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# The Role of the Court of Justice and National Courts in the EU Legal Protection System in the Context of the Organization of National Justice

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**Abstract**— The study addresses the issue of judicial independence from the perspective of EU law. As the system of protection of rights conferred by EU law is dualistic in nature, apart from exceptional cases in which individuals have a *locus standi* in direct actions, they can only enforce their rights derived from EU law before the national courts. The Court of Justice is entitled to assess the way in which justice is structured in the Member States for the reason that the activity of the national courts is not of a purely domestic nature. These courts act at the same time as EU courts whose task is to ensure effective protection of the rights of individuals under EU law. The competence of the Court of Justice in the above area cannot be limited by the jurisprudence of national constitutional courts, especially if that jurisprudence refers to national constitutional identity or national sovereignty in order to justify non-compliance with EU law, leading in fact to a lowering of the standard of protection of fundamental rights, including the right to a fair trial.

**Keywords**— judicial independence, rule of law, right to a fair trial, effective legal protection under EU law, principle of primacy.

## I. INTRODUCTION

A current and recently widely discussed challenge for a democratic state based on the rule of law is to guarantee the independence of the courts and of the judiciary. This issue is significant not only from a national perspective, in particular in relation to the values expressed in the Polish Constitution, such as the principle of separation and balance of powers (Article 10 of the Constitution) or the right to a fair trial (Article 45 of the Constitution). The organisation of the national judiciary also influences the system of legal protection of the European Union in connection with the role played by the courts of the Member States in this system.

This study addresses the issue of judicial independence from the perspective of EU law. By analysing the competences of the

Court of Justice and national courts in the EU legal protection system, it aims to answer the question why the Court of Justice of the European Union interferes in the shaping of the organisational structure of the judiciary in Poland and what significance the issue of judicial independence has for the protection of individual rights under EU law.

## II. LEGAL PROTECTION SYSTEM IN THE EUROPEAN UNION

At the outset, it should be recalled that the system of protection of rights conferred by EU law is dualistic in nature. On the one hand, this protection is provided by the EU courts in the narrow sense, that is, by the Court of Justice (hereinafter also the CJEU) and by the General Court of the European Union (hereinafter the General Court of the EU). In practice, due to the high requirements for private parties in direct actions, an individual can only gain direct access to the EU courts in exceptional cases (Póltorak 2021). Legal standing is granted primarily to natural or legal persons who are direct addressees of a given legal act, e.g. a decision of the European Commission declaring an abuse of a dominant position. In such a situation, the addressee of the decision may bring an action for annulment before the General Court of the EU on the basis of Article 263 of the Treaty on the Functioning of the European Union (hereinafter TFEU), potentially followed by an appeal before the Court of Justice. The filing of an action for the annulment of acts other than those addressed to a person requires that it be shown that the act is of direct (Judgment of the Court of Justice of 17 January 1985, Case 11/82, SA Piraiki-Patraiki and others v Commission of the European Communities, EU:C:1985:18) and individual (Judgment of the Court of Justice of 15 July 1963, Case 25/62, Plaumann & Co. v Commission of the European Economic Community, EU:C:1963:17) concern to



that person. Similar criteria apply to an action for failure to act under Article 265 TFEU. Also the scope of an action for non-contractual liability of the Union for damage caused by its institutions or its servants in the performance of their duties under Article 268 in conjunction with the second paragraph of Article 340 TFEU is limited as it requires the demonstration of restrictive conditions for liability for damages.

Apart from exceptional cases in which individuals have a *locus standi* in direct actions, they can only enforce their rights derived from EU law before the national courts (Judgment of the Court of Justice of 1 April 2004, Case C-263/02 P, *Commission of the European Communities v Jégo-Quéré & Cie SA*, EU:C:2004:210). Therefore, it is in fact for the national courts to ensure effective legal protection for individual parties in the fields covered by EU law (Wróbel 2003). This refers primarily to cases in which the decision is based directly on EU law or on national rules implementing EU law.

The EU system of legal protection, based on the one hand on the EU courts in the narrow sense and on the other hand on national courts acting as EU courts in the fields covered by EU law, is supplemented by the preliminary ruling procedure provided for in Article 267 TFEU. Under this procedure, national courts may refer to the Court of Justice questions concerning the validity or interpretation of the Union law applicable to the case. This gives an individual the indirect opportunity to have their case heard by the CJEU and, consequently, to have their rights or obligations adjudicated before a national court in accordance with EU law. In this way, the application of Article 267 TFEU by national courts becomes a guarantee of the right to a fair trial and effective legal protection (Allkemper 1994).

### III. JUDICIAL INDEPENDENCE AS THE FOUNDATION FOR EFFECTIVE PROTECTION OF INDIVIDUAL RIGHTS DERIVED FROM EU LAW

In recent years, the Court of Justice has repeatedly commented in its case law on issues of judicial independence as a cornerstone of a democratic state based on the rule of law and a guarantee of effective protection of individual rights. The respective judgments have been given both in preliminary reference proceedings in response to questions from national courts and in proceedings brought by the European Commission under Article 258 TFEU for failure to fulfil treaty obligations (see e.g. Judgment of the Court of Justice of 15 July 2021, Case C-791/19, *European Commission v Republic of Poland*, EU:C:2021:596; Grzelak, Sakowicz 2020). A number of important rulings have been made in connection with judicial reform in Poland, but it is worth noting that the Court of Justice has also analyzed the status of judges in other Member States, including Portugal and Romania (Bogdanowicz 2018, Sikora 2018).

The main legal bases for these judgments were Article 2 TEU, as well as the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights (hereinafter: the Charter). According to Article 2 TEU, the Union is founded on values - such as democracy, the rule of law

and respect for human rights - which are common to the Member States, in a society in which, *inter alia*, justice prevails. The second subparagraph of Article 19(1) TEU obliges Member States to provide for the legal remedies necessary to ensure the effective protection of individuals in the fields covered by Union law. In addition, it should be pointed out that, in accordance with the case law of the Court of Justice, the principle of effective judicial protection is a general principle of Union law stemming from the constitutional traditions common to the Member States and expressed also in Art. 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Judgment of the Court of Justice of 15 May 1986, Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206; Judgment of the Court of Justice of 25 July 2002, Case C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union*, EU:C:2002:462). This principle is reaffirmed in Article 47 of the Charter, which guarantees the right to an effective remedy and access to an impartial tribunal. In its decisions, the Court of Justice has consistently emphasised that "the European Union is a union based on the rule of law, in which (...) individuals have the right to challenge before the courts the legality of any decision or other national measure relative to the application to them of a European Union act (...)" (Judgment of the Court of Justice of 3 October 2013, Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, EU:C:2013:625)". It also points out that the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law (Judgment of the Court of Justice of 28 March 2017, Case C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, EU:C:2017:236).

In the Polish cases before the Court of Justice, an allegation was raised that the Court had no jurisdiction to rule on the independence of judges, as the organisation of justice is a competence reserved exclusively to the Member States. This plea is misplaced because the Court of Justice, like the European Court of Human Rights (hereinafter ECtHR), does not impose a particular organisation model of justice on the Member States. However, when shaping that model, Member States must comply with EU law and meet the standards required by that law, including guaranteeing the independence of judges. In other words, states are free to organise its system of justice provided that in doing so they do not violate the principle of effective judicial protection (Judgment of ECtHR of 6 May 2003, *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, Judgment of the Court of Justice of 24 June 2019, Case C-619/18, *European Commission v Republic of Poland*, EU:C:2019:531).

The Court of Justice is entitled to assess the way in which justice is structured in the Member States for the reason that the activity of the national courts is not of a purely domestic nature. These courts act at the same time as EU courts, whose task is to ensure effective protection of the rights of individuals under EU law, and not only of their own citizens. After all, national courts also decide cross-border cases involving citizens of other Member States. Thus, the Polish judiciary is not exclusively a

Polish matter.

As the Court of Justice points out, 'Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals (...). Consequently, national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed (Judgment of the Court of Justice of 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses v Tribunal de Contas, EU:C:2018:117)'. For this reason, any Polish court that adjudicates or even potentially may adjudicate on a case with an EU law element, and thus acting as an EU court, must meet the requirements of effective judicial protection under the second subparagraph of Article 19(1) TEU (Taborowski 2019). In order to guarantee this protection, it is crucial that the independence of the court is preserved, which follows, inter alia, from the second paragraph of Article 47 of the Charter (but also from Article 6 of the ECHR and Article 45 of the Polish Constitution).

In its judgments in the Polish cases, the Court of Justice recalled that "requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (Judgment of the Court of Justice of 5 November 2019, Case C-192/18, European Commission v Republic of Poland, EU:C:2019:924)". The concept of independence in the light of the Court's well-established case law presupposes, inter alia, that "the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever (...), and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (Judgment of the Court of Justice 16 February 2017, Case C-503/15, Ramón Margarit Panicello v Pilar Hernández Martínez, EU: C:2017:126)".

The Court has found in a number of rulings that, in connection with the reform of the judiciary in Poland, there are doubts about ensuring judicial independence due to a confluence of factors, including the way of shaping of the National Council of the Judiciary which participates in the appointment of judges, the infringement of the principle of irremovability of judges due to the shortening of their term of office, the lack of a judicial remedy or the rules of disciplinary regime in force.

The Court of Justice noted that the mere fact that judges are appointed by the President of the Republic of Poland does not undermine their independence if they are not subject to pressure in the performance of their duties. However, in the case of Poland, the possibility of appointing a judge depends on the

recommendation of the National Council of the Judiciary (hereinafter: NCJ), and therefore the NCJ should provide guarantees of independence from the legislative and executive authorities. However, in connection with the reform of the judiciary, a number of factors can be identified which may raise doubts as to the independence of the NCJ and thus undermine the independence of judges appointed under the new procedure. Such factors are, in particular, the shortening of the term of office of the members previously constituting this body, the increase in the number of members designated by the legislature and irregularities in the process of appointing the members of the NCJ, such as the lack of transparency, the lack of guarantees that the requirements under the law were met, the failure to ensure the representativeness of the different types and levels of courts (Judgment of the Court of Justice of 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, A. K. and Others v Supreme Court, CP v Supreme Court and DO v Supreme Court, EU:C:2019:982). The Court of Justice also drew attention to the problem of the lowering of the age of retirement of judges, which resulted in practice in their removal from office, and the lack of judicial review in cases on appointments of judges. In addition, it raised objections to the fact that judges could be exposed to disciplinary proceedings by virtue of exercising their right to make a preliminary reference (lack of protection against external pressure). As the Court emphasised, ensuring that such sanctions were not imposed in connection with the autonomous decision of a court to apply Article 267 TFEU was a guarantee essential to judicial independence (Judgment of the Court of Justice of 26 March 2020, Joined Cases C-558/18 and C-563/18, Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, EU:C:2020:234).

#### IV. NO GUARANTEE OF INDEPENDENCE - EFFECT ON THE PARTIES TO PROCEEDINGS WITH AN EU LAW ELEMENT

It is worth noting that the Court has assessed the question of judicial independence and the impartiality of the judge from the point of view of the individual who is a party to the proceedings. It has repeatedly pointed out that the "guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (Judgment of the Court of Justice of 2 March 2021, Case C-824/18, A. B. and Others v National Council of the Judiciary and Others, EU:C:2021:153)".

Such doubts may arise, for example, in cases where the interests of individuals clash with those of the State Treasury or representatives of the legislative or executive bodies. Examples under various procedures include tax cases, criminal tax cases, compensation cases against the State Treasury or personal injury or defamation cases involving representatives of the legislature or their family members. Although this does not

prejudge the question of the actual impartiality of a particular judge in a given case, the Court points out that the manner in which a judge is appointed, the possibility of his or her removal or being held liable under disciplinary regime, may give rise to legitimate doubts on this point with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law.

The consequences of the lack of independence caused by the introduction of the new rules on the appointment of judges and the widespread exertion of influence over their judicial activity, including through organisational and disciplinary sanctions, may be very severe for the parties to the proceedings.

The first point to be made is the lack of certainty as to the validity of judicial decisions. It follows from the judgment of the Court of Justice in the *W.Ż.* case that if appointment of a judge took place in a clear breach of the fundamental rules which form an integral part of the establishment and functioning of the Polish judicial system, such a judge adjudicating single-handedly cannot be regarded as an independent and impartial tribunal previously established by law. Thus, in the event of a collision of a decision made by that judge with EU law, such a decision, in accordance with the principle of primacy, should be declared null and void (Judgment of the Court of Justice of 6 October 2021, Case C-487/19, Proceedings brought by *W.Ż.*, EU:C:2021:798; Wróblewski 2021). On the one hand, the said judgment seems to have been issued in order to protect the individual rights under EU law, in particular by ensuring the right to judicial remedy, but on the other hand, it cannot be underestimated that the possibility to challenge court decisions as such affects negatively the effectiveness of the entire system of legal protection.

When assessing the consequences of the lack of independence from the point of view of EU law, it must be noted that the independence of national courts is essential for the proper functioning of the system of judicial cooperation in the form of the preliminary references provided for in Article 267 TFEU. A question for a preliminary ruling may be referred only by a court or tribunal of a Member State and, in accordance with the settled case-law of the Court of Justice, a court or tribunal is only a body which fulfils the criterion of independence. Thus, if a case is referred by a body which does not satisfy the conditions necessary to be regarded as a court or tribunal for the purposes of Article 267 TFEU, the Court of Justice may refuse to answer the question referred for a preliminary ruling. It should be recalled here that the preliminary ruling procedure acts as an indirect measure for protection of individual rights in the Union's system of legal protection. Consequently, the impossibility of obtaining a preliminary ruling may lead to a deprivation of the fundamental right to a court at two levels: firstly, the right to have the case heard by an independent national court and, secondly, the deprivation of the right of indirect access to the Court of Justice under the preliminary reference procedure. This may then result in a decision of the national court which is incompatible with EU law and thus failure to provide the individual with effective judicial protection of their rights derived from EU law

(Kastelik-Smaza 2021).

Judicial independence also plays an important role in the implementation within the Union of mutual recognition and enforcement of judicial decisions which is based on the principle of mutual trust. Mutual trust in the field of justice stems from the basic assumption that Member States share a number of common values on which the Union is based, as specified in Article 2 TEU, including the rule of law and respect for human rights. Pursuant to Article 45(1a) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, recognition of a decision shall be refused if such recognition would be manifestly contrary to the public policy in the Member State addressed. It follows from the case law of the CJEU that this condition is met if recognition would violate one of the fundamental principles, including the right to a fair trial (Judgment of the Court of Justice of 23 October 2014, Case C-302/13, *flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS*, EU:C:2014:2319). Thus, the allegation of lack of independence of the court may constitute grounds for refusal of recognition or enforcement of a Polish court decision by a court of another Member State. Such a situation would be highly disadvantageous for a party to the proceedings, who would, for example, obtain a European payment order in Poland against its foreign counterparty and then be unable to enforce it in another state where the debtor's assets are located.

In the context of criminal proceedings, there could be, for example, a refusal by another state to enforce a European arrest warrant for criminal proceedings in Poland. The Court of Justice has held that a judicial authority should refrain from executing a European arrest warrant if it finds that there is a real risk of infringing the fundamental right to an independent tribunal and, consequently, the right to a fair trial in the issuing Member State ((Judgment of the Court of Justice of 25 July 2018, Case C-216/18 PPU LM, EU:C:2018:586; Bárd, Bodnar 2021, pp. 4-5). The participation of a person appointed by the new NCJ in the composition of the judiciary may, in the view of the courts of other Member States, support the view that such a risk exists. While such a decision may be beneficial for a person who wishes to avoid transfer to Poland, the lack of transfer may have negative consequences, for example, for the victim of a crime who is interested in having a criminal case heard in Poland.

The consequences of the unclear status of judges appointed with the involvement of the new NCJ and the rulings made by them may therefore be far-reaching, both in national cases based on EU law and in cross-border cases.

## V. EUROPEAN STANDARDS ON JUDICIAL INDEPENDENCE AND THE JURISPRUDENCE OF THE POLISH CONSTITUTIONAL COURT

When discussing problems concerning the independence of the courts in the context of the competence of the Court of Justice, it is impossible not to mention the recent judgments of the Constitutional Court. They found incompatibility with the

Constitution of the Republic of Poland of, *inter alia*, the second paragraph of Article 19(1) in conjunction with Article 2 and Article 4(3) TEU, i.e. the principle of effective judicial protection in conjunction with the constitutional principles of Union law, including the principle of the rule of law, and the principle of loyal cooperation (see in particular the judgment of the Constitutional Court of 7 October 2021, K 3/21, Dz. U. poz. 1852; judgment of the Constitutional Court of 14 July 2021, P 7/20, Dz. U. poz. 1309). In its justification, the Constitutional Tribunal indicated, in particular, that European integration has reached a new stage, in which EU bodies act beyond the limits of their entrusted competences, the Constitution is not recognised as the supreme law of the Republic of Poland, and Poland cannot function as a sovereign and democratic state. In fact, the rulings in question were aimed at challenging the principle of primacy and, consequently, at rendering ineffective the provisions of EU law and the judgments of the Court of Justice concerning the standard of effective legal protection due to their alleged contradiction with the Constitution of the Republic of Poland (Biernat, Łętowska 2021).

It should be noted that the aforementioned jurisprudence constitutes a departure from the established line of jurisprudence of the Constitutional Tribunal prior to 2016, which, while stating the supremacy of the Polish Constitution over EU law, emphasised Poland's obligation to comply with international obligations, common values and the standard of protection of fundamental rights (Judgment of the Constitutional Tribunal of 11 May 2005, K 18/04, Legalis 68382; Judgment of the Constitutional Tribunal of 24 November 2010, K 32/09, OTK-A 2010, z. 9, item 108). It has been recognised that the axiological foundations on which the legal orders of the European Union and the Republic of Poland are based are the same, and their element is, *inter alia*, the rule of law (Biernat *in print*).

The recent judgments of the Constitutional Tribunal cannot have any impact on the application of EU standards to the Polish judiciary and on the effectiveness of the judgments of the Court of Justice on this issue (Bogdanowicz 2021).

Firstly, they are based on a mistaken understanding of Union law, based on a misinterpretation of it made in excess of the competences of the Constitutional Court and in breach of the obligation to make a preliminary reference to the Court of Justice in accordance with the wording of the third paragraph of Article 267 TFEU. Secondly, they are in conflict with the Constitution of the Republic of Poland, in particular with Article 188 of the Constitution (lack of competence of the Constitutional Tribunal to control the compliance of judicial decisions with the Constitution), with Article 9 thereof (breach of the obligation of Poland to comply with international law) and with Article 45 of the Constitution by questioning the validity in the Polish legal order of EU provisions and the jurisprudence of the CJEU guaranteeing the right to effective judicial protection. The undermining of the right to an independent court in cases with an EU element further results in a violation of the principle of a democratic state of law expressed in Article 2 of the Constitution. Thus, the judgments not only fail to defend the Polish constitutional identity, but

violate it.

Finally, it should be emphasised that the judgments in question contradict the jurisprudence of the Court of Justice, which implies the precedence of EU law over any national law, and, moreover, the prohibition of limiting national courts in ensuring the effectiveness of EU law, even when the source of this limitation is a constitutional court judgment (Miąsik 2022). In judgments concerning, *inter alia*, Romanian judges, the CJEU emphasised that national courts retain the competence to examine the compatibility with Union law of national provisions, even if the constitutional court has declared those provisions to be compatible with a provision of the national constitution and ordered their application. The Court of Justice has also indicated that national legislation which allows a judge to be held liable for disciplinary action for disregarding the case law of the constitutional court of the Member State concerned incompatible with the principle of the primacy of Union law and for the judge to apply Union law on the basis of an interpretation by the CJEU is contrary to Union law (Judgment of the Court of Justice of 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others v Inspecția Judiciară and Others*, EU: C:2021:393; Judgment of the Court of Justice of 21 December 2021, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Criminal proceedings against PM and Others*, EU:C:2021:1034; Judgment of the Court of Justice of 22 February 2022, Case C-430/21, *Proceedings brought by RS*, EU:C:2022:99).

## VI. CONCLUSIONS

It follows from the above considerations that the independence of the courts and the independence of judges are of crucial importance for the protection of individual rights under EU law. The right to a court and the guarantee, which forms part of it, that a case will be heard by an independent and impartial court are the cornerstones of a democratic state of law - a principle stemming from the Polish Constitution and one of the fundamental values on which the European Union is based.

Although the organisation of the national judiciary falls within the competence of the Member States, when exercising that competence the Member States are required to comply with the obligations arising for them under EU law. In particular, they must ensure, by virtue of the second subparagraph of Article 19(1) TEU, "that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law, meet the requirements of effective judicial protection (Judgment of the Court of Justice of 5 November 2019, Case C-192/18, *European Commission v Republic of Poland*, EU:C:2019:924)".

As a result, the organisation of national courts acting as EU courts falls within the jurisdiction of the Court of Justice of the European Union which may rule on this subject in the context of proceedings for failure to fulfil Treaty obligations under Article 258 TFEU, as well as answer preliminary questions

concerning the interpretation of Article 2 TEU, the second subparagraph of Article 19(1) TEU and Article 47 of the Charter in the context of national rules applicable in the field of justice.

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The competence of the Court of Justice in the above area cannot be limited by the jurisprudence of national constitutional courts, especially if that jurisprudence refers to national constitutional identity or national sovereignty in order to justify non-compliance with EU law, leading in fact to a lowering of the standard of protection of fundamental rights, including the right to a fair trial.

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