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The Concept of a 'Lawyer' as an Autonomous Concept of European Union Law and the Conditions of Representation before the Union Courts From the Perspective of the Principle of Effective Judicial Protection*

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Abstract

The paper aims to analyze the extent to which the European Union's procedural rules regarding the representation of individuals (natural and legal persons) in direct actions before the courts of the Union, as they have been interpreted in European case law, respect the substance of the right of access to a court established in Article 47, first paragraph, of the Charter of Fundamental Rights of the European Union.

In this regard, by analyzing the case law of the Union courts regarding the conditions of representation of the non-privileged applicants (the strict requirement regarding the "independence" of the lawyer, who must be a "third party" in relation to the party he represents), as well as the consequences that the case-law gives for not complying with this requirement, the paper concludes in the sense that it does not comply with the standards of effective judicial protection that the Court of Justice of the European Union has set for the Member States and which should also guide its activity. A case currently on the agenda of the Court of Justice of the European Union - Uniwersytet Wrocławski (C-515/17 P and C-561/17 P) and on which it is to rule in the Grand Chamber, may be the perfect opportunity to bring certain clarifications, all the more so as in his Opinion delivered on September 24, 2019 in this case, Advocate General Michal Bobek offers strong arguments in favor of a more relaxed interpretation of the condition of representation by "lawyer" in litigation before the courts of the Union. If these are to be followed by the Court, we could attend a radical reconsideration of the Union court's traditional stance on the issue.

Keywords: *Public Law, European Union Law, Court of Justice of the European Union, lawyer, the principle of effective judicial protection.*

Introduction

The European Union is constantly described by its institutions as a "union of law" (referring to the value of the rule of law enshrined in Article 2 of the Treaty

on European Union[1]) 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[2]. This implies the existence of effective judicial protection of the individual, the European Union law transforming the right of access to a court and to a fair trial in the fundamental principle before even its formal consecration in Article 47 of the Charter of Fundamental Rights of the European Union[3]. The task of carrying out the judicial control designed to ensure the legal exercise of power by EU institutions, offices, bodies and agencies is entrusted mainly to the Court of Justice of the European Union (CJEU), within the framework of direct actions for annulment provided for in Article 263 of the Treaty on the Functioning of the European Union (TFEU) and, in the alternative, to the national courts, which carry out an indirect control by means of the preliminary reference provided for by Article 267 TFEU, in the latter case if the act in question involves a national implementing measure.

In accordance with article 263 TFEU, the possibility for private plaintiffs to challenge the legality of EU measures directly before the EU courts it is subject to strict conditions: to be the addressee of the act or be direct and individual concern to them or, if it is a regulatory act, to be direct concern to them and does not entail implementing measures. The Court of Justice had strictly interpreted the *locus standi* requirements for private litigants, transferring the main responsibility of guaranteeing the right of access to the judge to the national courts (within the preliminary reference)[4], approach seen by many authors as problematic from the perspective of the effective judicial protection[5].

In addition to the restrictive criteria related to the *locus standi*, the procedural requirements regarding representation before the Union jurisdiction conditions the presence of an individual before the EU courts even more. Thus, in the case-

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[1] *Treaty on European Union and the Treaty on the Functioning of the European Union* (consolidated versions), OJ C 202, 7.6.2016, p. 1.

[2] Judgment of the Court of 29 June 2010, *E and F*, C-550/09, EU:C:2010:382, paragraph 44.

[3] Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, pp. 389–405.

[4] See A. Kornezov, *Locus standi of private parties in actions for annulment: Has the gap been closed?*, Cambridge Law Journal, 73, 2014, pp. 25–28.

[5] A. Arnull, *The Principle of effective Judicial Protection in the EU Law: An Unruly Horse*? European Law Review, no. 1/2011, pp. 51-70. See also M. Rhimes, *The EU Courts stand their ground: why are the standing rules for direct actions still so restrictive?* European journal of legal studies, no. 1/ 2016, pp. 103-172.

law of the EU courts, in particular of the General Court, which has jurisdiction to judge the applications of individuals, the failure of several actions was due to procedural reasons arising from Article 19 of the Statute of the Court, which requires that, with the exception of the Member States' Governments and the EU Institutions', parties to the dispute must be represented by an lawyer.

As we will highlight in the following, in this line of case-law the notion of "lawyer" appears as an autonomous notion of EU law, which does not depend on the various national legal contexts and which presupposes certain specific requirements/standards whose non-compliance entails consequences between the most drastic ones, namely the inadmissibility of the request. The fundamental aspects of this interpretation of the notion of "lawyer" will be analyzed, with emphasis on the problematic aspects that it raises from the perspective of the effective judicial protection Starting from the context of a case currently on the Court's agent, arguments are presented in favor of a possible reconsideration of this case-law.

1. The condition of representation by "lawyer" of individuals in direct actions before the CJEU

1.1. Legal framework

Article 19 of the Statute of the Court of Justice of the European Union (Protocol No (3) to the Treaties) states that while the Member States and the institutions of the Union are represented before the Court of Justice by an agent appointed for each case, the other parties must be represented by a lawyer "authorized to practice before a court of a Member State". Pursuant to Article 53 of the same statute, the provisions of Article 19 also apply in proceedings before the General Court.

Article 44 of the Rules of Procedure of the Court[6] and Article 51 of the Rules of Procedure of the General Court[7] provide the obligation to prove the status of representative of the party by submitting a document certifying that they have the right to exercise their profession before a court of a State member or other State Party to the EEA Agreement.

Neither Article 19 of the Statute or other of its provisions and nor the rules of procedure of the Union courts establish how the notion of "lawyer" is to be interpreted. Adding that proof of this quality must be made, after a simple

[6] *Rules of Procedure of the Court of Justice* of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013, p. 65), on 19 July 2016 (OJ L 217, 12.8.2016, p. 69) and on 9 April 2019 (OJ L 111, 25.4.2019, p. 73).

[7] *Rules of Procedure of the General Court* of 4 March 2015 (OJ 2015 L 105, p. 1), consolidated version.

request, at any stage of the procedure, Practice directions to parties concerning cases brought before the Court[8] do not set any requirements or conditions that the "lawyer" must meet. Such a requirement - "independence", without specifying the content, arises only from Practice rules for the implementation of the Rules of Procedure of the General Court[9], which at point 78 ("Lodging of procedural documents and annexes via e-Curia") stipulates that "the representative lodging a document via e-Curia must satisfy all the requirements laid down in Article 19 of the Statute and must, if he is a lawyer, have the requisite independence from the party he represents".

1.2. The notion of a lawyer as an autonomous concept of EU law. Formation and extension of case law

The quite general formulation of the rules of procedure regarding the representation of non-privileged applicants in direct actions before the courts of the Union and the requirement regarding the authorization to practice before a court of a Member State seem, at first sight, to refer exclusively to national law for the determination capacity of a legal representative to practice before the EU courts, especially as there is no Union rules to ensure standards of professional representation. Also, ssecondary law of the Union in the field of recognition of the professional qualifications of lawyers[10] leaves the Member States with a great deal of discretion as regards the regulation of the profession of lawyer in their territory, the rules applicable to this profession being able to differ substantially from a Member State to another.

However, such an interpretation is invalidated by the case-law of the EU courts regarding Article 19 of the Statute. Thus, on the one hand, they ruled that, in order to represent clients before the Union courts, legal representatives must be members of a national bar, which is also valid for public-law legal entities, such as independent central bodies or autonomous territorial entities (governments of regions or autonomous communities)[11] which, like so-called non-privileged claimants, cannot appoint an agent to represent them in a case.

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[8] Official Journal of the European Union, L 031, 31 January 2014.

[9] *Practice Rules for the Implementation of the Rules of Procedure of the General Court* adopted by the General Court on 20 May 2015 (OJ 2015 L 152, p. 1, corrigendum OJ 2016 L 196, p. 56), and the amendments adopted on 13 July 2016 (OJ 2016 L 217, p. 78) and on 17 October 2018 (OJ 2018 L 294, p. 23, corrigendum OJ 2018 L 296, p. 40).

[10] *Council Directive 77/249/EEC* of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ L 78, 26.3.1977, p. 17) and *Directive 98/5/EC of the European Parliament and of the Council* of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ L 77, 14.3.1998, p. 36).

[11] See, inter alia, Order of the Court of 20 February 2008, *Comunidad Autónoma de Valencia-Generalidad Valenciana v Commission* (C-363/06 P, unpublished, EU:C:2008:99) or Order of the Court of 18 November 2014, *Justice & Environment v Commission* (T-221/14, unpublished, EU:T:2014:1002).

On the other hand, the obligation for non-privileged applicants to be "represented" was interpreted as prohibiting self-representation, properly qualified lawyers and admitted to a national bar being unable to represent themselves[12].

Third, the prohibition on self-representation was extended to legal entities as well, in order to cover cases where legal representatives who held various corporate functions within the applicant were considered as not fulfilling the condition to be third parties in relation to this[13].

Finally, the jurisprudence of the European courts establishes a prohibition on representation of a claimant where legal representative (in-house lawyer) is employed by him[14]. This case-law concerns the situation of certain internal legal systems that allow lawyers registered in a bar or law firm to work as an in-house lawyer for a commercial company. In many of these jurisdictions, these lawyers are subject to the same ethical and professional rules or similar to those of other lawyers and enjoy the protection of the privilege of the legal profession or professional secrecy, according to the relevant national law.

In two more recent cases, the ban on representation goes even further. In the first of these[15], the General Court considers that the existence of contractual relations between the lawyer and the client, even though they are not employment relations and have no connection with the legal representation in the procedure in question, disqualifies the lawyer from ensuring representation before the EU courts, since there is a risk that the professional opinion of the legal representative will be influenced, at least in part, by his professional environment. In the second[16], the General Court established that a lawyer working in a law firm cannot represent the applicant, who is one of the co-founders of the law firm and one of its two associates, as the interests of the law firm are largely the same as the applicant's. As the latter exercises effective control over the law firm, there is a risk that the representative's professional opinion will be, at least in part, influenced by his professional environment and

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[12] See Order of the Court of 5 December 1996, *Lopes v Court of Justice* (C-174/96 P, EU:C:1996:473) or, more recently, Order of the General Court of 27 September 2018, *Sógor v Council and others* (T -302/18, unpublished, EU:T:2018:621).

[13] See, for example Order of the General Court of 8 December 1999, *Euro-Lex v OHIM (EU-LEX)* (T-79/99, EU:T:1999:312, paragraphs 28 and 29) or Order of the General Court of 19 November 2009, *EREF v Commission* (T-94/07, unpublished, EU:T:2009:451, paragraph 15).

[14] Order of the General Court of 23 May 2011, *Prezes Urzędu Komunikacji Elektronicznej v Commission* (T-226/10, EU:T:2011:234, paragraph 21), upheld by the Court in a Judgment of 6 September 2012, *Prezes Urzędu Komunikacji Elektronicznej v Commission* (C -422/11 P and C-423/11 P, EU:C:2012:553, paragraphs 33 and 34).

[15] Order of the General Court of 13 June 2017, *Uniwersytet Wrocławski v REA* (T-137/16, unpublished, EU:T:2017:407).

[16] Order of the General Court of 30 mai 2018, *PJ v EUIPO-Erdmann & Rossi (Erdmann & Rossi*) (T‑664/16, EU:T:2018:517) .

thus "he may have been unable to perform his main role as an officer of the court in the most appropriate manner"[17].

The arguments used by the EU courts to prohibit representation in the case of a connection between the legal representative and the party they represent are based on an interpretation of the notion of "lawyer" in Article 19 of the Statute as representing an autonomous notion of Union law, characterized necessarily through "independence".

In order to detect such a requirement, the Court relied on its case-law on documents which are protected by professional secrecy in investigations conducted by the European Commission in the field of competition law, in which it established that the protection of confidentiality is subsumed, inter alia, on the condition that the documents in question come from independent lawyers, namely "lawyers who are not linked to the client through a work relationship"[18]. To this end, the Court operates a distinction between internal lawyers, acting on the basis of an employment contract (subordination is considered inherent) and external lawyers, who enjoy independence, a distinction that is based "on a conception of the role of the lawyer, considered a collaborating in the administration of justice, who is required to provide, in full independence and in the overriding interests of the cause at issue, such legal assistance as the client needs". It considers that such a concept "reflects the common legal traditions of the Member States and is also found in the legal order of the Union, as is clear from the provisions of Article 19 of the Statute of the Court of Justice"[19]. The Court understands the notion of independence both positively, determined by reference to the obligations of professional ethics, but also negatively, by reference to the absence of a working relationship with the party in dispute, considering that an internal lawyer, even if he is a member of the bar and is thus subject to the obligations of professional ethics, does not benefit from his employer of the same degree of independence as the lawyer who works in an external firm against his client[20].

The requirements regarding independence developed in this context have been gradually transferred to the interpretation of Article 19 of the Statute of the Court, "independence" being transformed into an essential criterion in relation to which the ability to ensure representation of the non-privileged parties before the Union courts is determined. Thus, although the fourth paragraph of Article 19 of the Statute provides that only a lawyer authorized to practice before a court of a

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[17] *Ibidem*, paragraph 65.

[18] Judgment of 18 May 1982, *AM&S Europa v Commission* (155/79, EU:C:1982:157, paragraphs 21 and 22); Judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals v Commission* (C-550/07 P, EU:C:2010:512, paragraphs 42-45).

[19] Judgment *AM & S Europe*, paragraph 24, Judgment *Akzo*, paragraph 42.

[20] Akzo, paragraph 45.

Member State may represent a party before the Court, this condition, although necessary, is not "sufficient", "in the sense that any lawyer authorized to practice before a court of a Member State would automatically be allowed to practice before the Union courts"[21]. The notion of lawyer in the context of the provisions regarding the representation of non-privileged parties before the courts of the Union is "subject to objective implementation, which is necessarily independent of national legal orders"[22]. Consequently, the autonomous interpretation of this notion requires the analysis, from the perspective of the requirement regarding independence, of the compatibility between the employment relationship of the legal representative and his possibility to act before the courts of the Union. The Court thus upheld the judgment of the General Court ruling that "the existence of a subordination relationship" between legal advisers and a party connected with the applicant „implies a degree of independence less than that of a legal adviser or a lawyer practicing in a firm that is external to their client" [23].

2. Problematic aspects

Both the jurisprudence regarding the privilege of professional secrecy, and especially the extension of the requirement regarding independence, established for another purpose, in the field of representation before the EU courts, whose purpose is different, has been the subject of numerous criticisms in the specialized doctrine. On the one hand, it is appreciated that this creates a discrimination between legal advisers or internal lawyers and external lawyers, depriving the former in fact of their status as collaborators of justice[24], discrimination that also works in relation to the agencies or government lawyers, on whom there are no similar concerns about independence[25]. Thus, the notion of independence is approached in a simplistic way[26], being based essentially on the nature of the contractual relationship between the legal representative and his client (legal assistance contract or employment contract), without considering the

[21] Judgment of 6 September 2012, *Prezes Urzędu Komunikacji Elektronicznej v Commission* (C-422/11 P and C-423/11 P, EU:C:2012:553, paragraph 33).

[22] *Ibidem*, paragraph 34.

[23] Order of 23 May 2011, *Prezes Urzędu Komunikacji Elektronicznej v Commission* (T-226/10, EU:T:2011:234, paragraph 21).

[24] P. Marchandise, C. Jammaers, K. Macours, L. Vandoorne, *Déontologie et organisation générale de la profession de juriste d'entreprise. Théorie et cas pratiques de réflexion*, Bruxelles:Institut de Juristes d'Entreprise, 2018, p. 97.

[25] J. Stefanelli, *Expanding Akzo Nobel: in-house counsel, government lawyers, and independence*, International & Comparative Law Quarterly,Cambridge University Press, Volume 62, Issue 2/2013, pp. 485-492.

[26] S. Bryska, *In-house lawyers of NRAs may not represent their clients before the European Court of Justice. A case note on UKE (2011*), College of Europe, Research Paper in Law no. 3/2011.

possibility that, in fact, internal lawyers to benefit from much more autonomy in their work due to the professional stability guaranteed by their employment contracts and the labour law than a lawyer who practices on his own behalf but has only one important client.

On the other hand, it alleges infringement of the principle of conferral of powers resulting from Article 5 (1) and (2) TEU in conjunction with Article 4 (1) TEU, according to which the determination of the conditions to be fulfilled for practicing the profession of lawyer is the attribute of the Member States[27]. Thus, there are distinct regimes in Member States regarding the exercise of the profession of lawyer or legal adviser, in some legal systems lawyers or legal advisers employed having the right to practice regulated legal professions, to represent their employer in the proceedings before them to the national courts or to remain members of a national bar, sharing the same rules of ethics and disciplinary sanctions with lawyers acting outside a labor relationship[28]. Therefore, Article 67 (1) TFEU refers to the Union's obligation to respect the different legal systems and traditions of the Member States. However, the case law of the Union courts completely ignores the national laws governing the legal professions and the deontological mechanisms governing their exercise, which is seen by some authors as representing a message transmitted by the Union jurisdiction to the Member States to operate harmonization in this area[29]. This claim is not completely contradicted by the Court's arguments that the interpretation of the concept of lawyer in the context of Article 19 of the Statute concerns only the representation of the parties before the courts of the Union and has no bearing on the representation of the parties before the courts of a Member State[30], the case-law in question feeding on in many Member States the disputes between bars and associations of legal advisors regarding the nature of the role and the profession concerned and putting pressure on the Member States to distinguish between ”lawyers” and ”legal advisors” in their domestic rules governing the legal professionsIn addition, the implications on public resources cannot be ignored, as it implies a rethinking of how legal representation of public bodies that do not belong to the category of privileged claimants is ensured. They must have budgets that allow them to hire external lawyers for potential proceedings before the European Union courts[31].

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[27] N. Forwood, ”European Court of Justice case law on legal professionnal privilege”, in G.A. Dal (éd), *Legal Professional Privilege and European Case Law*, Bruxelles: Larcier, 2010, p. 61.

[28] See in this regard P. Marchandise, C. Jammaers, K. Macours, L. Vandoorne, *op. cit.*, pp. 86-94.

[29] S. Bryska, *op. cit., p. 6.*

[30] Judgment *Prezes Urzędu Komunikacji Elektronicznej* (C-422/11 P and C-423/11), paragraph 40.

[31] See S. Bryska, *op. cit., p. 7,* which evokes the situation of a specialized national regulatory authority.

Last but not least, the criticisms that can be made of the case law relating to representation by an "independent" lawyer refers to the violation of fundamental rights and general principles recognized by Union law, such as the principle of legal certainty and the principle of effective judicial protection[32]. From the perspective of the principle of legal certainty, which requires that a rule of law laying down obligations for individuals is clear and precise, and its application is predictable for the persons concerned[33], given the distinct regimes for the exercise of legal professions in the different Member States, as well as the absence in the Statute and the rules of procedure of clear references to "independence", the case law in question does not ensure the predictability of the criteria in relation to which the independence of a lawyer is assessed in a concrete situation. This case-law, in addition to deriving, most often, from orders of EU courts that are unpublished, available only in certain official languages, associates with the concept of independence different elements, such as the quality of third party vis-à-vis the complainant (which in some cases arise from the prohibition of self-representation), the existence of a work contract, the existence of other connections between the applicant and his lawyer of nature influence his professional opinion, on the basis of which the non-privileged claimants cannot clearly identify which type of relationship would disqualify a certain legal representative from at representation before the Union courts[34]. At the same time, elements that are traditionally associated with the concept of independence, such as the absence of any external pressure on the legal representative and the lack of any internal factors that would generate a conflict of interest between lawyer and client[35] are not considered.

With regard to the principle of effective judicial protection as currently reflected in Article 47 of the Charter of Fundamental Rights (”Right to an effective remedy and to a fair trial”)[36], the case-law in question can be seen as

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[32] P. Marchandise, C. Jammaers, K. Macours, L. Vandoorne, *op. cit*., p. 99.

[33] See J. Van Meerbeeck, *The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust*, European Law Review, Vol. 41, 2016, pp. 275-288. The author argues the need to mobilize the principle in favor of individuals, and not in favor of the Union.

[34] In some cases, the Court has formulated the requirement for independence on the condition that the legal representative is ”sufficiently distant” from the legal person which he represents (see Order of the Court of 4 December 2014, *ADR Center v Commission*, C-259/14 P, EU:C:2014:2417, paragraph 25), formulation which also does not excel in clarity.

[35] See *Charter of Fundamental Principles of the European Lawyer and the Code of Ethics of European Lawyers*, Council of European Bars, Edition 2019, p. 8, available on https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf.

[36] For an analysis of its various dimensions, see C. Mătușescu, S. Ionescu, *Effective Judicial Protection. Landmarks of Recent Case Law of the Court of Justice of the European Union,* in T. Ciulei, G. Gorghiu (eds.), LUMEN Proceedings Communicative Action & Transdisciplinarity in the Ethical Society, 2018, pp. 155-169.

problematic in relation to the various rights that compose it, such as the right of effective access to a court, the right to a fair trial or the free choice of the lawyer, and this especially from the perspective of the consequences that the EU courts have given to the non-observance of the requirements regarding the independent legal representation - to reject the action as manifestly inadmissible.

The Court of Justice rejected the allegations of violation of Article 47 of the Charter, referring to its case law (as well as to the European Court of Human Rights[37]) according to which the right of access to the court is not an absolute right, this may entail proportional limitations which serve a legitimate purpose and which do not prejudice this right in its very substance. Thus, the Court considered that the applicant in question did not prove that by his obligation to be represented by an independent lawyer he was disproportionately prevented from accessing justice or was affected in his substance this right as long as the requirement in question does not impose any specific choice as to the lawyer in charge of representing him[38].

However, European standards on access to justice that require the limitations of this right to be proportional also imply a fair balance to be achieved between the rights of the person and the public interest[39]. However, the conception from which the jurisdiction of the Union departs in defining the lawyer as an autonomous notion of European Union law is that the lawyer is "a collaborating in the administration of justice, who is required to provide, in full independence and in the overriding interests of the cause at issue, such legal assistance as the client needs"[40], accrediting the idea that the lawyer acts mainly in the public interest (good administration of justice) and only in the subsidiary in the defense of the clients' interests. On the one hand, this conception does not correspond to the reality, at least in some Member States, the legal representation being made mainly in the interest of the client and as a result of the choices made by him [41]. On the other hand, in this interpretation, the prevalence of the public

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[37] Its jurisprudence is relevant at EU level where, in accordance with Article 53 of the Charter of Fundamental Rights, the rights recognized in the Charter have the same meaning and scope as those provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[38] Order of the Court of 6 April 2017, *PITEE v Commission* (C‑464/16 P, EU:C:2017:291, paragraphs 31-33).

[39] See ECtHR judgment of 23 April 1997, *Van Mechelen and others v Netherlands*, no. 21363/93, 21364/93, 21427/93 and 22056/93, paragraphs 59-65.

[40] Judgment *Prezes Urzędu Komunikacji Elektronicznej* (C-422/11 P and C-423/11), paragraph 23.

[41] See *Charter of Fundamental Principles of the European Lawyer and the Code of Ethics of European Lawyers*. Also, in Romania, the *Statute of 3 December 2011 of the lawyer profession* (Off. G. no. 898 of 9 December 2011) establishes in art. 2 (1) that "The purpose of practicing the profession of lawyer is to promote and defend the rights, freedoms and legitimate interests of natural persons and legal persons of public and private law". According to art. 6 (3), "Everyone has the right to freely choose his lawyer".

interest would justify almost any interference in the relationship between lawyer and client, in other words, a high control of the quality of the legal representation, which departs from the idea of the exceptional and minimalist character of judicial supervision in this matter[42]. The rights and interests of the applicant (related, inter alia, to the free choice of a lawyer or to limiting the costs of legal assistance, provided he already has highly qualified legal representatives) are otherwise put in a clear imbalance in relation to the "higher interest" of the administration of justice. Accordingly, when arguments were raised before it regarding the absence of clear and legitimate objectives of its case-law on the interpretation of Article 19 of the Statute, the Court held that they were "unfounded"[43], without actually realizing an analysis from the perspective of the balance of interests.

A second condition of admissibility of limitations of the right of access to court is that this limitation does not affect the substance of the law, ie not in fact deprive the applicant of the right of access to court. From this point of view, the European Court of Human Rights has ruled that excessive formalism, within the meaning of a rigid interpretation of procedural rules, including those regarding mandatory representation (prohibition of self-representation), so as to prevent the substantive examination of an applicant's action constitutes a violation of the right of access to court[44].

For its part, in interpreting Article 47 of the Charter of Fundamental Rights or the principle of effective judicial protection, the CJEU did not hesitate to test the internal procedural rules in terms of the conditions that any restriction of the right of access to justice must require[45] and require national courts to interpret the rules in question in a manner that ensures rather than to refuse access to a court[46].

However, when it comes to access to their jurisdiction, the courts of the European Union do not seem to be held by the guarantees provided for in Article

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[42] For an example of the way in which the Romanian courts carry out this control, see *The Judicial Inspection Report regarding the verification of the compliance with the provisions of Law no. 51/1995 regarding the organization and exercise of the profession of lawyer, regarding the verification of the quality of lawyer of the persons who provide legal assistance* (4161/IJ/2253/DIJ/2016), available on www.csm1909.ro.

[43] See Order *PITEE* (C‑464/16 P), paragraph 30.

[44] European Court of Human Rights, Judgment of 11 February 2014, Case *Maširevizić v Serbia*, no. 30671/08 and Judgment of 5 April 2018, Case *Zubac v. Croatia*, no. 40160/12.

[45] See Judgment of the Court of 15 September 2016, *Star Storage et al* (C-439/14 and C-488/14, EU:C 2016 688, paragraphs 49-63).

[46] Judgment of the Court of 12 June 2014, *Peftiev and Others* (C-314/13, EU:C:2014:1645, paragraph 29) and Judgment of the Court of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraph 76).

47 of the Charter[47], declaring the action inadmissible[48] and thus refusing the substantive examination of the action of a complainant whose legal representative does not meet the conditions of "independence" within the meaning of Article 19 of the Statute. The declaration of inadmissibility, which prevents the applicant from bringing the action on the merits, is made by an ordinance which is not preceded by a notification regarding the irregularities of its legal representation, thus the applicant has no possibility to remedy the situation.

The transformation of a procedural requirement, which is not even expressly foreseen, and which has been discerned by jurisprudence as deriving from the common traditions of the Member States (based on appreciated criteria on a case-by-case basis, therefore unpredictable) in a substantive irregularity of the request, which cannot be remedied is difficult not to be seen as violating the fundamental guarantees provided by Article 47 of the Charter, representing in fact an unjustified restriction of access to justice.

From our point of view the arguments for such a restrictive interpretation are missing. Thus, on the one hand, the other condition of representation before the EU courts, namely the right of the lawyer to exercise his profession before the national courts, can be remedied, pursuant to Article 119 of the Rules of Procedure of the Court and Article 51 of the Rules of Procedure of the General Court giving a "reasonable time" for the party concerned to submit the supporting document, if it is missing[49]. From our point of view, there is no logical basis for refusing the same treatment in the case of the independence requirement. On the other hand, in the field of national law, at least in Romania, there is no very clear regulation of the sanction that must be given to the lack of representative quality, mainly due to the juxtaposition between this and the exception of the lack of proof of representative quality[50]. The doctrine is also divergent in this regard, some authors consider that the lack of representative is an absolute, fundamental exception[51] while others qualify it as a relative, procedural exception, which can be remedied[52]. However, the practice of the national courts is rather to take into account the aggravating effect of the

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[47] In fact, the Court applied a double standards of effective judicial protection for the Member States and the Union itself. See in this regard A. Arnull, *op. cit.*, p. 69.

[48] See Order of the General Court of 6 September 2011, *ClientEarth v Council* (T-452/10, unpublished, EU:T:2011:420, upheld in appeal by Order of the Court of 5 September 2013, *ClientEarth v Council* (C-573/11 P, unpublished, EU:C:2013:564).

[49] See, for example, the Ordinance of 13 November 2012, *Hârsulescu v Romania* (T-400/12, unpublished, EU:T:2012:595).

[50] See in particular the provisions on representation of the parties to the proceedings (Articles 80-89) of the Code of Civil Procedure.

[51] I. Leş, *Treaty of civil procedural law*, 5th ed., Bucharest: C.H. Beck, 2010, p. 168.

[52] M. Tăbârcă, *Procedural exceptions in the civil process*, Bucharest: Universul Juridic, 2006, p. 198.

situation of the claim holder, informing the party concerned about the irregularity of his legal representation and allowing them to rectify this irregularity[53].

3. Case *Uniwersytet Wrocławski* (C-515/17 P and C-561/17 P) and possible case-law reversals based on it

The Court of Justice's agenda is currently appealing against an order of the General Court declaring an action for annulment inadmissible due to the lack of appropriate legal representation that may shed little light on this nebula of representation before the EU courts. *Uniwersytet Wrocławski* (C-515/17 P and C-561/17 P) concerns the situation of a Polish university which brought an action before the General Court challenging a decision taken by the EU's Research Executive Agency whereby the university was forced to it returns certain funds previously granted to it. The General Court held the case inadmissible because the lawyer representing the applicant was not an independent counsel, as required by Article 19 of the Statute. Thus, although he was registered in the Polish bar and practiced his profession in a law firm, the representative also taught courses as associate professor at the University of Wrocław, concluding for this purpose with the university a civil law contract. In the opinion of the GeneralCourt, the existence of the respective contract implies the non-fulfillment of the requirement of independent legal representation.

The case is of particular relevance for Romanian lawyers who practice before the Union courts, an important part of them being at the same time university professors (possibility that is recognized by art. 16, lit. b) of Law no. 51/1995 for the organization and exercise of the profession of lawyer[54]). At the same time, the conclusions reached by the Court in this case will have an influence on another common situation, that of lawyers employed by a professional civil society (art. 5 (5) of Law no. 51/1995) on which the Court is to give concrete ruling in another appeal[55].

Pending the Court's solution, two arguments allow us to anticipate possible jurisprudential reversals that would result from this caseOn the one hand, its transmission to the Grand Chamber of the Court seems to confirm the awareness of the difficulty of the legal issues and the importance of clarifying them for the proper functioning of the Union courts. On the other hand, the Opinion of the

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[53] See in this regard *The Report of the Judicial Inspection* (cited at note 36), p. 29.

[54] *Law no. 51/7 June 1995 for the organization and exercise of the profession of lawyer* - republication, published in the Official Gazette of Romania, Part I, no. 210 of 28 March 2017.

[55] Case C-529/18 P, *PJ v EUIPO*.

Advocate General in this case[56], which argues the need for a review of how Article 19 of the Statute was interpreted and applied. Thus, by reviewing the evolutionary jurisprudence regarding Article 19 and identifying a number of issues raised by that interpretation (similar in fact to those retained in the doctrine and presented above), it proposes an adjusted interpretation of Article 19 as well from the point of view of the content of the obligation to represent through a lawyer, as well as of the procedural consequences related to non-compliance.

The starting point in the revision of the jurisprudence is related to the conception of the role and functions of the legal representation, the Advocate General rejecting the portrayal of the lawyer as a sort of agent of the courts and concludes that the role of the lawyer is private and that "in protecting the interests of private clients, the public interest in the sound administration of justice is also being served"[57].

Regarding the requirements regarding the status of a lawyer representing a non-privileged claimant before the EU courts, the qualification to practice before a court of a Member State is a matter that is determined in accordance with national rights, it being only the subject of a formal verification of the proving certificate. Instead, the right to represent an individual client in a specific case must be verified in relation to the autonomous notion of representation by a lawyer under Union law. In this regard, the Advocate General proposes as verification criteria:

- *the status of third party in relation to the applicant of the legal representative*, which arises from the requirement of paragraph 3 of Article 19 of the Statute as the non-privileged parties to be "represented" by a lawyer. In view of this requirement, it would be necessary to analyze and reject both the self-representation of the lawyers registered in a national bar and the representation of the legal persons by their own lawyers employed by employment contract. Thus, "an employed lawyer, who provides legal representation to his employer on the basis of an employment contract and thus finds himself in a relationship of subordination with regard to the provision of such legal services, cannot be considered, for the purposes of the autonomous interpretation of the third paragraph of Article 19 of the Statute, as a 'third party' in relation to his client"[58].

- *the quality of an independent party*, in the sense of the absence of any signs of external pressure exerted by any other party on the lawyer (of conflicts of interests), a requirement by which the existing relations between lawyer and

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[56] See Opinion of Advocate General Michal Bobek delivered on 24 September 2019 in *Uniwersytet Wrocławski v REA* (joined Cases C-515/17 P and C-561/17 P), EU:C:2019:774 (provisional text) .

[57] *Ibidem*, paragraph 105.

[58] *Ibidem*, paragraph 133.

client should be analyzed. In this sense, not any such connection would disqualify a lawyer from representing a specific client, but "only such links as manifestly call into question the capacity of the lawyer to provide advice exclusively in the best interests of the client"[59]. Thus, only if "the conflict is apparent and of such gravity as to prompt any court to override, in the interest of the sound administration of justice, a private choice of lawyer" should the courts of the Union prevent a lawyer from acting in the context of a particular dispute[60].

The application of this test in the concrete case of the University of Wrocław's lawyer leads according to the Advocate General to the conclusion that he fulfills the status of third party in relation to the applicant since he did not act as a lawyer employed by the university, the object of the respective contract having no connection with the legal representation within the framework of the procedure in question. The requirement of independence is also satisfied because "no financial or other links between the University of Wrocław and the legal representative were revealed that could give rise to reasonable doubts as to whether the legal representative pursued any other interests than those of the University of Wrocław"[61].

As regards the effects of a breach of Article 19, the Advocate General invites the Court to review its traditional approach which currently entails the inadmissibility of the application, considering it to be disproportionate. According to him, EU courts should inform the complainant of the irregularity of his legal representation and set a deadline to remedy it[62].

The proposed interpretation of Article 19 of the Statute is no doubt closer to the guarantees that Article 47 of the Charter confers on the right of access to a court, while giving more predictability[63]. However, the exclusion of lawyers or legal advisers employed in the scope of Article 19 of the Statute, proposed by the Advocate General on the basis of the above criteria, could in turn be subject to future reconsideration. Two aspects are relevant from this point of view. Thus, on the one hand, neither from the previous case-law of the Court, nor from the opinion of Advocate General Bobek, does it make it clear why the conditions relating to representation in Article 19 of the Statute, which apply to any proceedings before the Union courts, must be interpreted differently in the case of direct actions in relation to the preliminary references[64]. In the latter case,

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[59] *Ibidem*, paragraph 136.

[60] *Ibidem*, paragraph 141.

[61] *Ibidem*, paragraph 162.

[62] *Ibidem*, paragraphs 152-158.

[63] With reference to the need for predictability of jurisprudence, see I. Boghirnea, E. Vâlcu, *Jurisprudence and the judicial precedent of the European Court of Justice as sources of law*, LESIJ - Lex ET Scientia International Journal, no. 2/2009, pp. 253-258.

[64] For a similar point of view see D. Sarmiento, *What is a "lawyer" in EU courts and how "independent" should lawyers be?* Employment and Immigration, Institutional Law, Justice & EU

under Article 97 (3) of the Rules of Procedure of the Court, lawyers or legal advisers employed, authorized under national law to represent a party in the national courts may represent that party before the Court of Justice if the national court requests a preliminary reference.

On the other hand, though as a marginal note[65], Advocate General Bobek raises a long-criticized aspect in the doctrine, including in some personal studies[66] - that of the restrictive interpretation of the first paragraph of Article 19 of the Statute, more precisely the notion of "member state", the Union judge refusing to assimilate to the states the independent central bodies or the local and regional authorities, which would have allowed the rules regarding the privileged applicants to be applied to them (the possibility of being represented by an agent). This, while when it comes to imposing tasks and obligations arising from Union law, the respective bodies are assimilated to the state, being considered an "emanation" of it and subject to the same obligations, including those to compensate for the damages caused by the violation of Union law[67]. Considering that this restrictive interpretation is of little practical purpose and that many public bodies are likely to have qualified administrative staff or legal departments that can, like the national ministries, represent the public authority in question, without incurring unnecessary additional costs for the public finances by hiring external lawyers, the Advocate General clearly supports the revision of this case-law. The future will tell us, depending on the causes with which the courts of the Union will be invested, if this conception is shared and if the representation through "agents" will be extended to lawyers or advisers employed by such public bodies.

Conclusions

By structuring and constraining the exercise of the judiciary, the procedural law legitimizes the judicial decisions and, ultimately, the entire legal order[68].

Litigation, 27 september 2019, available on https://eulawlive.com/2019/09/27/what-is-a-lawyer-in-eu-courts-and-how-independent-should-lawyers-be.

[65] See Opinion of Advocate General Bobek, note 50.

[66] See C. Mătuşescu (eds.), *European Union law and local authorities*, Bucharest: Universul Juridic, 2013, pp. 118-123.

[67] Judgment of 4 July 2000, *Haim* (C-424/97, EU:C:2000:357, paragraphs 27-28 and the case-law cited). For an analysis of this case law, see also C. Mătuşescu, *The liability of subnational public authorities for damage caused to individuals by national measures taken in violation of the European Union law*, Romanian Journal of European Law, additional issue dedicated to the International Conference "Current problems of the political-legal space of the European Union", 3rd edition, 27 October 2016, Bucharest: Wolters Kluwer, pp. 190-200.

[68] S. Ionescu, *Principles of judicial procedure. In the current regulation and in the new procedural codes*, Bucharest: Universul Juridic, p. 13 et seq.

Unlike the national level, where the establishment of the procedural rules is mainly the legislator's concern, at the level of the European Union the normative texts contain a fairly general formulation of these rules. In fact, the EU judicature retains dominant control over its creation and application[69], without external control of the fair trial standards it applies, which may raise doubts about the democratic legitimacy of the procedural rules thus established[70].

As evidenced by the case law on the representation of the non-privileged parties before the Union courts, in the process of applying the procedural rules in practice, the Union judge sometimes refuses to take a proactive approach, preferring efficiency over a more pronounced orientation to individual rights. This approach, which can be seen in the broader context of the importance that the efficiency of judicial proceedings has for the courts of the Union and in which the applicant's lawyer is given much of the responsibility for the outcome of the case (for this purpose he is transformed into an agent of the court, acting mainly in the best interests of the justice) could hardly pass the test of time. On the one hand, by focusing too much on preliminary issues related to the quality of legal representation, considering that it is quite common to reject the applicants' actions as inadmissible (so without a substantive examination), the Union courts depart from their essential function, that of carrying out judicial control of Union acts. On the other hand, if the standards of the right of access to justice arising from Article 47 of the Charter, which the Court does not hesitate to prescribe to the national courts, will not govern the judicial activity of the EU courts, the legitimacy of their judgments is questioned. Achieving the right balance between the public interest in the administration of justice and the rights of parties to such proceedings must be necessarily.

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[69] M. Krajewski, *The Many-faced Court: The Value of Participation in Annulment Proceedings*, European Constitutional Law Review, Volume 15, Issue 2, 2019, pp. 220-221.

[70] C. Eckes, V. Abazi, *Closed Evidence in EU Courts: Security, Secrets and Access to Justice*, Common Market Law Review, vol. 55, 2018, p. 753.