8. The Court of Justice of the European Union and national courts as enforcers of EU law

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1. INTRODUCTION

According to the Treaty on the European Union, the Court of Justice of the European Union (CJEU) 'shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies to ensure effective legal protection in the fields covered by Union law' (Article 19.1 of the TEU). Thousands of national courts are expected to apply European Union (EU) law, under the guidance of the CJEU, to relevant cases. This guidance, in particular by the Court of Justice (ECJ), concerns material issues but it also sets standards for institutional matters such as what constitutes an independent national court.

This multi-layered judicial system is gradually evolving, with the enlargement of the EU, with the growing reach and complexity of EU law and with the case law. There are permanent concerns such as timeliness, knowledge and consistency, and differences of opinion arise about the content of judgments of the CJEU courts, as is clear from several chapters in this book.

These concerns are still relevant, but matters of principle have increasingly come up. While there have been persistent conflicting opinions about the precedence of EU law over national law and the demarcation of EU law and national law, these conflicts have expanded, since autocratic governments came to power in several countries. These governments put pressure on judges not to apply EU law, for instance in the areas of migration, lesbian/gay/bisexual and transgender rights and requirements for independent courts, and even try to stop them from requesting preliminary rulings by launching disciplinary actions, or deny them the right to ask these questions by changing the national law. These developments have led to a higher level of conflict: instead of material issues, disputes concern the independence of the courts, with national judges asking the ECJ for rulings on standards for independence. Not only is compliance by government with judgments of national courts an issue; so is compliance with judgments of the CJEU. These problems are not confined to the countries that seek open conflict with the European Commission (EC), Poland and Hungary. In other countries the independence of the judiciary is also under pressure.

In section 2 of this chapter we will discuss the functioning of the judicial system of the EU and in section 3 the main challenges. These main challenges are, in our view, the independence of national courts, the development of a common judicial culture and the balance between the State powers at EU level. Section 4 concludes, in particular with regard to research needs. Our main concern is the independence of the judiciary, which is essential for the enforcement of EU law, but we will cover the functionality of the judicial system of the EU in a broad sense, and we will also discuss behavioural aspects that underlie the decisions of the main actors.

2. CURRENT STATE OF THE EU JUDICIAL SYSTEM

Enforcement of EU law requires an effective judicial system, encompassing the national and EU level. Effectiveness, as in effective judicial protection (Prechal 2020), relates to principles but also to practical matters. To give an overview of the current state, we first discuss the functioning of the system with regard to the distribution of jurisdiction, the categories of cases that are adjudicated, timeliness and quality of adjudication. These are rather practical matters, but when not arranged adequately lead to a dysfunctional judicial system. Second, we examine the effectuation of principles with a focus on the independence and the authority of the courts as well as the ensuing trust placed in the courts by society.

2.1 Litigation in the EU

2.1.1 Balance between litigation at national and EU level

In the multi-layered judiciary of the EU, the courts of the Member States decide nearly all of the disputes on the enforcement of EU law. The available data on the volume of court cases in European countries show huge numbers (CEPEJ 2020). However, the data do not show how many of these cases have EU law aspects. The courts of the CJEU conduct a small number of procedures, but their judgments resolve many of the most relevant disputes and give guidance to the national courts. To disseminate its judgments the CJEU has put much effort into its website. Furthermore, as of 26 April 2022, the CJEU webstreams hearings and the handing down of judgments and opinions. It publishes yearly comprehensive quantitative data on its activities: the numbers of new cases, completed cases and pending cases, duration of cases and, in great detail, the subject matter, Member States of origin and decisions taken.

As reference, the General Court (GC) adjudicated 874 cases and the ECJ 865 cases in pre-Corona 2019 (CJEU 2020). The GC hears actions against the institutions of the EU by private actors and Member States. It considers disputes about EU regulation with direct effect. Quantitatively, major areas are intellectual property law and State aid: 318 cases concerned intellectual property and 75 State aid in 2019.

The ECJ hears appeals against judgments of the GC. The appeal rate was 30 per cent in 2019 (255 appeals were brought), but the appeal rate varies across areas of law: from a staggering 70 per cent for competition law and 44 per cent for State aid, to 18 per cent for intellectual property cases. National courts may and sometimes have a duty to request the ECJ for a preliminary ruling during a national procedure. In 2019, 601 references for a preliminary ruling were brought, leading to 528 judgments, opinions and orders, after a clustering of cases. Of these, 375 led to a judgment and 153 to a termination of procedures without judgment. In addition, a small number of specific direct actions are heard by the ECJ.

The ECJ also hears infringement cases brought by the EU institutions against Member States for not complying with or not implementing EU law in national law. In 2019, there were 28 infringement cases in which 25 infringements were declared. Only a very small percentage of the procedures started by the EU institutions ends in court: in 2019, 797 infringement procedures were launched by the EC (EC 2020). Most of these procedures are closed after sending formal letters of notice or after sending reasoned opinions. Some of the infringement procedures are fundamental to the rule of law, in particular cases against Poland concerning a range of issues about the independence of the judiciary. The volume of infringement procedures launched by the EC seems to be impressive, but the number that is pursued is small. Keleman

and Pavone (2021) argue that after 2004 infringements launched by the EC plummeted because the EC grew alarmed that aggressive enforcement was jeopardizing intergovernmental support for its policy proposals. In their view, the EC sacrificed its role as guardian of the treaties. This had consequences for upholding one of the prerequisites of EU law enforcement: independent judiciaries in the Member States. The data on infringement procedures seem to be consistent with the EC not pushing hard to achieve compliance by the Member States.

2.1.2 Categories of legal issues addressed by the courts regarding enforcement

For cases adjudicated by the EU courts, the CJEU publishes detailed information on the area of law. Here, we are interested in another distinction. Two categories of cases relating to enforcement of EU law can be distinguished: (1) regular, material disputes concerning the interpretation, implementation and enforcement of EU law. These cases are discussed in Part III of this book; (2) disputes concerning institutional matters, including disputes between regulators and governments concerning their role and position. These cases are of interest here.

No statistical data are available about these categories, and we have to resort to case law. The institutional disputes are often related to the independence increasingly granted to regulators by law to distance them from the political system and thereby reduce the possibilities for partisan decisions. A recent case at the ECJ concerns the dismissal of the governor of the Central Bank of Latvia (Cases C-202/18 and C-238/18; also Smits 2020). According to the Statute of the European System of Central Banks and the European Central Bank, a governor who is relieved of office can take recourse to the ECJ, which can annul the decision if strict conditions are not met. And he did so in this case. The far-reaching protection of the independence of central banks is unusual, and it stems from the intertwining of EU and national responsibilities in this area. Still, the independence of other regulators is also protected by the court system. A case against Hungary on prematurely bringing to an end the term served by the supervisory authority on data protection, the creation of a new authority and the appointment of another person as head of that authority is an example (Case C-288/12). Other cases relate to the independence of data protection authorities in Germany and Austria, as well as the railway safety authority in Poland and the electricity regulators in Slovenia and Germany (Case C-518/07; Case C-614/10; Case C-378/19; Case C-718/18). We have no insight on similar cases at the national courts. Given the trend towards autonomous/independent regulators, more court cases can be expected to protect the independence of regulators.

2.1.3 Timeliness

Courts lose much of their relevance when the adjudication takes longer than the urgency of the cases requires. This is an issue in many national courts. In the past, the CJEU has received much criticism regarding duration, in particular due to constraints on the number of judges (ESO 2013).

The CJEU publishes data on the length of its procedures, while the EU scoreboard based on data of CEPEJ gives data for the Member States (EC 2022a). Among countries, the comparability of the data is an issue, and the level of aggregation is high. Averages cover simple/small and complicated/large cases. As a result, the duration of complicated cases, which enforcement cases typically are, is heavily underestimated. Between the national judiciaries there is a large variety of duration. To provide a reference, a detailed study of five countries shows that large commercial cases with a claim of between 1 and 5 million euro take nine months at first instance and 15 months at appeal in Ireland, while in the Netherlands the related periods are

17 months and 21 months (three-year average of 2016, 2017, 2018; Costello et al. 2021). An even longer duration is found, for instance, in Italy.

At the GC, the average duration of regular procedures was 16.9 months in 2019 (CJEU 2020). Competition and State aid cases both took 26 months in 2019. As noted above, these cases are frequently appealed. Appeals at the ECJ took 11.1 months, undifferentiated. For competition and State aid this amounts to three years for first and second instance together. Intellectual property cases took less time at the GC: 13 months. Also, the appeal rate is much lower (18 per cent).

Direct actions at the ECJ, including infringement procedures, took 19.1 months on average. Preliminary rulings took on average 15.5 months. As such, the delay that is caused by preliminary rulings is not extreme, but it does add more than a year to already lengthy national procedures.

Under the assumption that most cases are complicated and parties tend to exhaust the procedural possibilities, the performance of the GC and ECJ seems not unreasonable in comparison with national courts. Furthermore, the availability of expedited procedures, which took on average ten months in 2019, and urgent preliminary ruling procedures, which took four months, helped to overcome the worst problems. Nonetheless, the accumulation of national and EU procedures slows down societal and economic processes, and may have significant detrimental consequences. This accumulation, and its consequences, require empirical research.

2.1.4 Knowledge and quality of judicial decisions

For many years, national judges' limited knowledge of European law was a major impediment for the implementation of EU law, and it remains an issue. A recent survey among Spanish judges shows that the problems discussed here are still relevant (Pedraz Calvo et al. 2020). Lack of knowledge was less of an issue for specialized courts, where these existed, than for the general courts. Many of the judges concerned were not trained in EU law at law school; they lacked foreign language skills, and almost all lacked the time and resources to study EU law on the job. They also did not see the need. In particular, first instance judges rarely encountered cases where they recognized the need to apply EU law. If the parties and their lawyers did not bring it up, the judges remained unaware of this need. The perceived rarity of occasions led them not to invest in knowledge. To overcome this problem, judiciaries facilitated judges by all sort of means, such as EU law newsletters, EU law coordinators at the courts, (mandatory) training and visits to Luxembourg, often supported by training and exchange programmes paid for by the EC. Where judges were aware of EU law angles in cases, practical concerns about the speedy resolution of cases led them to a desire to avoid complicating cases, let alone extending the procedure by requesting preliminary rulings. Given these problems, specialization on areas of EU law, where feasible, is an option taken by several judiciaries. As to these specialized courts or chambers of courts, increasing complexity of regulation makes it a challenge even for them to keep up with, for instance, regulators. While one would expect the problems to gradually diminish due to younger generations of judges taking over and as a result of all training efforts and organizational measures, knowledge will remain an issue at the national level.

At the level of the CJEU, legal proficiency does not seem to be an issue. Due to the small volume of cases that go before the CJEU, generalizability and consistency are essential for the court to be effective. As the whole system is designed for this, effectiveness does not seem

a great concern. Given the breadth of EU regulations, understanding of various, complex markets could be an issue. There is a tendency for regulators to set up dispute resolution mechanisms, such as boards of appeal, that hear objections against their decisions. The European system of financial supervision is an example, where there is a board of appeal against decisions of the three European supervisory authorities (European Banking Authority, European Securities and Markets Authority and European Insurance and Occupational Pensions Authority) with the aim to protect the rights of parties affected by these decisions. Members are individuals with proven professional experience in the relevant fields and with the necessary legal expertise. The decisions of the board of appeal can, in turn, be appealed to the CJEU. The intent is that the board of appeal is independent, while organized and facilitated by the supervisory authorities. This independence has a different (weaker) content than that of the judiciary. Apparently, the assumption is that there is added value in engaging experts from the financial sector in dispute resolution above addressing the CJEU directly. As appeal to the ECJ is allowed, judicial protection is not directly in doubt. Nonetheless, the development of a balanced system is a challenge: a board of appeal may have knowledge, but it must also be impartial and have dispute resolution skills. This development has drawn attention in the literature (eg Maat and Scholten 2021), but empirical research is needed to analyse the functioning of such a mechanism, including the way members are selected and appointed.

2.2 Principles

2.2.1 Independence of the EU judicial system

It is widely held that the independence of the CJEU is not an issue. This cannot be said of all national judiciaries of the EU. The critical situation in Poland and Hungary has drawn much attention (Pech and Scheppele 2017 and many others). The problems are, however, wider. Several surveys are available on judicial independence in the EU. Since 2016, the EC commissions annual surveys among citizens and companies about their perceptions of judicial independence, and the determinants thereof (most recently, Flash Eurobarometers 503 and 504, 2022b and c). These surveys show a wide variety of outcomes among countries, from 89 per cent of citizens who rate independence as good in Finland to just 20 per cent in Croatia. Poland (24 per cent), Slovakia (25 per cent) and Bulgaria (31 per cent) also score very low, while Italy (37 per cent) and Spain (38 per cent) do not perform much better and even lower than Hungary (43 per cent). The survey among companies has similar outcomes: outcomes vary from 87 per cent in Denmark to 20 per cent in Poland, followed by Croatia (23 per cent) and Latvia (27 per cent). No data are available on the perceived independence of the CJEU.

A different perspective is given by the regular survey among judges about their independence, organized by the European Network of Councils for the Judiciary (ENCJ). In the survey conducted in the first quarter of 2022 judges rate the independence of the judges in their country on average between 7.0 and 9.8 on a 10-point scale (ENCJ 2022). It should be noted that Poland and Romania did not participate in this survey. Judges are much less positive about several external and internal aspects of independence, for instance, about appointment and promotion, not being solely based on ability and experience (ENCJ 2020, Figures 31–33). In the view of respondents, appointment to the Supreme Court/Court of Cassation is particularly problematic in a variety of countries. Also, the interaction of the judiciary with the other State powers is fraught with difficulties in many judiciaries. Lack of respect for judicial independence by governments and parliaments is an issue in many countries, and widespread scarcity

of resources provided by governments is seen to affect independence negatively. In many judiciaries, judges also feel inappropriate pressure from the (social) media at case level, and lack of respect for their independence.

As Van Dijk (2021) shows, across EU countries the perceptions of judges are more positive than those of citizens and companies, but the correlation between these perceptions is high. The limited data on the views of lawyers show that their perceptions on judicial independence fall in between and are also highly correlated (ENCJ 2019). While the perceptions of judges regarding their independence in general are rather positive, on aspects of independence they are consistent with the critical views of citizens, companies and lawyers. Taking into account that attacks on the independence of the judiciary are ongoing, we conclude that the full realization of independence is a broad concern within the EU, and constitutes a major challenge.

2.2.2 Compliance with national and EU court decisions

Even if national and EU courts were fully independent and reached decisions that apply EU law in full, these decisions are futile if they are not implemented. As courts lack the means to enforce compliance, they depend on governmental actors to implement and, if parties fail to comply voluntarily, enforce court decisions. Compliance with court decisions can either be seen as a crucial complement of independence (Prechal 2020) or, as in much of the law and economics literature, as a part of independence itself (eg Rios-Figueroa and Staton 2012). This literature distinguishes two dimensions of independence: autonomy and influence.

With regard to the implementation of judicial decisions of national courts by government, few data are available. The ENCJ survey contains a pertinent question on the implementation/enforcement of judgments that went against the interests of the government (ENCJ 2022, Figure 16). Government behaviour is difficult to assess for anyone, including judges, and this difficulty is shown by a relatively large number of respondents answering that they are unsure (30 per cent). On average across countries, 20 per cent of respondents believe that judgments are usually not implemented, and 50 per cent believe that they are. The outcomes for individual countries differ. For instance, in Italy 68 per cent of the judges that give an assessment believe that decisions are usually not implemented; other countries for which more than 50 per cent of respondents give the same answer are Cyprus, Greece, Lithuania, Spain and Slovenia. The survey does not distinguish between national and EU law background of the cases.

The implementation of CJEU decisions is difficult to assess. Some high-profile cases, such as those on judicial independence, show non-compliance or at least procrastination, and the imposition of penalties by the EC. These cases have sparked further developments such as financial incentives to enhance the rule of law (conditionality regulation).

When the perceptions of judges on independence and their assessment of implementation are combined, it follows that independence is closely linked with implementation (ENCJ 2022, Figure 17). According to the respondents, a high (low) level of independence of the judiciary goes together with the implementation of judgments by government to a high (low) degree. Thus, lack of independence and non-implementation of judicial decisions form a combined problem.

It should be noted that the empirical observation of governments resisting the implementation of court decisions may be hampered by self-censure of the courts. Courts may avoid hearing cases that go against the interests of government or decide these cases in favour of the government. In this way they avoid their judgments not being implemented. Such courts may give a superficial impression of independence and influence. There is some empirical support

for such strategic behaviour (eg Herron and Randazzo (2003) for post-communist courts), but more research is needed.

To conclude, the available information about the implementation of court decisions is limited. What is available shows that judicial independence, together with the implementation and enforcement of courts' decisions, is fragile in countries other than those with high-profile conflicts with the ECJ and EC.

2.2.3 Legitimacy and trust

Finally, the population's conferral of legitimacy and trust is generally seen as a necessity for courts to be obeyed (eg Lenaerts 2020). Data are available on the trust of the public in the CJEU and in national courts, as part of extensive public opinion surveys by the EC. Surveys show, for each country, citizens' trust in the national judiciary and in the CJEU (Eurobarometer 2019, Table QA6.7 and QA12.6). Van Dijk (2021) summarizes the outcomes: trust in the CJEU and in the national courts is highly correlated. However, where trust in the national judiciary is low (high), trust in the ECJ is generally higher (lower) than in the national judiciary. Still, when trust is high in the national judiciary, trust in the ECJ is higher than in the countries where trust is low in the national judiciary. Relevant here is that where trust is low in national courts, citizens have higher trust in the ECJ. In particular, in Central Europe, trust in the ECJ is relatively high. This tendency can be expected to strengthen EU cohesion at the lower end of trust: the population's relatively high trust in the CJEU makes it riskier for politicians to ignore the judgments of the court, with regard to EU material law but also with regard to the rule of law. Obviously, other political factors play a role, and often a more dominant one.

2.2.4 Conclusion on the EU judicial system

The main challenges for the judicial system of the EU are at the national level. The CJEU performs reasonably well in the context of court performance in general. Cases take a long time, but not excessively so, and the quality of judgments seems adequate. It seems possible to conclude that remedies provided by the CJEU are hampered but generally not rendered obsolete by court delay and lack of quality, or incapacitated by lack of trust by citizens. Still, the accumulation of national and EU court procedures requires attention. At the national level, court performance varies greatly and knowledge about EU law remains a problem, but the main issue is lack of recognition of interrelated core principles.

3. CHALLENGES AND OPPORTUNITIES

The main challenge is safeguarding and, where necessary, restoring the independence of the judiciary at national level, in combination with the full implementation of judicial decisions. If one wants to achieve this, standards for independence have to be developed. Subsequently, the Member States need to be held to the standards. Upholding standards requires effective instruments and the determination to use the instruments when needed. The development of binding standards is gradually undertaken by the ECJ, building upon the work of others. If there is a bright side, it is that, thanks to the procedures at the ECJ, generally applicable standards and instruments for enforcement are developed.

It should be noted that the struggle between State powers cannot be seen as a conflict between a unitary government and a unitary judiciary. It extends within government and

within the judiciary. On the one hand, even within autocratic, nationalist governments there may be forces that want to implement EU law in controversial areas. Regulators with autonomy are likely to be among these actors. On the other hand, within the judiciary, judges may agree with a government's policy to control the judiciary. The latter issue raises the question to what extent a common judicial culture is developing in Europe and how broadly this culture is actually shared. Steps towards such a culture would have double benefits. It would create broader consensus about independence and its content, and it would promote the uniform application of EU law. More judges would be motivated to take part in training and exchange programmes at EU level. Understanding the development of a common judicial culture would be a second challenge.

A third challenge concerns the balance between the State powers at EU level. Does the EC enforce the judgments of the CJEU sufficiently? This has already been discussed in relation to the independence of national judiciaries. There is obvious discontent as to the way the EC is dealing with the rule of law issues in Poland and Hungary (Pech et al. 2021; Bard 2022).

We will discuss the three challenges in this section. The emphasis will be on the first, as this is the most important and urgent issue.

3.1 Independence of National Courts as Requirement of Enforcement of EU Law

At the foundation of what is now the EU, the Member States decided to enforce EU law using the existing national courts. It goes without saying that in order to secure consistency and uniformity in the enforcement in all Member States, national courts need to be free from undue influence of governments. In other words: their independence is key. This was so obvious for the founding countries – and belonged so obviously to their common values – that it was not explicitly mentioned in the treaties at the time. Nevertheless, the CJEU protected fundamental rights within the Union as 'general principles of Union law'. In 2009, the Charter of Fundamental Rights of the European Union (the Charter) entered into force. Article 47 of the Charter protects the individual right to 'an effective remedy and to a fair trial', using in the second paragraph a corresponding text to Article 6 of the European Convention on Human Rights (ECHR), provided there is a substantive connection between EU and national law in a specific case.

This approach was not effective enough as a response to judicial reforms in some Member States that were aimed at governmental control of national judiciaries. So, in 2018, in the *Portuguese Judges Association* case (Case C-64/16), the ECJ ruled that the requirement of judicial independence applies to all national courts potentially having to apply EU law, regardless of whether the Member States are implementing Union law. The foundation of this rule was Article 19 and Article 2 of the TEU. As a consequence of this judgment, the Union is able to address violations of judicial independence in the Member States directly, without first connecting it to EU law. This judgment is generally seen as one of the landmark decisions of the ECJ (Ovádek 2022).

The foundation of the requirement of judicial independence is therefore twofold: Article 19 of the TEU in connection to Article 2 of the TEU and Article 47 of the Charter in connection with Article 6 of the ECHR, with different approaches to the concept of independence, and with different supreme courts in the lead: the ECJ (Luxembourg) and the European Court of Human Rights (ECtHR) (Strasbourg). The first approach is about the effectiveness of EU law, abstracted from a connection in a case to the implementation of EU law. The second is

about the rights of individuals to have effective remedies before an independent and impartial tribunal established by law in a specific case. The EU Supreme Court and the ECtHR Supreme Court work closely together in developing the standards (Spano 2021). Due to the large number of cases on judicial independence in Hungary, Romania, Poland and other countries, the courts are clarifying the content of the standards very rapidly.

3.1.1 Development of binding standards for independence

The main lessons from the most current case law of both courts are the following.

General rules:

1. The organization of justice in the Member States falls within the competence of the Member States (Case C-619/18);
2. Member States have the duty to organize the justice system in accordance with the European standards (EU and EC) of independent judiciaries (ibid);
3. Member States have the duty to ensure that, in the light of the value of independent judiciaries, that any regression of their law on the organization of justice is prevented (Case C-896/19);
4. Member States have the duty to progress towards achieving the standards of independence on the basis of Decision 2006/928 (CVM) and the reports drawn up on the basis of that decision (Case C-83/19).

As to the appointment and promotion of judges:

5. Member States have the duty to make rules, particularly as regards the composition of the selection body and the appointment and length of service of its members, and as regards grounds for withdrawal by, objection to, and dismissal of its members, in order to dispel any reasonable doubt in the minds of litigants as to the imperviousness of the body to external factors and its neutrality with respect to the interests before it (Case C-619/18);
6. In case a judge is appointed as a result of a procedure in violation of the procedure identified by a national judge, and this irregularity amounts to a breach of the most fundamental rules within the procedure, a panel consisting of this judge is not a tribunal established by law (ECtHR *Guðmundur Andri Ástráðsson v Iceland*).

The ECtHR held the following circumstances to breach the most fundamental rules within the procedure:

– undue discretion exercised by the executive power undermining the integrity of the appointment procedure (ibid);
– the involvement of a selecting body lacking independence from the legislature or executive, such as the Polish Council for the Judiciary as selecting body for members of the Disciplinary Chamber of the Polish Supreme Court (ECtHR *Reczkowicz v Poland*) and the Polish Council for the Judiciary as selecting body for members of the Civil Chamber of the Polish Supreme Court, ECtHR *Advance Pharma sp zoo v Poland*);
– the rule that a judge of the Constitutional Court was to be elected by Parliament whose term of office covered the date on which his seat became vacant (ECtHR *Xero Flor w Polsce sp zoo v Poland*).

As to disciplinary, criminal and civil liability of judges:

1. Member States have the duty to design procedures for appointment of those occupying management positions in the body competent to conduct investigations and bring disciplinary proceedings against judges so that there can be no reasonable doubt that the powers and functions of that position will not be used as an instrument to exert pressure on, or political control over, judicial activity (Case C-83/19). Member States have the duty to provide sufficient safeguards which should dispel any reasonable doubt in the minds of individuals as to neutrality of the persecuting body with respect to the interests before it (Case C-83/19);
2. Member States have the duty to provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions (Case C-619/18);
3. Member States have a duty not to disciplinary prosecute judges on the basis that these judges exercise their EU law duty by submitting preliminary references or enforcing preliminary rulings (Case C-558/18).

Some constitutional courts of Member States do not accept the authority of either the ECJ or the ECtHR on the issue of judicial independence. An extreme example of non-compliance with the above-mentioned judgments are the decisions of the Polish Constitutional Tribunal that these judgments are ultra vires, and thus nil and void (Cases K 3/21 and K 7/21), but also the Romanian Constitutional Court does not always recognize the authority of the ECJ in cases concerning judicial independence.

3.1.2 Need for further standards for judicial independence

Standards have been developed by various networks, such as the Consultative Council of Judges of Europe (CCJE), the Venice Commission and the ENCJ. In particular, the members of the ENCJ have felt the need to define precisely to which standards councils of the judiciary should adhere. This has led to the development of a set of minimum standards for independence and accountability of the judiciary, and, in order to monitor whether these are met in individual countries, indicators for independence and accountability. Focusing on independence, these indicators cover two areas – *de jure* independence in the sense of formal safeguards and *de facto* (realized) independence – measured by means of perceptions of, among others, citizens and judges (see section 2). The formal indicators concern the legal basis of independence, organizational autonomy, financial independence, management of the court system, human resources decisions about judges, disciplinary measures, allocation of cases and internal independence (such as influence of court management). The ENCJ (2020) publishes country profiles of judiciaries. The list of topics shows that the requirements of independence has far and deep-reaching consequences for the governance, organization and decision making of the judiciary. For instance, having a council for the judiciary is not enough to guarantee judicial independence. This depends, among other things, on the influence of government on the appointment of its members (see for example Sterk (2022)).

Up to now, the procedures at the ECJ on independence have concerned organizational autonomy (in particular, how members of councils for the judiciary are appointed), human resource decisions (appointment of judges, lowering of pension age) and disciplinary procedures against judges. It is to be expected that more issues will be addressed in the coming years.

3.1.3 Compliance with national and CJEU decisions

The behaviour of autocratic governments towards the independence of the judiciary is an extreme form of disrespect for the judiciary. It is also relevant to examine a situation in which independence is accepted. What then determines compliance and non-compliance by government with judicial decisions?

Political science has identified factors that affect compliance by government. In this literature compliance is the outcome of political considerations by politicians who do not see compliance as a duty but as a matter they can use for political gain. The restraint shown in enforcement by the EC of issues of judicial independence as mentioned in section 2 is according to Keleman and Pavone (2021) an example of this behaviour at the EU level. Regarding national courts, Krehbiel (2021), following many others, argues that electoral considerations may affect compliance decisions. When the courts are highly respected by the population, and the population expects the government to implement court decisions, non-compliance may lead to electoral losses, and this provides an incentive to comply (Staton 2006; Vanberg 2001). Conversely, lack of support for the courts by the population may lead governments to ignore judicial decisions entirely, or frustrate them by delay and half-hearted implementation that may lead to further litigation (eg Kapiszewski and Taylor 2013). In particular, the implementation of judgments that are unpopular among the population requires strong general support for the courts. In some Member States, a source of unpopular decisions is the laws and regulations of the EU, which may differ from the prevalent common values and interests in Member States and are often seen as overly bureaucratic. Politicians may benefit from resisting implementation. It should be noted that where regulators have an independent position, the possibilities for such behaviour are much reduced. Understandably, the EC promotes regulatory autonomy/independence.

Adding to this literature, the popularity or unpopularity of courts is not a given, and courts can try to build support in society, both through their performance and by reaching out to the public. Accountability of the judiciary is seen by the ENCJ as instrumental in gaining and retaining the trust and support of society to play its constitutional role (eg Van Dijk and Vos 2018). Sterk (2022) advocates a change of mindset within judiciaries about accountability: for this author, provided that independence in deciding court cases is not affected, judiciaries should always be accountable to society – whereas the habitual mindset of the judiciary, in his opinion, is to only be accountable when there is a legal duty to do so. The relationship between independence and accountability is not uncontested. Contini and Mohr (2008) give a thorough discussion of the arguments. The courts have opportunities to resist autocratic tendencies and gain support in society, but they may not be sufficiently aware of the need to have the support of society, or may not be willing and able to work to increase support.

In daily practice, courts may be able to improve compliance through the way they formulate their decisions, for instance by making explicit the remedial measures that are required to achieve compliance (Stiansen 2021).

3.1.4 Tensions within the legal system

So far, we have focused on conflicts between State powers. Courts may however have different interests, and this may lead to tensions within the judiciary that may affect EU law compliance. In the political science literature, several hypotheses have been proposed as to the incentives within the judicial system. In this literature there is discussion as to why judges cooperate willingly with the CJEU and with other national courts. Contradictory interests are

at play. At a systemic level, the CJEU strengthens the hand of the national judiciary against the other State powers (Weiler 1994), as they can engage in EU-wide discussions and get the backing of the ECJ. However, within the judiciary there are different actors that stand to gain or lose: it is suggested that power shifts to first and second instance courts by use of the reference system. Supreme courts and constitutional courts may see this as loss of power (Alter 2001). In particular, the behaviour of some constitutional courts (Germany, Denmark) can be interpreted in this light. Such strategic behaviour may weaken the position of the judiciary overall and reduce the enforcement of EU law.

3.2 Convergence of Judicial Culture

'Towards an ever closer European Union' is enthusiastically endorsed by Lenaerts (2020) for the judiciary. Is that actually happening? Is a common European judicial culture that would include a common approach to EU law and its enforcement in the process of being formed? With this convergence, the enforcement of EU law would need less compulsion. In a theoretical analysis, Mak et al. (2018) see judicial culture as the shared normative basis for judicial functioning. They apply Hofstede's definition of culture: 'the collective programming of the mind which distinguishes the members of one group or category of people from another' (Hofstede 1997, 5). In their view, 'the development of a shared judicial culture across national border could be a natural next step in the evolution of "mental software" of judges in EU member states' (Mak et al. 2018, 30). At the moment, a common culture does not exist within the judiciaries of all Member States, and definitely not across judiciaries. Mak et al. recognize this and distinguish between 'globalist' and 'localist' judges with different experiences and interests. The ENCJ survey among judges lends support for these ideas. As argued by Jonski (2022) with regard to Hungary, the survey shows fundamental differences within several countries. While the government of Hungary is reducing the independence of the judiciary, 46 per cent of the judges still feel that their independence is respected by government and 38 per cent that it is not respected. This outcome indicates indeed a dichotomy among judges. It seems that part of the body of judges see themselves as national judges, subject to national law, and another part consider themselves as (also) European judges that apply EU law and seek the guidance of the CJEU. This dichotomy is unlikely to be confined to Hungary, but research is needed to verify this. If so, it is likely that the relative size of the two categories differs among countries.

The convergence of judicial cultures follows from judicial interaction and the trust that positive interaction brings about. Three mechanisms of interaction are particularly important, according to Mak et al. (2018): judicial networks, judicial training programmes and the case law of the CJEU. A range of networks exists, varying from networks of apex courts to networks of judges specialized in, for instance, competition law (for an overview see the website of the European Judicial Training Network (EJTN)). Judicial training programmes are foremost organized by the EJTN, which was founded by the national schools of judges. Many judges participate in these programmes. As to the case law of the CJEU, the court puts a lot of effort to disseminate it. It also manages the so-called Judicial Network of the European Union, which publishes (some) national case law. Next to trust among national judges, their trust in the CJEU affects the development of a shared judicial culture (see Mayoral 2017), and this seems to be well understood by the CJEU.

While many judges participate in exchange and training programmes, it is likely that judges with a European – in the terms used by Mak et al. (2018), globalist – orientation are overrepresented. As a result, the dichotomy suggested above is likely to persist. It may even become more pronounced if European-minded judges are replaced by judges with a national orientation, as is happening in Poland. Consequently, it seems that a common judicial culture will not evolve homogeneously in the judiciaries of the EU. This has consequences for the enforcement of EU law: on the one hand, a European orientation is likely to grow among judges in most Member States; on the other hand, a national orientation will remain strong in a number of judiciaries. This prediction is speculative and research is much needed. Mak et al. (2018) present a research agenda on judicial culture that seems relevant for the enforcement of EU law.

3.3 Balance of State Powers at EU Level

At several points in this chapter, the EC's willingness to enforce EU law came to the fore. We noted the reluctance of the EC to enforce EU law by pursuing infringement procedures at the ECJ and the resistance to unequivocal enforcement of judgments of the ECJ, in particular with regard to judicial independence. With the instruments available, will is needed to enforce compliance. Political risk assessments and bargaining strategies in which interests are traded may lead to weak enforcement. The underlying problem seems to be the great discretionary powers of the EC. While political compromise is part of democracy, it is questionable whether it should extend to principles such as the independence of the judiciary. The answer might lie in limiting these powers when it comes to upholding EU law, or at least where the independence of national judiciaries is at stake. This topic is beyond the scope this chapter, but it is fundamental to the functioning of the EU, and further research is necessary.

4. CONCLUSIONS

We have examined the institutional and human factors concerning the courts with regard to effective enforcement of EU law from complementary perspectives: law, court data and political science. While national judges' knowledge of EU law is a persistent problem as well as the accumulated duration of procedures, the main issues we identified are institutional: the independence of the judiciary in combination with compliance with court decisions. Independence of the judiciary is a prerequisite for enforcement of EU law. The paramount challenge is to safeguard and restore independence not only in Poland and Hungary but in a broader range of countries. An important step is the development of standards for independence which is currently being undertaken by the ECJ. This work is likely to extend to more aspects of independence in the coming years. A parallel step is the further development of enforcement mechanisms. In addition to a top-down approach, the growth of a European judicial culture is gradually taking place. This could lead to more homogeneous opinions and attitudes of judges and other legal professionals within and across countries. However, it is likely that subcultures of nationally oriented and EU-oriented national judges will continue to exist. Understanding the development of judicial culture is a second challenge.

The balance between the State powers at the EU level would be the third challenge. Also at the EU level, the judiciary depends on the executive to enforce its decisions. Particularly in

relation to independence, there is much criticism of the EC's perceived lack of will to enforce the decisions of the ECJ in full. Limitation of the EC's powers deserves consideration, in particular when the independence of the judiciary is at stake.

Major topics for research are the following.

(1) We need to know more about the implementation of court decisions, at national and at CJEU levels.
(2) The conceptualizations of independence and accountability need further study, to address their interrelations.
(3) In the political science literature, strategic behaviour is attributed to the courts, just as it is to other actors. It is an empirical question whether and to what extent judges and courts act strategically when dealing with the other State powers. Strategic behaviour seems inconsistent with judicial independence, but it may be indispensable in situations where independence is already compromised. Practically, strategic behaviour does not fit easily into the decentralized decision-making structure of the judiciary, except for the apex courts, and it is of interest to analyse its occurrence empirically.
(4) The balance of the State powers at EU level needs fundamental thinking when it comes to enforcement of EU law, at least, in case the independence of national judiciaries is at stake.

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