05 ASML; C-341/04 Eurofood)
    - the adversarial principle (C-450/06 Varec; C-276/01 Steffensen)
  - Representation and legal assistance (C-227/88 Hoechst; Krombach, case C–7/98; C-305/05 Ordre des barreaux francophones et germanophone)
  - Procedural transeprency
    - Access to file (C-63/01 Evans; C-402/05 P Kadi; C-300/11 ZZ)
    - Public hearings – oral hearing
  - Burden of Proof Rules (199/82 San Giorgio, 109/88 Danfos, CHEZ)
  - Public and Elaborated (reasoned) decision (C-221/97 P Schröder; C-583/11 P Inuit)
- Reasonable Length (C-385/07 P Der Grüne Punkt; C–185/95 Baustahlgewebe)

Execution of Judicial Decisions

- The judgment of a court cannot remain ineffective because that court does not have any means of securing observance of that judgment
  - C-556/17 *Torubarov*,
  - C-752/18 *Deutsche Umwelthilfe*
    - order the coercive detention of state officials responsible for violation of EU environmental law

No Right to Appeal

- C-93/12 Agrokonsulting

As regards, next, the principle of effectiveness, it must be recalled that, from the point of view of the analysis required by the case-law cited at paragraph 38 above, the question whether a national procedural provision renders the exercise of an individual's rights under the European Union legal order *impossible in practice or excessively difficult* must be assessed taking into consideration, as appropriate, the principles which lie at the basis of the national legal system concerned, such as the *protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings* (see inter alia, to that effect, *Peterbroeck*, paragraph 14, and *Pontin*, paragraph 47).

the case in the main proceedings, the referring court must, as regards the concerns set out at paragraphs 30 and 31 above, take account of the following factors.

…

So far as concerns, lastly, **Article 47** of the Charter, it is apparent from the Court's case-law that that provision **constitutes a reaffirmation of the principle of effective judicial protection**, a general principle of European Union law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention … (see to that effect, inter alia, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37; and Case C-334/12 RX-II *Arango Jaramillo and Others* v *EIB* [2013] ECR, paragraph 40).

In the present case, it is sufficient to observe in this connection that, taking account, inter alia, of the considerations expressed in paragraphs 50 to 58 of this judgment and in the light of the information available to the Court in these proceedings, it does not appear that an individual in a position such as that of Agrokonsulting is deprived of an effective remedy before a court with a view to defending rights derived from European Union law.

In the light of the foregoing, the answer to the questions referred is that European Union law, in particular **the principles of equivalence and effectiveness and Article 47 of the Charter, does not preclude a national rule** of jurisdiction such as that in Article 133(1) of the APK, which results in conferring on a single court all disputes relating to decisions of a national authority responsible for the payment of agricultural aid under the European Union common agricultural policy, provided that actions intended to ensure the safeguarding of the rights which individuals derive from European Union law are not conducted in less advantageous conditions than those provided for in respect of actions intended to protect the rights derived from any aid schemes for farmers established under national law, and that jurisdiction **rule does not cause individuals procedural problems in terms, inter alia, of the duration of the proceedings**, such as to render the exercise of the rights derived from European Union law excessively difficult, which it is for the referring court to ascertain.

Redress/Sanctions

- Already in the **Case 14/83 von Colson** the Court held that „national remedies had to guarantee real and effective judicial protection”:

“22 It is impossible to establish real equality of opportunity without an appropriate system of sanctions.
...

23 Although, as has been stated in the reply to Question 1, full implementation of the Directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection.

Moreover, it must also have a real deterrent effect on the employer. It follows that where a member state chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.”

Effectivness of Redress

- No specific form of redress required:
  - Restitution
    - in kind or financial compensation
      - effectiveness: must be adequate and enable making good and damage sustained (C-271/91, M. Helen Marshall; C-180/95 Draehmpaehl)
        - pecuniary and non-pecuniary damages
        - no disproportional caps/ceallings
      - equivalence applicable (C-78/98 Preston)
  - special performances (C-489/07 Messner; C-65/09 - Gebr. Weber and Putz)
    - if mandated by secondary law elaborating the principle of effective remedy
  - suspensive remedies/injunctions (C-314/12 UPC)

The Fundamental Right and/or the General Principle – The Scope

- The distinction between the Right and the Fundamental Principle
  - not primarily about the substance (substantive/material content)
  - ***rather about the scope of application (the reach)***
    - *fundamental right provided to individuals – primarily as a shield against state action*
    - *general principles safeguard structural integrity of the system – **positive duty** to protect against the collapse of the system*
    - consequently, about the authority and strength of the Court's scrutiny over conduct of national authorities in MSs, including national judiciary

The Scope of the General Principle

Art 2 TEU

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.

Art 19/1 TEU

- 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.

Comparing Art 2 and Art 19 TEU

Values of EU - Article 2

Article 2 TEU outlines the core values of the European Union, including human dignity, freedom, democracy, equality, rule of law, and human rights.

Judicial Protection - Article 19

Article 19 TEU ensures that Member States provide effective legal protection in areas covered by Union law, guaranteeing judicial protection within the EU.

C-64/16 Associação Sindical dos Juízes Portugueses

- 30 According to Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU (see, to that effect, Opinion 2/13 (Accession of the European Union to the ECHR).
- 31 The European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act .
- 32 Article 19 TEU, which gives **concrete expression to the value of the rule of law** stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals
- 35 The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, **is a general principle of EU law** stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (see, to that effect, judgments of 13 March 2007, Unibet, C-432/05, EU:C:2007:163, paragraph 37, and of 22 December 2010, DEB, C-279/09, EU:C:2010:811, paragraphs 29 to 33).
- 36 **The very EXISTENCE OF effective judicial review designed to ensure compliance with EU law is of THE ESSENCE OF the rule of law** (see, to that effect, judgment of 28 March 2017, Rosneft, C-72/15, EU:C:2017:236, paragraph 73 and the case-law cited).

The Scope of the Right: C-727/21 Hann-Invest

31 The scope of the Charter, in so far as the action of the Member States is concerned, is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States when they are implementing EU law. That provision confirms settled case-law, which states that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations (judgment of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 78 and the case-law cited).

32 In the present case, as regards, more specifically, Article 47 of the Charter, the referring court has not provided any indication that the disputes in the main proceedings concern the interpretation or application of a rule of EU law being implemented at national level.

33 Therefore, in the present cases, the Court does not have jurisdiction to interpret Article 47 of the Charter per se.

The Scope of the Principle: C-727/21 Hann-Invest

34 In the second place, it should be borne in mind that, under the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective legal protection for individual parties in the fields covered by Union law. It is therefore for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields .

35. As regards the scope ratione materiae of the second subparagraph of Article 19(1) TEU, that provision refers to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law (see, to that effect, judgments of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, paragraph 29, and of 26 March 2020, Miasto Łowicz and Prokurator Generalny, C-558/18 and C-563/18, EU:C:2020:234, paragraph 33 and the case-law cited).

36 The second subparagraph of Article 19(1) TEU is intended, inter alia, to apply to any national body which can rule, as a court or tribunal, on questions concerning the interpretation or application of EU law and which therefore fall within the fields covered by that law.

37 This is true of the referring court, which may be called upon to rule on questions relating to the application or interpretation of EU law and, as a 'court or tribunal' within the meaning of EU law, comes under the Croatian judicial system in the 'fields covered by Union law', within the meaning of the second subparagraph of Article 19(1) TEU, so that that court must meet the requirements of effective judicial protection).

38 Consequently, the Court has jurisdiction to interpret the second subparagraph of Article 19(1) TEU in the present cases.

The Necessary Conditions of…

- C-64/16 AJSP

36 **The very EXISTENCE OF effective judicial review designed to ensure compliance with EU law is of THE ESSENCE OF the rule of law.**

41 In order for that protection to be ensured, maintaining such a court or tribunal's independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy.

…

44 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.

C-216/18 PPU LM – External Independence

63 As regards the requirement that courts be independent which forms part of the essence of that right, it should be pointed out that that requirement is inherent in the task of adjudication and has two aspects.

The first aspect, which is external in nature, presupposes that the court concerned exercises its 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, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.

64 That essential freedom from such external factors requires certain guarantees appropriate for protecting the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office (judgment of 19 September 2006, Wilson, C-506/04, EU:C:2006:587, paragraph 51 and the case-law cited). Their receipt of a level of remuneration commensurate with the importance of the functions that they carry out also constitutes a guarantee essential to judicial independence

C-216/18 PPU LM – Internal Independence/Impartiality

65 The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgment of 19 September 2006, Wilson, C-506/04, EU:C:2006:587, paragraph 52 and the case-law cited).

66 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. In order to consider the condition regarding the independence of the body concerned as met, the case-law requires, inter alia, that dismissals of its members should be determined by express legislative provisions (judgment of 9 October 2014, TDC, C-222/13, EU:C:2014:2265, paragraph 32 and the case-law cited).

Positive duty (LM)

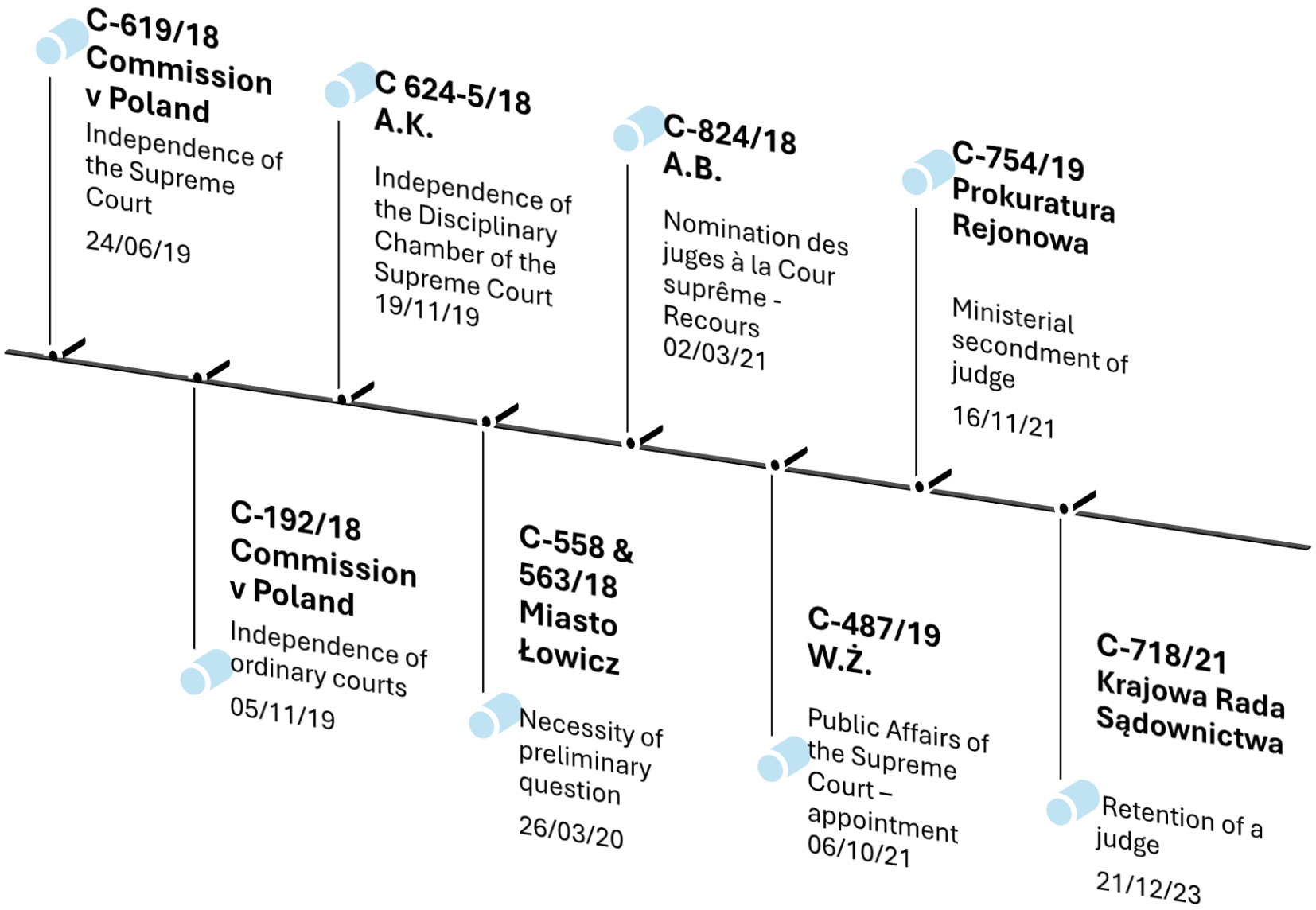
- 68 If, having regard to the requirements noted in paragraphs 62 to 67 of the present judgment, the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts, that authority must, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk (see, by analogy, in the context of Article 4 of the Charter, judgment of 5 April 2016, Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 92 and 94).

- 73 Accordingly, as long as such a decision has not been adopted by the European Council, the executing judicial authority may refrain, on the basis of Article 1(3) of Framework Decision 2002/584, to give effect to a European arrest warrant issued by a Member State which is the subject of a reasoned proposal as referred to in Article 7(1) TEU only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, that there are substantial grounds for believing that the person in respect of whom that European arrest warrant has been issued will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial.

- 74 In the course of such an assessment, the executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's courts, to which the material available to it attests are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject.

First Aspect:

External Independence (Polish Backsliding)



External Independence – Other MS

- C-272/19 Land Hessen 09/07/20
- C-896/19 Repubblika 20/04/21
- C-83/19 Romanian judges (I) 18/05/21
- C-216/21 Romanian judges (II) 07/09/23
- C-146/23 and C-374/23 Polish and Lithuanian Judicial Salaries

Second Aspect: Internal Independence

C-727/21

Hann-Invest

C-332/23

Bulgarian Judicial Inspectorate

C-727/21 Hann-Invest:

Internal Independence

54 Although the ‘external’ aspect of independence is intended essentially to preserve the independence of the courts from the legislature and the executive in accordance with the principle of the separation of powers which characterises the operation of the rule of law, that aspect must also be understood as aiming to safeguard judges against undue influence from within the court concerned (see, to that effect, ECtHR, 22 December 2009, Parlov-Tkalčić v. Croatia, CE:ECHR:2009:1222JUD002481006, § 86).

55In the second place, bearing in mind the inextricable links which exist between the guarantees of judicial independence and judicial impartiality as well as that of access to a tribunal previously established by law, the second subparagraph of Article 19(1) TEU also requires the existence of a tribunal ‘previously established by law’. That phrase, which reflects, inter alia, the principle of the rule of law, concerns not only the legal basis for the very existence of the court concerned, but also the composition of the bench in each case.

That principle means, inter alia, that it is only the judicial panel responsible for the case that is to take the decision closing the proceedings.

56 The purpose of the phrase ‘previously established by law’ is to prevent the organisation of the judicial system from being left to the discretion of the executive and to ensure that that matter is governed by a law. Nor, moreover, in codified law countries, can the organisation of the judicial system be left to the discretion of the judicial authorities, which does not, however, rule out conferring on them a certain power to interpret the relevant national legislation (see, to that effect, judgment of 15 July 2021, Commission v Poland (Disciplinary regime for judges), C-791/19, EU:C:2021:596, paragraph 168 and the case-law cited).

C-727/21 Hann-Invest:

Internal Independence

57 A ‘tribunal established by law’ is characterised by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must therefore, in addition to the independence and impartiality of its members, also satisfy other conditions**, in particular the existence of guarantees offered by the procedure before it** (see, to that effect, ECtHR, 22 June 2000, Coëme and Others v. Belgium, CE:ECHR:2000:0622JUD003249296, § 99).

58 Those guarantees include, in the third place, the principle that the parties should be heard, which is an integral part of the right to a fair hearing and to effective judicial protection (see, to that effect, judgments of 17 December 2009, Review M v EMEA, C-197/09 RX-II, EU:C:2009:804, paragraph 59; of 16 October 2019, Glencore Agriculture Hungary, C-189/18, EU:C:2019:861, paragraph 61; of 29 April 2021, Bank BPH, C-19/20, EU:C:2021:341, paragraph 92; and of 10 February 2022, Bezirkshauptmannschaft Hartberg-Fürstenfeld (Limitation period), C-219/20, EU:C:2022:89, paragraph 46).

That principle means, in particular, that the **parties must be able to debate and be heard on all matters of fact and of law which will determine the outcome** of the proceedings (judgments of 2 December 2009, Commission v Ireland and Others, C-89/08 P, EU:C:2009:742, paragraph 56, and of 17 December 2009, Review M v EMEA, C-197/09 RX-II, EU:C:2009:804, paragraph 41).

59 The requirements referred to in paragraphs 47 to 58 above thus presuppose, inter alia, **the existence of rules concerning the composition of judicial panels which are transparent and known to litigants and which are such as to preclude any undue interference in the decision-making process relating to a given case by persons from outside the judicial panel** responsible for that case before whom the parties have not been able to put forward their arguments.

The Scope of the General Principle

Art 2 TEU

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.

Art 10 TEU

- 1. The functioning of the Union shall be founded on representative democracy.
- 2. Citizens are directly represented at Union level in the European Parliament.
- Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
- 3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.
- 4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Democracy – Precondition of the Rule of Law

- C-829/24 Commission v Hungary
- The Law at issue establishes a Sovereignty Protection Office in Hungary, endowed with extensive powers of investigation. Its activities are largely excluded from judicial review and, based on a binary distinction between Hungarian and non-Hungarian activities and interests, it is empowered to operate in such a way that it need not take account of Hungary's membership of the European Union or Hungary's obligations under the EU Treaties. Specifically, the Commission submits that the Law at issue makes it possible to target activities that are a legitimate expression of the rights conferred by the EU Treaties on EU citizens and organisations and to restrict such activities. In addition, it makes those citizens and organisations subject to the exercise of State powers that infringe the rules on data protection and are incompatible with a number of fundamental rights, which are the pillars of a pluralistic and democratic society.

Art 2 Values – Self-standing Ground for Action

- Case C-769/22 Commission v Hungary (Child Protection Act/Anti LGBT Act)
- Hungary has failed to fulfil its obligations under EU law in the following ways:

(1) by prohibiting children from accessing content which promotes or portrays gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality, Hungary has infringed Article 3(2) of Directive 2000/31/EC on electronic commerce, (1) Articles 16 and 19 of Directive 2006/123/EC on services in the internal market, (2) Article 56 TFEU and Articles 1, 7, 11 and 21 of the Charter of Fundamental Rights of the European Union.

— by prohibiting children from accessing advertising which promotes or portrays gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality, Hungary has infringed Article 9(1)(c)(ii) of Directive 2010/13/EU on audiovisual media services, (3) Article 3(2) of Directive 2000/31/EC on electronic commerce, Articles 16 and 19 of Directive 2006/123/EC on services in the internal market, Article 56 TFEU and Articles 1, 7, 11 and 21 of the Charter of Fundamental Rights of the European Union.

— by imposing on media service providers which offer linear media services an obligation to classify under Category V all programmes the essential element of which is the promotion or portrayal of gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality, and thus to broadcast those programmes between 22.00 and 05.00, and by excluding such programmes from classification as public interest media or as socially beneficial advertising, Hungary has infringed Article 6a(1) of Directive 2010/13/EU on audiovisual media services and Articles 1, 7, 11 and 21 of the Charter of Fundamental Rights of the European Union.

— by imposing on the Media Council an obligation to request that the Member State having jurisdiction over the media service provider take effective measures and take action to put an end to infringements detected by the Media Council, Hungary has infringed Articles 2 and 3(1) of Directive 2010/13/EU on audiovisual media services.

— by prohibiting professions related to sexual culture, sexual life, sexual orientation and sexual development from being aimed at the promotion of gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality, Hungary has infringed Articles 16 and 19 of Directive 2006/123/EU on services in the internal market, Article 56 TFEU and Articles 1, 7, 11 and 21 of the Charter of Fundamental Rights of the European Union.

(2) by adopting the legislation cited in the first paragraph, Hungary has infringed Article 2 TEU.

(3) by imposing on the body with direct access to the registered data an obligation to make available, to persons entitled to access them, the registered data of persons who have committed, against children, offences against sexual freedom and sexual morality, Hungary has infringed Article 10 of Regulation (EU) 2016/679 on general data protection, as well as Article 8(2) of the Charter of Fundamental Rights of the European Union.