

THE DEFINITION OF NATIONAL COURT WITHIN THE MEANING OF EUROPEAN UNION LAW. CONSIDERATIONS IN THE CONTEXT OF THE POLISH REFORM OF THE JUDICIAL SYSTEM

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Summary. The article deals with two main problems. The first concerns the interpretation of the concept of “court” within the meaning of the provisions of Art. 47 CFR and Art. 267 TFEU. The second part is devoted to the analysis of judgements of the Court of Justice regarding the reform of the Polish judicial system. It enables one to draw several conclusions.

Firstly, the Court of Justice found that Poland had violated its Treaty obligations by introducing the provisions that determine the retirement age of judges and establish the procedure enabling the extension of active service by virtue of the discretion of the President of the Republic of Poland.

Secondly, the Court of Justice analysed the concept of “court” from the perspective of Art. 19, para. 1, subpara. 2 TEU. It emphasised that these provisions obligate the Member States to establish a system of legal remedies and procedures ensuring effective judicial protection in areas covered by EU law. It also stressed that this concerns a body that can only potentially settle cases with an EU element.

Thirdly, the Court of Justice clarified the concept of judicial independence in the context of irremovability of judges and judicial impartiality. It formulated a certain test of judicial independence that should be conducted by the referring court.

Key words: Court, EU justice system, judicial independence, judicial impartiality, EU case

1. INTRODUCTORY REMARKS

The European Union is a specific international organisation that has been equipped with specific competences by the Member States. Within the limits of the conferral, it has created an autonomous, independent legal system that is directly applicable in national legal orders. As a consequence of the special nature of EU law, EU justice system, based on systemic dualism, was established. It covers the Court of Justice of the European Union¹ and courts of the Member States.² Each of the indicated entities has separate competences. The first supervises the proper implementation of EU law and is the only entity that can provide its legal interpretation. On the other hand, national courts are obligated to ensure that this law is directly applicable in the national legal order. Thus, when they rule on the basis of EU law, they become EU courts. However, this does not change the fact that

¹ Henceforth cited as: CJEU.

² Henceforth cited as: national courts.

the CJEU operates on the basis of the Founding Treaties as well as on the status and regulations adopted at the EU level. By contrast, the organisation of the national judicial system falls under the exclusive competence of the Member States. In accordance with the principle of procedural autonomy, the States decide on the jurisdiction of national courts and procedures for processing claims under EU law. The issue of the scope of competences of the Member States in the indicated area and the manner of their exercise has been the subject of several judgements of the CJEU, and currently it causes a lot of controversy in connection with the CJEU judgements regarding the reform of the Polish judicial system.

The subject of this article will be an analysis of the position of national courts in the EU judicial system. Two issues will be discussed. Firstly, the structure of the EU justice system and the evolution of the definition of a national court in the context of Art. 267 TFEU³ and Art. 47 CFR.⁴ Secondly, the author will present the criteria for assessing the national court's independence that have been indicated by the CJEU in its judgement regarding the reform of the Polish judicial system.

2. THE STRUCTURE OF THE JUSTICE SYSTEM OF THE EUROPEAN UNION

The European Union has created an autonomous, independent legal system, which is derived from international law, yet unlike international law, it is directly applicable in the national legal order.⁵ In terms of competences that were conferred on the EU by the Member States in the Treaty, it creates rights and obligations not only for the EU itself and the Member States (i.e. entities of international law), but also for individual entities.⁶ Consequently, entities that make and apply law are bound by EU law.⁷ In addition, the Court of Justice emphasised that achieving Treaty objectives at supranational level requires that priority be given to EU law in the national legal order, of course, within the limits of the competence conferred,⁸ regardless of the rank of the national law norm.⁹ The specificity of EU law required the creation of its two-tier protection system: at supranational and national level.

³ Treaty on the Functioning of the European Union, O.J. EU C 202, 7.06.2016.

⁴ Charter of Fundamental Rights of the European Union, O.J. EU C 202, 7.06.2016, p. 391–407.

⁵ Judgement of the Court of Justice of 15 July 1964 in case C 4/64 *Costa v. ENEL*, ECLI:EU:C:1964:66.

⁶ Judgement of the Court of Justice of 5 February 1964 in case 26/62 *Van Gend & Loos*, ECLI:EU:C:1963:1.

⁷ Judgement of the Court of Justice of 9 March 1978 in case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, ECLI:EU:C:1978:49.

⁸ *Costa v. ENEL*.

⁹ Judgement of the Court of Justice of 17 December 1970 in case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114.

The Founding Treaties established the CJEU that includes the Court of Justice, the General Court and specialised courts that ensure respect for law in the interpretation and application of the Treaties.¹⁰ The scope of CJEU's jurisdiction is determined by the Treaties, and in accordance with Art. 19, para. 3 TEU it covers: actions brought by the Member States, institutions or natural or legal persons, questions referred for a preliminary ruling by the courts of the Member States regarding the interpretation of Union law or the validity of acts adopted by institutions, and other matters provided for in the Treaties.¹¹ At the same time, it should be emphasised that the scope of CJEU's jurisdiction is directly linked to the scope of EU competence and was expanded with the extension of EU competence in subsequent Treaties.

The second level of protection of EU law covers the judicial systems of the Member States that are shaped individually by these States in accordance with their constitutional standards and traditions. In accordance with the principle of conferral, the organisational structure and operating rules of national courts fall within exclusive competences of the Member States. However, it should be borne in mind that the autonomy of the Member States in this respect is not absolute. C. Mik emphasises that the Member States, as democratic States, are first of all obligated to guarantee independence, impartiality and respect for the courts' own competence. Secondly, the States cannot evade liability for violation of Community law by identifying a specific internal organization [Mik 1997, 21]. The Court of Justice itself has repeatedly emphasised that the exercise of the exclusive competence of the Member States cannot infringe Union law, impede its implementation or cause serious difficulties in the implementation of its provisions. The scope of duties of the national courts is closely linked to the principle of direct application of EU law. Therefore, they are obligated to guarantee the effectiveness of this law in the national legal order. Consequently, EU law, which mostly contains substantive norms, is implemented through procedural norms of the Member States. In this respect, The Member States use the principle of procedural autonomy, which means that in the absence of EU procedural solutions, national rules apply. This principle is interpreted widely and covers not only procedural measures, but also systemic issues.¹² However, according to the case law of the Court of Justice, procedural autonomy is not absolute and is limited by the need to guarantee efficiency (ensuring practical effectiveness of EU law) and equivalence of a procedural measure (procedural rules must not be less favourable to claims based on EU law) [Krzysztofik 2012, 295–98]. Therefore, there is no doubt that from the perspective of the functioning of the EU justice system the most important task is to provide a precise definition of a national court which, by applying EU law, per-

¹⁰ Treaty on the European Union, O.J. EU 2016 C 202, p. 1, Art. 19, para. 1.

¹¹ For more on the competences of the Court of Justice of the European Union see Koncewicz 2009, 196–99.

¹² Judgement of the Court of Justice of 19 November 1991 in case C 6/90 and 9/90 Andrea Francovich and Danila Bonifaci and others v. The Italian Republic, EU:C:1991:428.

forms the function of an EU court. This issue is usually analysed from the perspective of two provisions: Art. 267 TFEU and Art. 47 CFR. The first relates to an instrument which is a form of cooperation between national courts and the CJEU. For the national courts it is the basis for referring the question for a preliminary ruling regarding the interpretation or examination of the legality of an act of EU law. The purpose of the regulation is to open access to the Court of Justice for a uniform interpretation of EU law. A different development may be seen in the goal pursued under Art. 47 CFR, which guarantees access to a body that is impartial and independent of national authorities, as it settles the dispute over the legal situation of a given entity in a binding and final manner [Grzeszczak and Krajewski 2012, 2–3]. Consequently, in relation to the definition of a national court within the meaning of Art. 267 TFEU, the scope of the Court’s analysis focuses on its material features, which seem insufficient from the perspective of Art. 47 CFR.

2.1. The definition of national court within the meaning of Article 267 TFEU

The reference to the definition of national court in the Founding Treaty appears in the context of the right to refer a question for a preliminary ruling (Art. 267, para. 2–4 TFEU). What is more, the judgements themselves distinguish between a national court and a national court whose decisions are not subject to appeal under internal law (Art. 267, point 3 TFEU). From the perspective of the definition of national court itself, that distinction is not relevant. However, it plays a key role from the perspective of the obligatory character of the question referred for a preliminary ruling. Namely, it is a court that not only enjoys the privilege of referring a question, but is obligated to do it. The literature on the subject draws attention to two theories explaining this problem: an abstract one, which imposes the obligation on each supreme court in every Member State, and a specific one, which refers to a court whose judgement cannot be appealed [Krzysztofik 2012, 289].

The Court of Justice has repeatedly emphasised that the definition of national court in the context of the right to refer a question for a preliminary ruling is of Union significance and must be interpreted in accordance with EU law. Similarly, the Information Note of the Court of Justice emphasises that “The status of that court or tribunal is interpreted by the Court as a self-standing concept of Community law”.¹³ At the same time, there is no uniform definition and the Court of Justice always examines whether the entity referring the question should be considered a national court within the meaning of EU law. The analysis of judgements makes it possible to determine the conditions that must be met cumulatively by the entity referring the question. The CJEU emphasises that “In order to determine whether a body making a reference is a court or tribunal for the purposes of

¹³ Information Note on References from National Courts for a Preliminary Ruling, O.J. EU 2005, C 143/01.

Art. 234 EC (presently Art. 267 TFEU), which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent”.¹⁴ The result of this practice is that entities that are not a court within the meaning of national law are recognised as a national court within the meaning of Art. 267 TFEU, e.g. the Appeals Committee for General Medicine¹⁵ recognised as a British court, or the National Council of the Association of Architects¹⁶ as a Belgian court. There is a view in the literature that the position of the Court of Justice in this respect is not consistent and shows excessive casuistry [Szpunar 2012, 379]. However, the CJEU refused this status to contractual arbitration, to which the parties did not have to turn to resolve the dispute,¹⁷ to the Director of the Tax Office (emphasising that a court should act as a third party in relation to the dispute)¹⁸ or to the Public Ministry (because it does not resolve disputes independently).¹⁹ However, judicial practice indicates that the Court of Justice has never refused this status to a court established under national law.

2.2. The definition of a court within the meaning of Article 47 CFR

The provisions of Art. 47 CFR establish the right to a court which, in accordance with the provisions of Art. 47, para. 2 CFR, meets the conditions of independence and impartiality, and which must be established by law. N. Pórtorak also emphasises that the provisions of Art. 47, para. 2 specify the right to an effective legal remedy in court and cover several aspects: the right of access to justice which satisfies the conditions of independence and impartiality, and is established by law; the right to a fair and public trial within a reasonable time; the right to legal advice, defence counsel, attorney assistance and legal assistance [Pórtorak 2013, 1209]. In accordance with Art. 51 CFR, it binds the EU and the Member States, including the courts of the Member States, in the area of EU competence and in the process of its application. Consequently, the right of access to justice should be considered whenever the subject matter of the proceedings concerns an

¹⁴ Judgement of the Court of Justice of 27 April 2006 in case C 96/04 *Standesamt Stadt Niebüll*, ECLI:EU:C:2006:254.

¹⁵ Judgement of the Court of Justice of 6 October 1981 in case C 246/80 *Broekmeulen v. Huisarts Registratie Commissie*, ECLI:EU:C:1981:218.

¹⁶ Judgement of the Court (Third Chamber) of 12 October 2016 in case C 166/15 *Aleksandrs Ranks and Jurijs Vasiļevičs v. Finanšu un ekonomisko noziegumu izmeklēšanas prokuratūra i Microsoft Corp.*, EU:C:2016:762.

¹⁷ Judgement of the Court of Justice of 23 March 1982 in case C 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, EU:C:1982:107.

¹⁸ Judgement of the Court of Justice of 30 March 1990 in case C 24/92 *Pierre Corbiau v Administration des contributions*, ECLI:EU:C:1993:118.

¹⁹ Judgement of the Court of Justice of 12 December 1996 in joined cases C-74/95 and C-129/95. *Criminal proceedings against X*, ECLI:EU:C:1996:491.

area governed by EU law. The national court applying EU law then becomes an EU court. Similarly to the provisions of Art. 267 TFEU, the Charter uses the definition of a court, but it gives the characteristics it must have in order to perform judicial functions. In addition, the analysis of the definition requires a reference to Art. 52 CFR, which, in the scope of the interpretation of the provisions of Art. 47, refers to the source from which this right originates, i.e. Art. 6, sect. 1 of the European Convention on Human Rights.²⁰ Nowicki emphasises that “the concept of «court» in the material sense is characterised by its judicial function, i.e. the resolution of matters falling under its jurisdiction in accordance with the rule of law and in proceedings conducted in accordance with a legally established procedure” [Nowicki 2010, 425–26]. Additionally, it must meet the conditions listed above: independence, impartiality and being established by law. The Court of Justice referred to the premise of independence, i.a., in the *Graham*²¹ judgement. It emphasised that “The concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision.” It indicated the two elements that create independence: internal and external. The first “is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity [...] and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law” (C 506/04, point 52). The latter, external aspect, “presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgement of its members as regards proceedings before them” (C 506/04, point 53). It indicated that “Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the impartiality of that body to external factors and its neutrality with respect to the interests before it” (C 506/04, point 53). N. Póltorak emphasises that the premise of independence should also be considered from the perspective of independence from EU institutions [Póltorak 2013, 1231].

The Court also addressed the second condition in the judgement cited above. It considered that the Disciplinary and Administrative Committee examining an appeal against the decision refusing entry on the list of lawyers, which includes only representatives of this profession, does not guarantee impartiality because its members may have been interested in limiting competitors on the market of services.²² Following from the interpretation of the provisions of Art. 6, sect. 1 ECHR, it should be emphasised that this premise guarantees the rule of law and

²⁰ Henceforth cited as: ECHR.

²¹ Judgement of the Court of Justice of 19 September 2006 in case C 506/04 *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, ECLI:EU:C:2006:587.

²² C 506/04, point 54–63.

ensures the trust that courts should enjoy in a democratic state. This means no bias and prejudice [Nowicki 2002, 187].

The last premise concerns the requirement to establish a court by law. It means ensuring the systemic independence of the judicial system from the executive power and creating the constitutional and organisational basis for its functioning [Hofmański and Wróbel 2010, 311].

3. THE ANALYSIS OF THE PREMISE OF INDEPENDENCE AND IMPARTIALITY IN THE CONTEXT OF THE POLISH REFORM OF THE JUDICIAL SYSTEM

The reform of the Polish judicial system, initiated by the Act of 12 July 2017²³ met with criticism from Polish judges, the Venice Commission and the European Commission. In exercising the powers granted to it under Art. 258 TFEU, the European Commission lodged two complaints to the Court of Justice. The first, lodged on 15 March 2018, was based on two arguments – whether “by introducing, in Article 13(1) to (3) of the Ustawa z dnia 12 lipca 2017 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych (Law of 12 July 2017 amending the Law on the Organisation of Ordinary Courts), a distinction between the retirement age for men and women working as ordinary judges, Supreme Court judges, and prosecutors, the Republic of Poland has failed to fulfil its obligations under Article 157 of the Treaty on the Functioning of the European Union and under Articles 5(a) and 9(1)(f) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)” and whether “by lowering, by means of Article 13(1) of that law, the retirement age applicable to ordinary court judges, and at the same time granting the Minister for Justice the right to decide whether to extend the period of active service of judges pursuant to Article 1(26)(b) and (c) of that law, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) of the Treaty on European Union, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union”.²⁴

The second complaint was lodged on 2 October 2018 and contains statements that “by, first, lowering the retirement age for judges of the Sąd Najwyższy (Supreme Court) and applying that measure to serving judges who were appointed to that court before 3 April 2018 and, second, granting the President of the Republic of Poland the discretion to extend the period of active judicial service of judges of that court beyond the newly-set retirement age, the Republic of Poland has failed to fulfil its obligations under the combined provisions of the second subpa-

²³ Act of 12 July 2017 amending the Law on the Organisation of Ordinary Courts and Certain Other Laws, *Journal of Laws*, item 1452.

²⁴ C 192/18 – Complaint lodged on 15 March 2018 – *The European Commission v. The Republic of Poland*, O.J. EU L 204, p. 23.

paragraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union (“the Charter”).²⁵ In addition, the Commission requested interim measures and an expedited examination of the case.²⁶ There is a view in the literature that the order of the Court of Justice on interim measures is a “certain” interference with the autonomy of the national legislator, since it obligates the Member State to immediately suspend the application of the provisions of national law in question, including the provisions that repeal or replace those which previously provided for retirement age of the judges of the Supreme Court. It *de facto* leads to “revival” of the provisions that were previously repealed by the national legislator [Bogdanowicz and Taborowski 2019, 17]. W Gontarski criticised the order of the Court of Justice and emphasised in his gloss that it was adopted on the basis of a false premise [Gontarski 2019, 3].

The third proceeding includes a question referred for a preliminary ruling by the Labour Law and Social Security Chamber in three combined cases C 58/18, C 624/18 and C 625/18.²⁷ It referred two questions in Case C 585/18 and three in joined Cases C 624/18 and C 625/18. The analysis of the questions allowed the Court of Justice to distinguish two problems. Firstly, determining “whether Article 9(1) of Directive 2000/78 read in conjunction with Article 47 of the Charter must be interpreted as meaning that, where an action is brought before a court of last instance in a Member State alleging infringement of the prohibition of discrimination on the ground of age arising from that directive, such a court must refuse to apply provisions of national law which confer jurisdiction to rule on such an action on a court, such as the Disciplinary Chamber, which has not yet been formed because the judges of that court have not been appointed” (C 585/18, C 62/18, C 625/18, point 66). Secondly, “the referring court asks, in essence, whether Article 2 and the second subparagraph of Article 19(1) TEU, Article 267 TFEU and Article 47 of the Charter must be interpreted as meaning that a chamber of a supreme court in a Member State, such as the Disciplinary Chamber, which is called on to rule on cases falling within the scope of EU law, satisfies, in the light of the circumstances in which it was formed and its members appointed, the requirements of independence and impartiality required by those provisions of EU law. If that is not the case, the referring court asks whether the principle of the primacy of EU law must be interpreted as meaning that that court is required to disapply the provisions of national law which reserve jurisdiction to rule on such cases to that chamber of that court” (C 585/18, C 62/18, C 625/18, point 72).

²⁵ C 619/18 – Complaint lodged on 2 October 2018 – The European Commission v. The Republic of Poland, O.J. EU C.2018.427.30.

²⁶ Order of the Court of Justice of 17 December 2019 in case C 619/18 The European Commission v. The Republic of Poland, ECLI:EU:C:2018:1021.

²⁷ Judgement of the Court of Justice of 19 November 2019 in joined cases C 585/18, C 624/18, C 625/18, ECLI:EU:C:2019:982.

The first key issue to be highlighted is the different modes of action. The first two are complaints lodged by the European Commission pursuant to Art. 258 TFEU that regulates the liability of the Member States for the breach of Treaty obligations. The third procedure concerns the question referred for a preliminary ruling by the Supreme Court, namely the Labour Law and Social Security Chamber, in connection with pending proceedings. It should be emphasised that the purpose of the indicated proceedings is different. Art. 258 TFEU is applied when according to the European Commission a Member State has violated one of the Treaty obligations. However, the question referred for a preliminary ruling is a form of support for the national court when it applies EU law. In any case, however, the subject matter of the complaint and question falls within the EU competence.

3.1. The right to effective protection of rights and the exercise of the exclusive competence of the Member States

In the proceedings before the Court of Justice, the Republic of Poland based its arguments on two main premises. Firstly, it referred to the principle of conferral and procedural autonomy, which gives the Member States full freedom in the organisation of the national judicial system. Thus, the Court of Justice did not have any competence to review the provisions in question.²⁸ Secondly, it was emphasised that the provisions cited in the Commission's complaint – Art. 19, subpara. 2, sect. 1 TEU and Art. 47 CFR – are only applicable during implementation or in areas regulated by EU law (C 619/18, points 39–41).

The Court of Justice began its argumentation with fundamental issues. The European Union is based on values common to all Member States that respect them and commit to supporting them. Therefore, among the Member States, including their courts, there is “set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected” (C 619/18, C 64/16, point 30, C 216/18, point 35). At the same time, the EU justice system was established and its aim is to guarantee the specific characteristics and autonomy of EU law, in particular in the process of its application and interpretation.²⁹ According to the wording of Art. 19 TEU, it covers the Court of Justice of the European Union and national courts. The European Union is a union of law in which each entity is entitled to challenge the validity of any decision or other national act in the light of EU law and, as emphasised by the Court of Justice, “The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation

²⁸ Judgement of the Court of Justice of 24 June 2019 in case C 619/18, *The European Commission v. The Republic of Poland*, O.J. EU C 427 of 26.11.2018, point 38.

²⁹ Judgement of the Court of Justice of 6 March 2018 in case C 284/16 *Slowakische Republik v. Achmea BV*. ECLI identifier: ECLI:EU:C:2018:158, point 35.

and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.” The Court of Justice emphasised that Art. 19 TEU clarifies the rule of law, which is one of the values of the EU. Consistently, in accordance with this principle and the provisions of Art. 19, para. 1, subpara. 2, the Member States are required to establish a system of legal remedies and procedures that will ensure effective judicial protection in areas covered by EU law. Expressed in the provisions of Art. 19, para. 1, subpara. 2, the principle of effective judicial protection of rights is a general principle of EU law, derived from constitutional traditions common to all Member States, as well as from the provisions of Art. 6 and 13 ECHR.

After determining the political position of Art. 19, para. 1, subpara. 2, the next issue is the material scope of application of the provisions. As has been indicated above, the position presented by the Polish side emphasised the relationship between the application of the abovementioned provisions and an EU case. However, the Court of Justice adopted a different position, which it had already expressed in the judgement in case C 64/16 (in the indicated judgement, the facts of the case concerned the reduction of remuneration of judges that was related to the introduction by the Portuguese authorities of an assistance program, which was based in European Union law. It assumed lowering of the salary of a certain group of people holding positions and performing functions in the public sector, including judges of the Tribunal de Contas). It emphasised that “as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision relates to «the fields covered by Union law», irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter.”³⁰ In the C 619/18 judgement, it clarified this thesis by emphasising that “the national body which that case concerned [...] could, subject to verification to be carried out by the referring court in that case, rule, as a court or tribunal, on questions concerning the application or interpretation of EU law and which therefore fell within the fields covered by EU law” (C 618/19, point 51). It should be assumed that the Court of Justice has competence with regard to reviewing judicial independence in case of a court that can potentially settle disputes with an EU element. Thus “organisation of judicial systems of the Member States is no longer the exclusive domain of the Member States in the supranational structure of the EU. European legal space, based on respect for the values of Article 2 TEU, requires national courts, entrusted by a Member State with the application of EU law, to comply with the requirements of institutional guarantees set by the principle of effective judicial protection” [Bogdanowicz and Taborowski 2019, 20].

³⁰ Judgement of the Court of Justice of 27 February 2018 in case C 64/16 *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, EU:C:2018:117, point 29.

3.2. Irremovability of judges as a guarantee of judicial independence

The considerations indicated above clearly obligate the Member States to ensure that judicial bodies, being courts within the meaning of EU law and belonging to the system of remedies in cases with an EU element, meet the requirements of effective judicial protection, and thus give guarantees of judicial independence, as confirmed by Art. 47, para. 2 CFR. The Court of Justice emphasised that the „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” (C 618/19, point 58). The arguments presented by the Polish side emphasised that the guarantees of independence in the Polish judicial system are connected with the guarantee of irremovability of the judge, immunity, decent remuneration, secrecy of meetings, as well as with the prohibition of combining judicial functions with other public functions, the order of political neutrality, and prohibition of business activity. On the other hand, dismissal of a judge from office is possible only in the situation of the most severe disciplinary offences or a conviction with a final judgement for a criminal offence. It was emphasised that retirement is not removal from office, as the person remains a judge and enjoys immunity, decent remuneration and is subject to the same principles of professional ethics. When referring to the argument of the Polish side, the Court of Justice emphasised that the requirement of independence should be analysed in two aspects: internal and external. The first means full autonomy in the performance of their functions, no subordination to anyone, adjudication free from orders and external pressures. The latter concerns equal distance from the parties to the dispute and their interests. It is based on objectivity and the lack of interest in a specific decision that would go beyond the strict application of legal provisions. According to the Court of Justice, solutions regarding the composition of the court, the appointment of its members, their term of office and exclusion and dismissal are particularly important from the perspective of independence. It emphasised that the guarantee of irremovability of judges is an element ensuring their freedom from all interference and pressure from the outside. It requires that “judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term.” It is not absolute, however, according to the Court of Justice, its restriction must be an overriding and justified exception, subject to the procedures provided for by law. It is generally accepted that this measure may be applied if such judges are unfit to perform their duties and have committed a serious breach of their obligations. The Court of Justice emphasised that the application of the indicated disciplinary measures requires the creation of a guarantee that they will not become a tool for political control of court rulings. The elements that must be specified by law in detail are the types

of offences, the system of penalties, the procedure for their application and the intervention of an independent body within the meaning of Art. 47 and 48 CFR, including the right to defence and the possibility to appeal against the decisions of disciplinary authorities. The application of such measures “is acceptable only if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it.”³¹ In the context of these considerations, the Court of Justice referred to the issue of Polish provisions that lower the retirement age of the Supreme Court judges. It does not deny the State’s ability to reform retirement age. The implementation of employment policy justifies the harmonisation of the retirement age within the professions covered by public service and the implementation of a balanced age structure that will allow young employees to access, inter alia, the profession of judge. However, it indicated three areas that may be controversial as to the purpose of the reform.

Firstly, while recognising the position of the Commission and the European Commission for Democracy through Law (Venice Commission) in this regard, it criticised some of the wording in the draft law on the Supreme Court, which, according to the Court of Justice, raises doubts as to the real purpose of the reform. The Commission indicated political and propaganda motivation, not only the will to standardise the retirement system.³² The problem of the legislator’s intention had appeared partly in the C 103/97³³ judgement, but the Court of Justice adopted a general assumption that public authorities act in accordance with the Constitution of the state and the rule of law. Despite the deficiencies noticed in guaranteeing judicial independence, it relied on trust in the state and the assumption that the authorities would not use legislation gaps to influence the body concerned [Filipek 2019, 12]. In relation to the Polish case, the Court of Justice adopted the assumption that the authorities acted in accordance with the Constitution and the rule of law, however, it directed its objections only to the motives of the actions undertaken. It focused its considerations on two issues: the mechanism of prolonging active service under the discretion of the President of the Republic of Poland, and the impact of the reform on the current composition of the Supreme Court.

The second issue raised by the Court of Justice was the effect of national provisions regulating the consequences of reaching the retirement age. Their analysis indicates that the legislator has introduced two different standards. The first refers to employees reaching the retirement age, which establishes the right to retire. The deciding entity is the employed person who notifies the employer of their de-

³¹ Judgement of the Court of Justice of 4 February 1999 in case C 619/18 Köllensperger and Atzwanger, EU:C:1999:52, point 79.

³² Opinion of the Venice Commission of 11 December 2017 in case 904/2017, point 33, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)031-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e) [accessed: 24.04.2020].

³³ Judgement of the Court of Justice of 4 February 1999 in case C-103/97 Josef Köllensperger GmbH & Co. KG and Atzwanger AG v. Gemeindeverband Bezirkskrankenhaus Schwaz, EU:C:1999:52.

sire to retire. The legislator normalised differently the problem of retirement of a judge by specifying the age of 65 as a prerequisite for mandatory retirement. The Court of Justice emphasised that, seeing the effects of the reform from the perspective of an already appointed judge who has reached retirement age under the new law, this is premature and immediate retirement. The introduction of the possibility to extend the term of office by virtue of the decision of the President of the Republic of Poland does not eliminate the disproportion. Moreover, in previous judgements the Court of Justice had emphasised that “the provisions at issue abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned. [...], which does not comply with the principle of proportionality [...]”³⁴ When analysing the considerations of the Court of Justice, it should be noted that it recognised the earlier retirement of judges as a disciplinary instrument, the use of which is not justified by a legitimate aim.

Another issue addressed by the Court of Justice was the decision on the possibility to continue performing the function of a judge, and specifically the procedure applied by the President of the Republic of Poland in making the decision. The Court emphasised that the Member States have the competence to allow the extension of active service after retirement, however, the establishment of such a mechanism must guarantee the implementation of the principle of judicial independence. Granting the indicated right to the President of the Republic of Poland is not a breach of the principle of independence. It is important that at the same time material conditions and procedural rules for making such a decision are created, and that, in the perception of the legal entity, there are no reasonable doubts as to the independence of the judges concerned from external factors and their neutrality in relation to interests before them. When referring directly to the problem of judges of the Supreme Court, the Court of Justice noted that the President’s decision is discretionary because it is not subject to any objective and verifiable criteria and does not have to be justified. Furthermore, it cannot be subject to judicial review. This is not changed by the fact that, pursuant to the Act, the President consults the National Council of the Judiciary before making his decision. According to the Court of Justice, this opinion could help to objectify the process under several conditions. Firstly, the decision-making body is independent of the legislative and executive authorities and of the body to which it is to present its opinion. The aforementioned condition has been interpreted more broadly in another judgement of the Court of Justice and will be discussed in more detail later. Secondly, there are objective, justified and verifiable criteria that are the basis for its adoption and proper justification. The Court of Justice noted, which was also emphasised by the Polish side, that in the case of the National

³⁴ Judgement of the Court of Justice of 6 November 2012 in case C 286/12 *The European Commission v. Hungary*, EU: C 2012:687, points 68, 80.

Council of the Judiciary the opinion is limited only to positive or negative recommendation. The Act does not provide for specific criteria and limits itself to general premises: the interest of the judiciary or important social interest, in particular the rational use of the staff of the Supreme Court or the needs arising from the tasks of individual chambers of the Supreme Court. The Court of Justice did not refer to examination of the indicated premises, but only to the already stated opinions of the National Council of the Judiciary, and it found that they did not actually contribute to providing objective information that is necessary in making a decision on the extension of the term of office of a judge.

3.3. Judicial independence and the procedure for establishing a judicial body

Another issue that was the subject of the judgement of the Court of Justice in the context of the Polish reform of the judicial system was the problem of maintaining judicial independence from the legislative and executive authorities and the procedure for selecting judges of the Disciplinary Chamber. Basically, two issues were raised: independence of the National Council of the Judiciary, which had already been signalled in the 619/18 judgement, and independence of the Disciplinary Chamber itself. Recalling the interpretations of judicial independence expressed in previous judgements, the Court of Justice emphasised the need to create procedural rules regarding the composition of the Court, including appointment, duration of the term of office and reasons for exclusion or dismissal, which should convince subjects of the law that there is no doubt as to its independence from external factors and its neutrality with regard to the interests before it. The indicated premises also include the exclusion of all recommendations and more indirect forms of influence that may affect the judges' decisions. This position is reflected in the judgements of the ECtHR, which additionally emphasises that maintaining the independence of the court is seen from the perspective of the trust that it should inspire among subjects of the law in a democratic society. However, the premise of impartiality should be examined from a subjective and objective perspective. The first is related to the judge's personal conviction and behaviour. It should be examined whether "[...] the judge gave any indication of personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality" (C 585/18, C 624/18, C 625/18, point 128). The objective approach, on the other hand, requires examining whether, irrespective of the judge's individual conviction, verifiable facts can be identified that may indicate his lack of impartiality. The European Court of Human Rights emphasises that the premise of independence and objective impartiality are closely related and subject to joint control. In case of any doubt in this respect two elements are taken into account: the party's point of view, although it is not an important criterion, and determining whether the indicated doubts can be seen as objectively justified.

In the light of the above considerations, the Court undertook an analysis of the independence of the Disciplinary Chamber. Firstly, it found that the mere fact of its appointment by the President does not mean violation of the principles indicated. However, it is important to know whether judges are subject to any pressure after assuming their duties and whether they receive any guidelines. What is extremely important from this perspective is the procedure itself and the material conditions for the selection of judges of the Disciplinary Chamber, which must not lead to any doubt about the independence of the judges concerned from external factors and their neutrality with regard to the interests before them. Appointment of judges by the President takes place at the request of the National Council of the Judiciary, i.e. a body guarding judicial impartiality and independence. The Court of Justice emphasised, as in the C 619/18 judgement, that the participation of such a body can make the process of appointing judges more objective, but it must guarantee its own independence from the legislative and executive authorities and from the body to which it is to submit its recommendations. The degree of independence, according to the Court of Justice, may affect the assessment of independence and impartiality under Art. 47 CFR of judges selected by the National Council of the Judiciary. However, it is for the referring court to examine the condition in question, on the basis of factual and legal grounds relating to the circumstances that led to the selection of the members of that body and the manner in which it exercises its constitutional powers. The Court of Justice indicated that even if each of the elements listed is not an individual basis for criticism and falls within the competence of the Member States and their choices, the set of these elements, combined with the circumstances surrounding the selection of judges, may raise doubts as to the independence of the authority taking part in the procedure of the appointment of judges, even if such a conclusion would not have arisen in the situation where these factors were considered separately. It should be emphasised, however, that the Court of Justice left the decision concerning the impartiality and independence of the National Council of the Judiciary to the referring court.

The analysis of independence of the Disciplinary Chamber largely depends on recognising the position of the National Council of the Judiciary. Based on the reservations contained in the questions referred for a preliminary ruling, the Court of Justice indicated several debatable issues that may affect the independence of the Disciplinary Chamber. Firstly, competences in the field of labour law and social security regarding the judges of the Supreme Court with simultaneous introduction of the judicial reform and reduction of the retirement age of judges, as well as applying the indicated provisions to judges who have reached the indicated age at the time of its entry into force. Another element is the high independence of the Disciplinary Chamber in relation to other chambers of the Supreme Court. As emphasised by the Court of Justice regarding the National Council of the Judiciary, also in relation to the Disciplinary Chamber, the debatable elements should be analysed jointly, although each of them individually raises no obje-

ctions as to the independence of the Chamber. At the same time, it obligated the referring court to “assess, in the light, where relevant, of the reasons and specific objectives alleged before it in order to justify certain of the measures in question, whether, taken together, the factors [...] and all the other relevant findings of fact which it will have made are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the Disciplinary Chamber to external factors, and, in particular, to the direct or indirect influence of the legislature and the executive, and as to its neutrality with respect to the interests before it and, thus, whether they may lead to that chamber not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law” (C 585/18, C 624/18, C 625/18, point 153). If the referring court recognises lack of independence of the Disciplinary Chamber, it is obligated not to apply national rules, which leads to the Chamber’s actual failure to exercise its powers.

4. FINAL REMARKS

The analysis of the definition of “court” in the doctrine of EU law focused mainly on the interpretation of the provisions of Art. 47 CFR and Art. 267 TFEU. The first establish the right to access to court, which should be understood as a guarantee of access to an impartial body, independent of national authorities, that settles disputes over the legal position of an entity in a binding and final manner. The latter concern the possibility for a national court to refer a question to the Court of Justice. The purpose of the provisions is to open the access to the Court of Justice for a uniform interpretation of EU law. In this case, the analysis of the definition focuses on the material features of the court, which are insufficient from the perspective of Art. 47 CFR.

The analysis of the judgements of the Court of Justice on the reform of the Polish judicial system conducted in the second part of the present article enables one to draw several conclusions.

Firstly, the Court of Justice found that Poland had violated its Treaty obligations by introducing the provisions that determine the retirement age of judges and establish the procedure enabling the extension of active service for two three-year periods by the discretion of the President of the Republic of Poland.

Secondly, the Court of Justice analysed the definition of “court” from the perspective of Art. 19, para. 1, subpara. 2 TEU. It emphasised that the above provisions obligate the Member States to establish a system of legal remedies and procedures that ensure effective judicial protection in areas covered by EU law. Referring to the previous judgement in case C 64/18, it emphasised that this concerns a body that can only potentially resolve cases with an EU element. The basis for adopting this thesis was the combination of the principle of access to effective legal protection with the fundamental principle of the rule of law expressed in Art. 2 TEU.

Thirdly, the Court of Justice clarified the concept of judicial independence in the context of irremovability of judges. It emphasised that the requirement of independence is directly related to the guarantee of irremovability of judges, which is an element ensuring the judges' freedom from all external interference and pressure. It is not absolute, but its limitation is an overriding and justified exception, which is applied under specific procedures. It showed that Polish solutions are not justified by the overriding goal and do not meet the condition of proportionality.

Another issue raised by the Court of Justice was the requirement of judicial impartiality. The presented argumentation refers not only to the well-established case-law of the Court itself, but also to judgements of the ECtHR regarding the interpretation of Art. 6, para. 1 ECHR. It absorbed these solutions into EU law. The analysis of the judgement of the Court of Justice shows that it has formulated a certain test of judicial impartiality that should be conducted by the referring court. It contains four premises: impartiality of the entity participating in the procedure of determining the composition of the body, appointment procedure and the manner of exercising the competences. The last premise is general and applies to "[...] all the other relevant findings of fact which it will have made are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the Disciplinary Chamber to external factors, and, in particular, to the direct or indirect influence of the legislature and the executive, and as to its neutrality with respect to the interests before it and, thus, whether they may lead to that chamber not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law" (C 585/18, C 624/18 and C 625/18, point 153). An indispensable element preceding the formulation of the above premises was the analysis of impartiality of the National Council of the Judiciary. The Court of Justice did not give an unequivocal answer, but it formulated the conditions for the review that should be conducted by the referring court. Thus, the first element necessary to assess impartiality of the Court Chamber is the assessment of the degree of impartiality of the National Council of the Judiciary, the body participating in the process of selecting members of the Chamber itself. In both cases, it is for the referring court to decide on this matter.

In the literature on the subject there is no doubt about the interpretative effect of the judgement of the CJEU in joined cases C 624, C 625 and C 585/18.³⁵ The referring court, in this case the of the Labour Law and Social Policy Chamber of the Supreme Court, received the tools that enable it to make decisions concerning the independence of the Disciplinary Chamber. However, there is no unequivocal position on the consequences of the judgement for judges appointed with the participation of the National Council of the Judiciary. Examination of impartiality

³⁵ See *Skutki Wyroków Trybunału Sprawiedliwości i Sądu Najwyższego dotyczących Izby Dyscyplinarnej Sądu Najwyższego i Krajowej Rady Sądownictwa. Debata w redakcji „Europejskiego Przeglądu Sądowego” w dniu 17.12.2019 r.*, "Europejski Przegląd Sądowy" 1 (2020), p. 1–26.

of the judges (including members of the Disciplinary Chamber) is based on the referring court' determining the lack of impartiality of the National Council of the Judiciary. However, it seems that such a far-reaching interpretation was not the CJEU's purpose. When answering the question referred, it formulated theses that were addressed to the referring court. On the other hand, based on the *acte eclere* doctrine, any court with similar facts and an identical legal basis may apply that interpretation. This means that the independence test should be conducted with reference to individual cases. It is also worth emphasising the fact that the Court of Justice cites the interpretation of Art. 6, para. 1 ECHR from the judgments of the ECtHR. This led to combining of the independence standard at EU and European level.

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POJĘCIE SĄDU KRAJOWEGO W ROZUMIENIU PRAWA UNIJNEGO. ROZWAŻANIA NA TLE POLSKIEJ REFORMY WYMIARU SPRAWIEDLIWOŚCI

Streszczenie. W artykule poruszone zostały dwa zasadnicze problemy. Pierwszy dotyczy wykładni pojęcia „sądu” w rozumieniu postanowień art. 47 KPP oraz art. 267 TFUE. Druga część poświęcona została analizie wyroków Trybunału Sprawiedliwości w sprawie reformy polskiego wymiaru sprawiedliwości. Umożliwiła ona sformułowanie kilku wniosków.

Po pierwsze Trybunał Sprawiedliwości uznał, że Polska naruszyła zobowiązania traktatowe w związku z wprowadzeniem przepisów określających wiek przejścia sędziów w stan spoczynku oraz ustanawiających procedurę umożliwiającą przedłużenie czynnej służby na mocy dyskrecjonalnej decyzji Prezydenta RP.

Po drugie Trybunał Sprawiedliwości dokonał analizy pojęcia „sądu” z perspektywy art. 19 ust. 1 akp. 2 TUE. Podkreślił, że wskazane postanowienia zobowiązują państwa członkowskie do ustanowienia systemu środków odwoławczych i procedur zapewniających skuteczną ochronę sądową w dziedzinach objętych prawem UE. Podkreślił również, że dotyczy to organu, który jedynie potencjalnie może rozstrzygać sprawy z elementem unijnym.

Po trzecie Trybunał Sprawiedliwości doprecyzował pojęcie zawisłości sędziowskiej w kontekście nieusuwalności sędziego oraz niezależności sędziowskiej. Sformułował swoisty test niezawisłości sędziowskiej, który powinien być badany przez sąd odsyłający.

Słowa kluczowe: sąd, unijny wymiar sprawiedliwości, niezawisłość sędziowska, niezależność sędziowska, sprawa unijna

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