RECENT DEVELOPMENTS IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

SUPREME COURT OF CYPRUS

NICOSIA

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Mr. President,

Esteemed fellow justices,

Dear friends and colleagues,

First of all, may I take this opportunity to thank the Supreme Court of Cyprus for its kind hospitality in organising today's colloquium. I am extremely pleased to address you as we look forward to the forthcoming 15th anniversary of the 2004 enlargement of the European Union (EU), which saw the accession of ten new Member States including Cyprus.

The importance of Cyprus' accession to the EU, after decades of political tension and conflict, cannot be overstated.

That accession perfectly illustrates the purpose of the European Union, which the French President Emmanuel Macron recently described in his speech on a *European renewal* as "an unprecedented project of peace, prosperity and freedom."[1] Indeed, "Europe is not just a market. It is a project. A market is useful, but it should not detract from the need for (...) values that unite."[2]

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[1] Emmanuel Macron, *For European renewal*, 4 March 2019, https://www.elysee.fr/emmanuel-macron/2019/03/
04/for-european-renewal.en.

[2] *Ibid.*

In that context, my contribution today will focus on some of the latest developments in EU law, by reference to the case law of the Court of Justice.

I would like to start by reminding you of a basic truth that is self-evident but nevertheless fundamentally important. The EU is neither an empire nor even a State. It is a voluntary Union of sovereign Member States. Those States have not renounced their national sovereignty but have pooled a significant part of it in a new, *sui generis* legal order that belongs to them all collectively.

It is against that background that the Court of Justice recalled in its recent *Wightman* judgment, a preliminary ruling concerning the revocability of a Member State's notification under Article 50 TEU of its intention to leave the Union, that Member States join the Union and stay in the Union of their own free sovereign will. Consequently, a Member State exercises its sovereignty both when activating the mechanism for leaving the Union under the Treaty, and when withdrawing any such notification.[3]

Each Member State has thus, whilst retaining ultimate ownership of its national sovereignty, conferred part of that sovereignty on the EU institutions in order for certain competences to be exercised *supranationally* in the interests of all Member States, including the Member State concerned.

Exercising this shared sovereignty *supranationally* however requires, as the Court held in *Les Verts v Parliament*, that the EU is a Union 'based on the rule of law, 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.'[4]

The EU being a 'Union of law' means, in essence, that each Member State as well as each Union institution, body or agency is bound by 'the rules of the game', which comprise not only the Treaties but also the Charter of Fundamental Rights of the EU (the 'Charter') and the general principles of EU law. Since the EU is founded on the rule of law, judges, both at national and EU level, are called upon to play a pivotal role in the European integration

[3] Judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, para. 44.
[4] Judgment of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166, para. 23; see also judgment of 29 June 2010, *E and F*, C-550/09, EU:C:2010:382, para. 44.

project. Within that 'Union of law', judicial power in the EU is not vested exclusively in EU courts, but is rather shared between those courts and national courts.

Thus, national courts and tribunals of the Member States contribute significantly to the development of EU law. To put it differently, national judges are, as is said in French, « *les juges de droit commun du droit de l'Union* », an expression that may be translated into English as 'the courts of general jurisdiction for EU law'.

Whenever national judges have doubts as to the interpretation of a provision of EU law, those judges can – or as the case may be – *must* enter into a dialogue with the Court of Justice by referring a preliminary question to the Court of Justice under Article 267 TFEU. It is moreover settled case-law that any national court or tribunal that has doubts as to the validity of EU law may not itself review that validity but should rather refer the matter to the Court of Justice.[5]

In the first 15 years after accession, Cypriot courts and tribunals have asked the Court of Justice for preliminary rulings on nine occasions. Two of these cases are still pending.

The dialogue between the Court of Justice and the national courts is not limited to the preliminary ruling mechanism under Article 267 TFEU. There is also an informal dialogue. In this context, I would like to mention the establishment of the Judicial Network of the EU on the 1st of January 2018, comprising the Constitutional and Supreme Courts of the Member States, including the Supreme Court of Cyprus. The purpose of the network is, first and foremost, to exchange information on the application of EU law in both the EU and national legal orders. The Network's website allows the participating courts to consult pending requests for a preliminary ruling before the Court of Justice and thus to verify before referring a preliminary question to it, whether the Court is about to rule on the same or a similar question. But the website *also* allows the participating courts to check national case law on questions of EU law. As far as national case law is concerned, the network largely relies on the active contribution of the Constitutional and Supreme courts of the Member States. I strongly invite you to contribute Cypriot cases to the website. The pages of the Network's website concerning national judicial decisions are indeed the most popular ones.

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[5] Judgment of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452.

Since the Network has proven to be a great success, it is now our firm intention that all courts and tribunals of the Member States will have access to the content of the Network's website by January 2020. We are even hoping that this might be done by September 2019.

Moreover, it is our intention to make the Court of Justice's new search engine *Eurêka* accessible to the courts of the Member States via the Court's own curia website (curia.europa.eu), but this is a longer-term objective.

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In order for the cooperative mechanism under Article 267 TFEU to succeed, there must be a culture *of mutual trust* between the Court of Justice and national courts. It is essential that that trust operates in both directions: On the one hand, the Court of Justice must trust national courts in their assessment of the need to make a reference. On the other hand, national courts must trust the Court of Justice to deliver, within a reasonable time, well-reasoned judgments that not only enable them to settle the disputes in the main proceedings, but also to take due account of societal and technological changes where appropriate.

Inasmuch as national courts must remain confident that the Court of Justice is faithful only to the law of the EU, the Court of Justice must be confident that national courts apply that law faithfully, regardless of any political considerations. It follows that only national courts that are genuinely independent may have recourse to the preliminary ruling mechanism in order to engage in a dialogue with the Court of Justice.

The Court of Justice's judgment in *Associação Sindical dos Juízes Portugueses* is pivotal in that respect.[6] In this case, also known as the '*Portuguese Judges Case*', the Court of Justice held that Article 19 TEU may be relied upon in order to set aside national measures that call into question the independence of the national judiciary.

The facts of the case were as follows:

[6] Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117.

In the context of the 'Euro-crisis', Portugal passed a law that sought to cut down public spending by reducing the salaries of public office holders, including members of the judiciary, in this case the members of the Portuguese Court of Auditors.

The Trade Union of Portuguese Judges, acting on behalf of members of the Court of Auditors, brought legal proceedings against the acts implementing that legislation, arguing that those salary-reduction measures threatened the judicial independence of those members, as guaranteed by Article 19 TEU and Article 47 of the Charter.

Consequently, the Portuguese Supreme Administrative Court in Portugal (Supremo Tribunal Administrativo) asked the Court of Justice whether the principle of judicial independence, enshrined not only in the Portuguese Constitution but also in EU law, precludes such salary-reduction measures.

In its judgment, the Court of Justice held first that judicial independence forms part of the requirement under Article 19 TEU 'to ensure effective legal protection in the fields covered by Union law'. Thus, that provision itself requires national courts or tribunals, in so far as they may rule on questions concerning the application or interpretation of EU law, to be 'independent' within the meaning of Article 47, second subparagraph, of the Charter. As regards the main proceedings, however, the Court held that, subject to final verification by the referring court, the salary-reduction measures did not threaten judicial independence as those measures were provisional, proportionate and did not target the judiciary specifically, forming part of a more general effort to overcome that crisis. Thus, the Court of Justice's ruling in the *Portuguese Judges Case* goes well beyond the Euro-crisis, marking a 'constitutional moment' for the rule of law within the EU.

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The dialogue between the Court of Justice and the national courts under Article 267 TFEU is the guarantor of the uniform interpretation and application of EU law in every part of the Union, from the Gulf of Finland to the Strait of Gibraltar and from the Western coast of Ireland to Cyprus.

The judgment of the Court of Justice in *Achmea* is an important development in the case law concerning that imperative of uniformity. It highlights that the autonomy of EU law

requires that the operation of the preliminary reference mechanism under Article 267 TFEU should be protected.[7]

The *Achmea* case concerned a Bilateral Investment Treaty (BIT) between two Member States, the Netherlands and the Slovak Republic, the latter acting as a successor State to the former Czech and Slovak Federative Republic. The BIT contained an arbitration clause entitling an investor from either Party, in the event of a dispute concerning investments in the other Member State, to bring proceedings against that latter State before an arbitral tribunal whose jurisdiction that Member State had undertaken to accept.

Following the Slovak Republic's decision to liberalise the private sickness insurance sector in 2004, *Achmea*, a company belonging to a Dutch insurance group, decided to invest in that Member State. However, in 2006, the Slovak Republic reversed the liberalisation of that sector, in particular by prohibiting the distribution of profits generated by private sickness insurance activities. That action caused financial harm to Achmea, which decided to start arbitration proceedings against the Slovak Republic. The parties chose Germany as the place of arbitration, meaning that the law of that Member State applied to those proceedings. The arbitral tribunal ordered the Slovak Republic to pay Achmea damages in the principal amount of EUR 22.1 million. The Slovak Republic challenged that award before the German courts, which led the *Bundesgerichtshof* to ask the Court of Justice, in essence, whether the arbitration clause set out in the BIT was compatible with EU law.

In its judgment, the Court of Justice found that such an arbitral tribunal might be called upon to interpret and apply rules and principles of EU law, in particular the freedom of establishment and the free movement of capital, in order to rule on possible infringements of the BIT. The Court of Justice then noted that the arbitral tribunal did not form part of the EU judicial system, since the very *raison d'être* of the arbitration clause contained in the BIT was precisely to prevent investor-related disputes from being submitted to the courts of the Contracting Parties. As a result, it decided that the tribunal did not qualify as a court or tribunal '*of a Member State*' within the meaning of Article 267 TFEU.

[7] Judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158.

That situation was held to be such as to threaten the uniform application and interpretation of EU law. The Court of Justice therefore ruled that the autonomy of EU law precludes an international agreement, entered into by the Member States, the effect of which would be to remove from the jurisdiction of national courts – and thus from the preliminary reference procedure – disputes that may involve the application and interpretation of EU law.

Following this judgment, the *Bundesgerichtshof* subsequently held that arbitration clauses in BITs between the Member States of the EU are incompatible with EU law, which means that arbitral awards issued in such a context must be set aside.[8]

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So far, I have emphasised the importance of the preliminary ruling procedure in upholding the rule of law in the EU. I will now have a closer look at a number of cases that resulted from the financial crisis.

For the first 30 years following the signature of the Treaties of Rome, the Court's judgments mainly concerned the creation of the internal market, whereas over the past 30 years the competences of the Union itself have been substantially expanded, meaning that the Court of Justice is now called upon regularly to examine complex and socially delicate questions. Furthermore, with the entry into force of the Treaty of Lisbon on 1 December 2009, the Charter became a binding catalogue of fundamental rights that enjoys the same legal value as the Treaties. As a result, the Court of Justice is called upon to interpret the Charter in an increasing number of cases.

A case that is of particular interest for Cyprus in this context is *Ledra Advertising and Others v Commission and ECB*.

That appeal against a judgment of the General Court of the EU ('General Court') raised the question whether individuals were allowed to bring actions against the Commission before the EU courts on the basis that it had signed a Memorandum of Understanding (MoU) on behalf of the European Stability Mechanism (ESM).

The facts of the case were as follows:

[8] Judgment of the Bundesgerichtshof of 31 October 2018, Case I ZB 2/15.

During the first few months of 2012, the Cyprus Popular Bank and the Bank of Cyprus were facing financial difficulties. Consequently, the Cypriot authorities decided to recapitalise them by means of financial assistance from the ESM.

Depositors of the banks, more particularly a company established in Cyprus and a number of Cypriot citizens, who suffered losses resulting from the subsequent restructuring of those banks, sought the MoU's annulment and compensation in damages. They argued that the MoU had led to the violation of their right to property as guaranteed in Article 17 of the Charter.[9]

At first instance, the General Court declared those actions inadmissible, because neither the ESM nor the Republic of Cyprus were an institution, body, office or agency of the EU (Article 263 TFEU) over whose acts the General Court has jurisdiction.[10] Accordingly, it also dismissed the claims for compensation, referring to the fact that they were based on the illegality of certain provisions of the MoU.[11]

On appeal, the Court of Justice confirmed the interpretation of the General Court, to the extent that the MoU cannot be considered as an act of the institutions, bodies, offices or agencies of the EU, and cannot, therefore, be contested on the basis of Article 263 TFEU.[12]

However, the Court of Justice observed that "whilst the Member States do not implement EU law in the context of the ESM Treaty, so that the Charter is not addressed to them in that context (…), the Charter is addressed to the EU institutions, including (...) when they act outside the EU legal framework."[13]

Thus, it found that the Commission, by taking into account its role as guardian of the Treaties, is bound, under Article 17, paragraph 1, TEU, to ensure that such MoUs are consistent with EU law and, in particular, with the Charter.

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[9] Orders of the General Court of 10 November 2014, *Ledra Advertising v Commission and ECB*, T-289/13, EU:T:2014:981; *Eleftheriou and Papachristofi v Commission and ECB*, T-291/13, EU:T:2014:978; *Theophilou v Commission and ECB*, T-293/13, EU:T:2014:979.

[10] Order of the General Court of 10 November 2014, Ledra Advertising v Commission and ECB, T-289/13, EU:T:2014:981, para 56.

[11] *Ibid,* para 47.

[12] Judgment of the Court of 20 September 2016*, Ledra Advertising and Others v Commission and ECB*, Joined Cases C-8 to 10/15 P, EU:C:2016:701.

[13] *Ibid*., para 67.

The Court examined, on that basis, the conditions for establishing the EU's non-contractual liability, namely the unlawfulness of the conduct of the EU institution concerned, the damage and the existence of a causal link between the conduct of the institution and the damage complained of. The Court decided that the Commission had not contributed, by having facilitated the adoption of the MoU, to a serious breach of the appellants' right to property enshrined in Article 17, paragraph 1, of the Charter. It followed that the measures adopted on the basis of the MoU "d[id] not constitute a disproportionate and intolerable interference impairing the very substance of the appellants' right to property."[14]

Thus, the Court of Justice, first, set aside the order of the General Court and, second, dismissed the actions for compensation of damages brought by the Cypriot banks' depositors.

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In the same vein, in the *Mallis and Malli and Others v Commission and ECB* case,[15] the Court of Justice decided, again on appeal, that the Eurogroup statement of March 2013 referring to the same MoU signed by the Commission on behalf of the ESM could not be regarded as a joint decision of the Commission and the European Central Bank (ECB).

That was so because the duties conferred on the Commission and the ECB by virtue of the ESM Treaty do not entail the exercise of any power to make decisions. Accordingly, the Eurogroup statement of March 2013 could not be regarded as the binding expression of a decision-making power of those two institutions.[16] The Court of Justice concluded that the adoption, by the Cypriot authorities, of the legal framework necessary for restructuring the banks concerned could not be considered as having been imposed by the Commission and the ECB.[17]

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[14] *Ibid.*, para 74.
[15] Judgment of the Court of 20 September 2016, *Mallis and Malli and Others v Commission and ECB*, Joined Cases C-105/15 to C-109/15, EU:C:2016:702.
[16] *Ibid.*, paras 53, 57.
[17] *Ibid.*, para 60.

As a result, the Court of Justice dismissed the appeals and upheld the orders of the General Court.[18]

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More recently, in the *Rimšēvičs and ECB v Latvia* case,[19] the Court of Justice was called upon, for the first time, to hear a case based on Article 14, point 2, of the Statute of the European System of Central Banks and of the European Central Bank ('ESCB Statute'). In order to guarantee the independence of the governors of the national central banks, that provision grants the governor of a national central bank, as well as the Governing Council of the ECB, the right to bring an action before the Court of Justice against a decision of an authority of a Member State to remove that governor from office. The Court can verify, in the context of such proceedings, whether the removal at issue conforms to the 'Treaties or any rule of law relating to their application', including the conditions for removal set out in Article 14, point 2, of the ESCB Statute.

Latvia's Anti-Corruption Office had taken the decision to suspend provisionally from office Mr Rimšēvičs, Governor of the Central Bank of Latvia, on the basis of criminal charges brought against him. Both Mr Rimšēvičs (C-202/18) and the ECB (C-238/18) challenged that decision.

At the outset, the Court of Justice recalled that the underlying rationale of the remedy based on Article 14, point 2, of the ESCB Statute is the *annulment* of an act of *national law* relieving a governor of a national central bank from office. That specific form of action thus derogates from the general distribution of powers between the national courts and the EU courts as provided for by the Treaties and in particular by Article 263 TFEU. The Court of Justice held that its own jurisdiction under Article 14, point 2, of the ESCB Statute provision cannot displace that of the national courts having jurisdiction to rule on questions of criminal liability of the governor involved, nor interfere with the preliminary criminal investigation being conducted by the competent administrative or judicial

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[18] Orders of the General Court of 16 October 2014, *Mallis and Malli v Commission and ECB*, T-327/13, EU:T:2014:909; *Tameio Pronoias Prosopikou Trapezis Kyprou v Commission and ECB*, T-328/13, EU:T:2014:906; *Chatzithoma v Commission and ECB*, T-329/13, EU:T:2014:908; *Chatziioannou v Commission and ECB*, T-330/13, EU:T:2014:904; *Nikolaou v Commission and ECB*, T-331/13, EU:T:2014:905.

[19] Judgment of 26 February 2019, *Rimšēvičs and ECB v Latvia*, Joined Cases C-202/18 and C-238/18, EU:C:2019:139.

authorities. However, the Court of Justice confirmed that it has jurisdiction under Article 14, point 2, of the ESCB Statute to verify whether there is sufficient evidence of serious misconduct capable of justifying removal from office of a national central bank's governor.

In that particular case, the Court of Justice noted that Latvia had not provided any evidence supporting the view that the accusations made against Mr Rimšēvičs were well founded.

Consequently, the Court annulled the decision at issue "in so far as it prohibits Mr Rimšēvičs from performing his duties as Governor of the Central Bank of Latvia."[20]

In academic circles, the national decision's annulment in the *Rimšēvičs and ECB v Latvia* case has been considered a 'constitutional moment' for EU law.[21]

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Lastly, I would take this opportunity to stress that we are grateful not only for the contribution of the courts here in Cyprus to the European project. On a daily basis, my colleagues and I are also grateful that we may count on the distinct and valuable input of our esteemed colleague Judge Constantinos Lycourgos, who has been the Cypriot member of the Court of Justice since 8 October 2014.

Over the past four and a half years, Judge Lycourgos has acted as Judge-Rapporteur in numerous important cases. Most recently, at the beginning of this year, he was in charge of drafting the judgment in *Cresco Investigation*, an appropriate case to mention during the Easter period. In that case, the Court of Justice's Grand Chamber held that the granting in Austria of a paid public holiday on Good Friday only to employees who are members of certain Christian churches constitutes a discrimination on grounds of religion prohibited under EU law.[22]

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[20] *Ibid.*, para 97.
[21] *Sarmiento*, Crossing the Baltic Rubicon, VerfBlog, 2019/3/04, http://www.verfassungsblog.de/crossing-the-baltic-rubicon/.
[22] Judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43.

Mr. Lycourgos was also the reporting judge in *MP v Secretary of State for the Home Department*[23], delivered in April 2018.

In that case, the Court of Justice decided that a person who has in the past been tortured in his country of origin – a non-member State – is eligible for 'subsidiary protection' if his physical and psychological health could, if he were returned to that third country, seriously deteriorate, so as create a risk for suicide and, where there is a real risk of him being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of torture.

Furthermore, we are equally grateful for the contribution made by our Cypriot colleagues from the General Court, Judge *Savvas Papasavvas* and Judge *Anna Marcoulli.*

Judge *Papasavvas* became the first Cypriot member of the General Court on 12 May 2004. On 13 April 2016, as part of the reform of the General Court adopted in 2015 that allowed the Member States to nominate a second judge at the General Court, he was joined by Judge *Marcoulli* as part of the first stage of that reform process.

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I hope and trust that the judiciary of Cyprus, in close cooperation with the Court of Justice, will continue to uphold the rule of law on both a national and European level in the future.

Thank you very much for your attention.

[23] Judgment of 24 April 2018, *MP v Secretary of State for the Home Department case (subsidiary protection of a person previously a victim of torture)*, C-353/16, EU:C:2018:276.