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Standards for Review of the Concept of a "National Court" in EU Law

Wzorce kontroli pojęcia „sądu krajowego" w prawie unijnym

ABSTRACT

The aim of the article is to demonstrate the evolutionary approach of the Court of Justice to the criteria for review of the concept of a court within the meaning of EU law. It has been shown that there are three basic standards used by the Court in this area. The first one is an examination of the premises developed as part of the procedure of a question referred to for a preliminary ruling, which includes functional and systemic premises. The second one is based on Article 47 of the Charter of Fundamental Rights of the European Union, which specifies three premises: independence, impartiality and establishment of a court by statute. The third standard of control indicated by the Court of Justice in the judgment in case C-64/16 is of a different nature. It has been applied to reforms of the justice system in the Member States and is based on the combined interpretation of three provisions: Article 2, Article 4 (2) and Article 19 (1) of the Treaty on European Union. The indicated standard was the cause of a lively discussion initiated by the constitutional tribunals of the Member States (the case of Poland and Romania). In principle, they do not question the right of the Court of Justice to

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review the concept of a court under the first and second standard. However, in relation to the reforms of the justice system, they emphasize their own competence, which is granted to them by their national constitutions. It should be noted that the fundamental problem that appears in the jurisprudence of both the Polish Constitutional Tribunal and the Court of Justice is the protection of primacy of the constitution and irrefutability of the judgments of constitutional tribunals by the Court of Justice.

Keywords: Court of Justice; Polish Constitutional Tribunal; principle of judicial independence; national courts

INTRODUCTION

The European Union is a special international organization. As a derivative entity recognized by international law, it has been equipped with specific competences and has created an autonomous, independent legal system within its limits. In accordance with the established jurisprudence of the Court of Justice (hereinafter also referred to as the Court), it binds not only entities of international law, but also individual entities. Direct application of EU law and its effectiveness guarantee the achievement of the goals set for the EU by the Member States when signing the founding Treaties. This particular feature of the EU legal system forced the creation of a system that ensures its proper application at the level of the EU itself and at the level of the Member States. With the development of the case law of the Court of Justice that defines the nature of EU law and the principles of its application, the position of national courts within this system also gradually developed. At the same time, the only entity empowered to interpret EU law and examine the validity of its norms is the Court of Justice, while national courts are entitled/obligated to refer questions for a preliminary ruling when they have doubts in the indicated situations. Thus, they were included, initially by practice and now under Article 19 (1) TEU,[1] in the system of protection of EU law, and even the EU justice system.

However, a very important question should be answered here: to what extent can the EU influence the structure of national justice systems? As noted above, participation of national courts in the process of application of EU law is beyond dispute and it is a necessary condition to guarantee the effectiveness of EU law. Thus, when adjudicating on the basis of EU law, they become, as it were, "EU courts" because of the subject matter of the pending case. It seems reasonable to assume that they are, so to speak, "borrowed" for EU purposes. Therefore, a question arises regarding the principles of shaping the national justice system: is it an exclusive competence of the Member States or was it transferred to the EU level?[2]

[1] Treaty on European Union (OJ EU C 202/13, 7.6.2016).

[2] This issue was analyzed in more detail by the authors in previous publications. See E. Krzysztofik, *Scope and Exercise of the Exclusive Competences of the Member States of the European Union*, "Review of European and Comparative Law" 2020, vol. 43(4), p. 37.

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Referring only to the controversial issue of the competence of the Court of Justice to review reforms of the justice system in the Member States, with particular emphasis on the Polish case, it should be highlighted that the Court of Justice has already developed several standards for review of national courts. The legal basis for these standards are the following provisions: Article 267 TFEU[3] in connection with questions for a preliminary ruling referred to the Court of Justice by national courts, Article 47 CFR,[4] which, pursuant to Article 6 (1) TEU, is binding and its normative force is equal to that of the Treaties, Articles 67, 81, 82 and 85 TFEU in the part devoted to the area of freedom, security and justice in connection with the establishment of a system of mutual recognition of judgments in civil and criminal matters.

The above-mentioned provisions confirm the existence of a legal union in which the binding principle is the principle of mutual trust and certainty that the courts established at the level of the Member States meet the requirements provided in Article 47 CFR, i.e. they guarantee independence and impartiality and are established by statute.

The last standard for review was developed in the judgment C-64/16.[5] It directly concerns the CJEU's review of the reforms of the justice system in the Member States based on the provisions of Article 19 (1) TEU in conjunction with Article 4 (2) TEU and Article 2 TEU.

In this complex structure of obligations, there is a discourse between the Court of Justice and the Polish Constitutional Tribunal (similarly the Romanian Constitutional Tribunal) concerning the reform of the justice system.

This article attempts to demonstrate the evolutionary approach of the Court of Justice to the review of national justice systems and the lack of coherence and mutual understanding shown by the Court of Justice and the Polish Constitutional Tribunal, which, according to the authors, is caused by different points of reference in relation to the basis of this review.

THE STRUCTURE OF THE EU JUSTICE SYSTEM WITHIN THE MEANING OF ARTICLE 19 (1) TEU

According to the wording of Article 19 (1) TEU, "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 and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal

[3] Treaty on the Functioning of the European Union (OJ EU C 202/47, 7.6.2016).

[4] Charter of Fundamental Rights of the European Union (OJ EU C 202/389, 7.6.2016).

[5] Judgment of the Court of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117.

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protection in the fields covered by Union law". When interpreting the above-mentioned provisions, the Court of Justice emphasized that "judicial review of compliance with the European Union legal order is ensured (…) by the Court of Justice and the courts and tribunals of the Member States".[6] Similarly, in opinion 1/09 the Court indicated that "it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law".[7] However, it should be considered whether the presented interpretation of Article 19 (1) TEU is a breakthrough moment in the jurisprudence of the Court of Justice. When attempting to answer this question, two issues should be addressed. Firstly, there is no doubt that the structure of the EU system of protection of EU law, as defined in the Treaties, indicates two levels – the EU and national "measures necessary to ensure effective legal protection in the areas covered by EU law". National courts are not specifically mentioned, but if one analyzes the provisions of the TFEU, one will notice direct reference to the courts of the Member States in the context of, for instance, questions referred for a preliminary ruling, which may be used by a national court when applying EU law,[8] or indirectly in the part devoted to the area of freedom, security and justice in connection with the establishment of a system of mutual recognition of judgments in civil and criminal cases.[9]

Secondly, it is necessary to refer to the role played by national courts in the process of application of EU law. In accordance with the established case law of the Court of Justice, the Union has created an autonomous and independent legal system derived from international law that is directly applicable in the legal systems of the Member States.[10] The unique features of the indicated legal system result directly from the need to ensure the principle of effectiveness of this law, which underlies the entire integration process.[11] As emphasized by N. Półtorak, this principle is defined as a systemic principle, functional for the entire legal system, which affects not only

[6] Judgment of the Court of 3 October 2013, case C-583/11, *P Inuit Tapiriit Kanatami*, ECLI:EU:C:2013:625.

[7] Opinion 1/09 of the Court (Full Court) of 8 March 2011, ECLI:EU:C:2011:123.

[8] Article 267 TFEU.

[9] Articles 67, 81, 82 and 85 TFEU.

[10] For example, see judgment of the Court of 9 March 1978, case C-106/77, *Simmenthal*, ECLI:EU:C:1978:49; judgment of the Court of 15 July 1964, case C-4/64, *Costa v. ENEL*, ECLI:EU:C:1964:66. The analysis of the indicated issue has been the subject of many publications. For example, see E. Krzysztofik, *Charakter prawa unijnego w orzecznictwie Trybunału Sprawiedliwości i sądów konstytucyjnych państw członkowskich*, "Roczniki Nauk Prawnych" 2014, vol. 24(2), pp. 7–25; E. Całka, *Zasada pierwszeństwa w prawie Unii Europejskiej. Wybrane problemy*, "Studia Iuridica Lublinensia" 2016, vol. 25(1), pp. 47–56; I. Grądzka, *Charakter prawa Unii Europejskiej w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej*, [in:] *Wstęp do źródeł prawa Unii Europejskiej*, ed. E. Krzysztofik, Warszawa 2023, pp. 89–110.

[11] E. Krzysztofik, *The Principle of Effectiveness of EU Law from the Perspective of the Obligations of National Courts*, "Orbeliani Law Review" 2022, vol. 1(1), pp. 87–104.

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the protection of individuals' rights, but also the integrity, proper functioning and uniform implementation of EU law.[12] Its scope is understood in two aspects: objective, which concerns the obligation to ensure the effectiveness of EU law, and subjective, which ensures the effectiveness of EU law in a specific case by granting adequate protection to an individual's rights derived from EU law.[13] The consequence of the indicated understanding is the principle of effective judicial protection. It includes judicial protection understood as access to the court and effective protection through the existence of specific legal remedies and rules of court conduct.[14] The above elements show direct involvement of national courts in the process of application of EU law.

Consequently, it should be assumed that the provisions of Article 19 (1) TEU indicate the existence of an EU justice system based on systemic dualism and covering the Court of Justice and the judicial systems of the Member States.[15] In accordance with the above-mentioned provisions, the CJEU consists of the Court of Justice, the General Court and specialised courts. The composition, structure and scope of jurisdiction of the indicated institutions are specified in Article 19 (1) TEU and Article 19 (3) TFEU. Moreover, the above-mentioned provisions refer to specific competences of the CJEU that result from the provisions of the Treaties. However, the second dimension of the EU justice system is based on the courts of the Member States which, when adjudicating on the basis of EU law, become EU courts.[16]

PREMISES FOR REVIEW OF THE CONCEPT OF A NATIONAL COURT UNDER PRELIMINARY RULING PROCEDURE

Provisions of Article 267 TFEU do not contain a definition of the concept of a national court. The Court of Justice, however, generally states that a national court ruling on the basis of EU law becomes an EU court. It should, therefore, be assumed that review of the concept of a court within the meaning of Article 267 TFEU occurs only when a national court rules on the basis of EU law, i.e. within the competences of the EU itself.[17] The procedure of preliminary ruling is of particular importance and

[12] N. Półtorak, *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych*, Warszawa 2010, p. 76.

[13] D. Miąsik, *System prawa Unii Europejskiej*, vol. 2, Warszawa 2022, p. 21.

[14] *Ibidem*, p. 27.

[15] For a different approach, see M. Muszyński, *O alternatywnej praworządności*, "Concilium Iuridicum" 2023, no. 7, p. 33.

[16] For more, see P. Kapusta, *Sąd krajowy jako sąd unijny*, [in:] *Zasada pierwszeństwa prawa Unii Europejskiej w praktyce działania organów władzy publicznej RP*, eds. M. Jabłoński, S. Jarosz-Żukowska, Wrocław 2015, pp. 225–250.

[17] E. Krzysztofik, *The Definition of National Court within the Meaning of European Union Law. Considerations in the Context of the Polish Reform of the Judicial System*, "Teka Komisji Prawniczej PAN Oddział W Lublinie" 2020, vol. 13(1), p. 249.

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has a specific function in EU law. This is an instrument provided to national courts that apply EU law. They may use it if a problem arises during adjudication regarding the interpretation or validity of an EU legal norm. Consequently, in this procedure, the concept of a court is generally analyzed not from the systemic, but from the functional perspective, i.e. whether it is competent to apply the law. Therefore, the analysis of the case law of the Court of Justice in the light of Article 267 TFEU indicates five basic features that a national court must have: the entity is permanent in nature and operates on the basis of the law, it adjudicates on the basis of the law, its jurisdiction is compulsory, it adjudicates between the parties (it is third in the dispute).[18] The above-mentioned catalog of premises for review of the concept of a national court is not exhaustive. As one of the Advocates General noted, "the case-law is casuistic, very elastic and not very scientific".[19] In the initial period of the EU's functioning, the Court of Justice assumed that common courts were national courts within the meaning of Article 267 TFEU. Gradually, however, introduction of the premise of independence has been noticeable. The initial judgments did not generally refer to its examination in the context of a national court, but more broadly in relation to a quasi-judicial body.[20] Nowadays, the Court of Justice has expanded the scope of review of the independence requirement also in relation to national courts.[21] It is worth mentioning here the position of the Court of Justice in case C-658/18,[22] which refers to the question of an Italian Justice of the Peace who raised concerns regarding his own independence due to specific employment conditions, and in case C-272/19[23] regarding the doubts of a German court in connection with dependence on legislative and executive power. In both cases, the Court of Justice found that the conditions of a national court were met within the meaning of Article 267 TFEU and stated that "single aspects of national law do not constitute a lack of judicial independence. The situation may be different in the case of the accumulation of legal and factual factors, the combination of which may raise doubts in an individual as to the independence of the court and undermine the confidence that the judiciary should inspire in individuals

[18] *Ibidem*, p. 251.

[19] Opinion of Advocate General Colomer of 28 June 2001, case C-17/00, *François De Coster v. Collège des bourgme-stre et échevins de Watermael-Boitsfort*, EU:C:2001:366, point 14.

[20] For example, see judgment of the Court of 30 June 1966, case C-61/65, *G. Vaassen-Göbbels*, ECLI:EU:C:1966:39; judgment o of the Court of 6 October 1981, case C-246/80, *C. Broekmeulen*, ECLI:EU:C:1981:218; judgment of the Court of 13 December 2013, case C-465/11, *Forposta SA and ABC Direct Contact Sp. z o.o. v. Poczta Polska SA*, ECLI:EU:C:2012:801, point 17.

[21] R. Grzeszczak, *Preliminary References in the Area of Human Rights: A Practical Handbook for Parties' Representatives*, 2019, https://hfhr.pl/upload/2022/01/pytania-prejudycjalne-w-obszarze-praw-czlowieka-podre-cznik-dla-pelnomocniko-w-eng.pdf (access: 28.11.2023), p. 47.

[22] Judgment of the Court of 16 July 2020, case C-658/18, *UX v. Governo della Repubblica italiana*, ECLI:EU:C:2020:572.

[23] Judgment of the Court of 9 July 2020, case C-272/19, *VQ v. Land Hessen*, ECLI:EU:C:2020:535.

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in a democratic society".[24] Extension of the premises for review of the concept of a court has made it possible to review the status of national courts. As an example, one should indicate the judgment of the Court in the case of the Spanish Tribunal Economico Administrativo Central, which was initially recognized as an entity competent to refer questions for a preliminary ruling.[25] However, in the judgment in case C-274/14,[26] the Court of Justice changed its position and stated that due to changes in the Treaties and the position of the CFR, it was not competent to refer questions for a preliminary ruling.[27]

Summarizing the above, it should be indicated that the standards for review of the concept of a court by the Court of Justice as part of the preliminary ruling procedure have evolved and include both functional and systemic premises.

PREMISES FOR REVIEW OF THE CONCEPT OF A NATIONAL COURT WITHIN THE MEANING OF ARTICLE 47 CFR

Another standard concerns review under Article 47 CFR, which includes the right to an effective remedy and the right of access to an independent and impartial court established by statute.[28] Półtorak also emphasizes that the provisions of Article 47 (2) CFR specify the right to an effective remedy before the court and cover several aspects: the right of access to the court that meets the premises of independence, is impartial and established by statute; the right to a fair and public trial within a reasonable time; the right to obtain legal advice, assistance from a defense attorney and representative, as well as legal assistance.[29] According to the explanations to the CFR, the source of the provisions of Article 47 (1) CFR is Article 13 of the European Charter of Human Rights (ECHR), and for Article 47 (2) CFR it is Article 6 (1) ECHR. Consistently, in accordance with the wording of Article 51 CFR, the right to an effective remedy and the right of access to an impartial court should be interpreted in accordance with the jurisprudence of the European Court of Human Rights. As M.A. Nowicki emphasizes, "the concept of 'court' is characterized in the material sense by its judicial function, i.e. the

[24] A. Kastelik-Smaza, *Procedura prejudycjalna w kontekście prawa do sądu*, "Roczniki Administracji Publicznej" 2021, vol. 7, p. 131.

[25] Judgment of the Court of 21 March 2000, joined cases C-110/98 and C-147/98, *Gabalfrisa SL and Others v. Agencia Estatal de Administración Tributaria (AEAT)*, ECLI:EU:C:2000:145.

[26] Judgment of the Court (Grand Chamber) of 21 January 2020, case C-274/14, *Proceedings initiated by Banco de Santander SA*, ECLI:EU:C:2020:17.

[27] See A. Kastelik-Smaza, *op. cit.*, p. 131.

[28] Article 47 (2) CFR.

[29] N. Półtorak, *Komentarz do art. 47 ust. 2 i 3 KPP*, [in:] *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, ed. A. Wróbel, Warszawa 2013, p. 1209.

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resolution of matters that fall within its competences in accordance with the principle of the rule of law and in proceedings conducted in accordance with a legally established procedure".[30] Moreover, it must meet the above-mentioned conditions, i.e. to be independent, impartial and established by statute.

The Court of Justice has repeatedly analyzed the premises of independence, including in the Wilson judgment,[31] where it emphasized 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". The Court of Justice indicated two elements that shape judicial independence: external and internal. The first of them was explained by the Court of Justice, among others, in the judgment in case C-274/14, where it noted that the external aspect of judicial independence "requires that the body concerned exercise its 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, being thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions".[32] In the judgment in the Polish case, the Court of Justice emphasized that it was directly related to irremovability of judges, which means 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".[33] However, independence in the internal sense 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".[34] In the judgment in the Wilson case, the Court of Justice found that a disciplinary and administrative commission examining an appeal against a decision refusing entry on the list of lawyers, composed exclusively of representatives of this profession, does not guarantee impartiality because its members may be interested in limiting competitors on the service market.[35]

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[30] M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej konwencji o ochronie praw człowieka*, Warszawa 2010, pp. 425–426.

[31] Judgment of the Court of 19 September 2006, case C-506/04, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, ECLI:EU:C:2006:587.

[32] Operative part of the judgment in case C-274/14, point 57.

[33] Judgment of the Court of 24 June 2019, case C-619/18, *European Commission v. Republic of Poland*, ECLI:EU:C:2019:531, point 76.

[34] Judgment of the Court of 16 February 2017, case C-503/15, *Margarit Panicello*, EU:C:2017:126, point 38.

[35] Operative part of the judgment in case C-506/04, points 54–63.

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PREMISES FOR REVIEW OF THE CONCEPT OF A NATIONAL COURT WITHIN THE MEANING OF ARTICLE 19 (1) TFEU IN THE CONTEXT OF THE REFORM OF THE POLISH JUSTICE SYSTEM

The problem of review of reforms relating to the justice system by the Court of Justice concerned four countries: Hungary, Portugal, Poland, and Romania. The review was connected with questions referred for a preliminary ruling by national courts or a complaint filed by the Commission about Member States' failure to fulfill treaty obligations.

The first judgment that should be recalled is the case C-286/12.[36] It examined the status of a judge from the perspective of infringement of the provisions of the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. It emphasized that Hungary had violated its treaty obligations "by adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 – which gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued". The next judgment, C-64/16, concerned a temporary reduction of remuneration of ASJP (Associação Sindical dos Juízes Portugueses, Trade Union of Portuguese Judges) members in the context of determining the budgetary policy of Portugal. There is no doubt that the position expressed by the Court of Justice in this case is of fundamental importance for the development of the principles of EU law and the significance of the EU justice system. When replying to the question referred to under Article 267 TFEU, the Court interpreted the provisions of Article 2, Article 19 (1) (2) and Article 4 (3) TEU. The basic thesis put forward by the Court of Justice was the significance of Article 19 (1) TEU, which applies to "the fields covered by Union law", regardless of the situation in which the Member States apply this law, within the meaning of Article 51 (1) CFR.[37] Among the arguments presented, the Court of Justice drew attention to the fact that the EU is based on the values provided in Article 2 TEU and shared by all Member States, including the rule of law, which also covers independence of national courts. As a community of law, the EU guarantees individuals the right to challenge in court any decision made by national authorities on the basis of EU law. Pursuant to the provisions of Article 19 (1) TEU, national courts, together with the Court of Justice, guarantee respect for the law in its interpretation and application. Consequently, the Member States, in accordance with the principle of loyalty, have an obligation to create the measures necessary to ensure that the right of individuals to effective judicial protection in areas falling within EU competence is respected. The Court of

[36] Judgment of the Court of 6 November 2012, case C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687.

[37] Operative part of the judgment in case C-64/16, point 29.

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Justice also emphasized that each national court will potentially adjudicate on EU law and therefore must meet the standards of independence.[38] In accordance with the above-mentioned position of the Court of Justice, the provisions of Article 19 (1) (2) TEU contain the principle of effective legal protection, which has gained the status of a general principle of EU law. As J. Barcik noted, the interpretation presented by the Court of Justice in the above-mentioned case allows invoking the provisions of Article 258 TFEU as an instrument that may be used for protection of national courts' independence.[39] Although in the case that was the subject of the question referred for a preliminary ruling, the Court did not apply the indicated interpretation and found that the Portuguese provisions did not constitute a threat to judicial independence, it should be noted that it had a significant impact on the assessment of the Polish reform of the justice system.

REVIEW OF THE REFORMS OF THE JUSTICE SYSTEM ON THE EXAMPLE OF POLAND POSITION OF THE COURT OF JUSTICE

The discussion on the reform of the justice system in Poland began in 2017. Its source were draft laws that introduced changes to the Act on the National Council of the Judiciary, the Act on the system of common courts, and the draft Act on the Supreme Court submitted by Members of the Parliament. Because of the nature of these considerations, reforms of the Supreme Court are of key importance.[40] The actions of the Polish legislator were assessed negatively at the EU level.

The European Commission filed the first complaint to the Court of Justice on 18 April 2018 and it concerned the changes introduced by the Polish legislator. The complaint included two allegations. The first was related to the retirement age of judges (60 years for women and 65 for men), and the second to the power of the Minister of Justice to appoint and dismiss presidents of courts.[41] In subsequent applications, the Commission alleged violation of independence of the Supreme Court

[38] J. Barcik, *Niezawisłość sędziowska jako wartość konstytucyjna Unii Europejskiej. Glosa do wyroku Trybunału Sprawiedliwości z 27.02.2018 r., C 64/16 Associação Sindical dos Juízes Portugueses*, "Europejski Przegląd Sądowy" 2019, no. 2, p. 25.

[39] Idem, *Ochrona praworządności w Radzie Europy i Unii Europejskiej ze szczególnym uwzględnieniem niezależności sądów i niezawisłości sędziowskiej*, Warszawa 2018, p. 171.

[40] The parliamentary draft bill on the Supreme Court submitted in July 2017 was adopted on 20 July 2017, but the President did not sign it and returned it to the Sejm with a request for reconsideration (Article 122 (5) of the Polish Constitution). Then the President presented his own draft Act on the Supreme Court (Parliamentary Paper no. 2003, 8th term). The new Act was adopted on 8 December 2017 (Journal of Laws 2018, item 5).

[41] Changes introduced by the Act of 12 July 2017 amending the Act on the organization of common courts (Journal of Laws 2017, item 1452); Act of 8 December 2017 on the Supreme Court (Journal of Laws 2018, item 5).

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and questioned granting arbitrary power to the President of the Republic of Poland to extend active service of individual judges of the Supreme Court.[42] Shortly thereafter, the Commission requested that the Court of Justice apply interim measures against Poland in the context of failure to fulfill the obligations of a Member State.[43] According to the Commission, the Republic of Poland failed to fulfill its obligations under Article 19 (1) TEU and Article 47 CFR. The Court required Poland to: immediately, and until the judgment concluding the proceedings in case C-619/18 was issued, suspend certain provisions of the Act on the Supreme Court; enable Supreme Court judges subject to national provisions on retirement to continue to serve in the same position; refrain from appointing Supreme Court judges to vacant positions and from appointing a new First President of the Supreme Court.[44] Poland was also required to inform the Commission, at monthly intervals, of all measures adopted to fully comply with this order. The Court found that Poland's actions to lower the retirement age of judges and the right of the President of the Republic of Poland to decide on the possible extension of a judge's term of office violated Article 19 (1) (2) TEU (C-619/18 R, point 114).[45] According to the Court of Justice, all these elements may affect the image of the Supreme Court as the body guaranteeing that in all circumstances it will act beyond any suspicion of bias or lack of independence (C-619/18 R, point 102).

In 2019, the Chamber of Labor and Social Insurance of the Supreme Court referred three questions for a preliminary ruling to the Court of Justice.[46] They concerned the issue of non-discrimination on the grounds of age, the principle of judicial independence, creation of a new chamber within the Supreme Court – the Disciplinary Chamber, independence of the National Council of the Judiciary, and the right to waive application of national provisions inconsistent with EU law. The Court of Justice found a violation of the prohibition of discrimination on the grounds of age provided in Directive 2000/78. "The Member States are, (…) responsible for ensuring that, pursuant to Article 47 of the Charter, the right to effective judicial protection (…) is effectively protected in every case" (C-585/18, C-624/18, C-625/18, points

[42] P. Filipek, *Nieusuwalność sędziów i granice kompetencji państwa członkowskiego do regulowania krajowego wymiaru sprawiedliwości*, "Europejski Przegląd Sądowy" 2019, no. 12, p. 6.

[43] Order of the Court of 17 December 2018, *European Commission v. Republic of Poland*, case C-619/18 R, ECLI:EU:C:2018:1021.

[44] Operative part of the order C-619/18 R.

[45] Judgment of the Court of 24 June 2019, case C-619/18, *European Commission v. Republic of Poland*, ECLI:EU:C:2019:531.

[46] Judgment of the Court of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18, *A.K. v. National Council of the Judiciary of Poland, CP and DO v. the Supreme Court*, ECLI:EU:C:2019:982. It is claimed in the literature that the question for a preliminary ruling to the Court of Justice was submitted by the wrong court, specifically by a Chamber of the Supreme Court – Labor and Social Insurance Chamber. See Z. Czarnik, *The Legitimacy of Preliminary Questions to the Court of Justice of the European Union (CJEU) on the Legal Status of Supreme Court Judges in Poland*, "Studia Iuridica Lublinensia" 2021, vol. 30(5), p. 158.

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114–115). "The independence of the judiciary must be ensured in relation to the legislature and the executive" (point 124). When referring to the National Council of the Judiciary, as a body "tasked with safeguarding the independence of the courts and the independence of judges", the Court challenged its independence from the legislative and executive powers in performing the tasks assigned to it by the national legislation. Ultimately, the Court of Justice concluded that through its actions the Republic of Poland had violated the irremovability and independence of the Supreme Court judges and had failed to fulfill its obligations under Article 19 (1) (2) TEU.

The Court of Justice authorized national courts, adjudicating within their competences, to "disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it" (C-573/17 point 61; C-585/18, C-624/18; C-625/18 point 161).

POSITION OF THE POLISH CONSTITUTIONAL TRIBUNAL

In its jurisprudence since 2005, the Polish Constitutional Tribunal has emphasized primacy of the Polish Constitution, which is the "supreme law of the Republic of Poland" – Article 8.[47] The Tribunal recalled that, according to the Constitution, the Treaties, as the basis on which the EU operates, are formally international agreements ratified under Article 90 (1) of the Constitution, and in the event of a legal conflict they take precedence only over national legislation (K 18/04, point 4). The procedure for ratification of an international agreement does not exclude this type of agreements from the scope of jurisdiction of the Constitutional Tribunal (K 32/09, point 1.1.1).

Two judgments of the Constitutional Tribunal are important for the discussed issue: P 7/20[48] and K 3/21.[49] They were issued "in response" to the allegations from the European Commission and the Court of Justice, which generated great political and social emotion, and therefore heated comments. It was alleged in the literature that judgment K 3/21 has no legal effects, that it constitutes a gross violation of EU law or that the Constitutional Tribunal's rulings continue to develop a new anti-EU line of jurisprudence.[50]

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[47] Judgment of the Polish Constitutional Tribunal of 11 May 2005, K 18/04, OTK-A 2005, no. 5, item 49. The principle of supremacy of the Constitution of the Republic of Poland was recalled by the Polish Constitutional Tribunal in the judgment of 24 November 2010, K 32/09, OTK-A 2010, no. 9, item 108.

[48] Judgment of the Polish Constitutional Tribunal of 14 July 2021, P 7/20, OTK-A 2021, item 49.

[49] Judgment of the Polish Constitutional Tribunal of 7 October 2021, K 3/21, OTK-A 2022, item 65.

[50] Europejskie Stowarzyszenie Studentów Prawa ELSA Poland, *Glosa krytyczna do orzeczenia Trybunału Konstytucyjnego o sygn. K 3/21*, https://www.adwokatura.pl/admin/wgrane_pliki/file-glosa-krytyczna-do-orzeczenia-trybunalu-konstytucyjnego-o-sygn-k-321-32138.pdf (access: 28.11.2023);

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The judgment of 14 July 2021 (P 7/20) was initiated by the Disciplinary Chamber of the Supreme Court in the form of a legal question addressing the decision of the Court of Justice of 8 April 2020 in case C-791/19 R.[51] The question referred for a preliminary ruling was whether Article 4 (3) sentence 2 TEU in conjunction with Article 279 TFEU, in the extent to which the Court of Justice imposes on Poland as an EU Member State the obligations that consist in the implementation of interim measures relating to the structure and jurisdiction of Polish courts and proceedings before Polish courts, is consistent with the Constitution of the Republic of Poland. The scope of inconsistency concerned the following provisions of the Constitution: Article 2 (principle of rule of law), Article 7 (principle of legalism), Article 8 (1) (principle of supremacy of the Constitution), and Article 90 (1) (transfer of state competences to an international organization) in conjunction with Article 4 (1) (principle of sovereignty) of the Constitution.

The Tribunal recognized its jurisdiction in this respect. Since the Disciplinary Chamber questioned compatibility of the scope of the provisions of primary law, and specifically the norm derived from the provisions of the Treaties, the Constitutional Tribunal, pursuant to Article 188 (1) of the Constitution, may examine their compatibility with the Constitution of the Republic of Poland. Additionally, it did not exclude the possibility of examining the constitutionality of EU law in response to the legal question submitted by the Disciplinary Chamber under Article 193 of the Constitution (P 7/20, point 3).

In the discussed judgment, the Tribunal applied *ultra vires* review for the first time, within the limits of the Disciplinary Chamber's question and within the principle of comprehensive investigation of the matter. In this way, it gave itself the right to investigate the EU's actions in violation of the limits of competences transferred to it in the Treaties. Such a violation may take the form of European resolutions, directives, decisions, but also judgments of the Court of Justice. The Tribunal, acting within its constitutional powers and taking action to safeguard Polish constitutional identity, has the right and obligation to undertake this type of review of the norms of primary, secondary and subsidiary law.[52] The Tribunal emphasized

P. Bogdanowicz, *Opinia prawna na temat skutków prawnych orzeczenia Trybunału Konstytucyjnego w sprawie o sygn. akt K 3/21 dotyczącego niezgodności przepisów Traktatu o Unii Europejskiej z Konstytucją Rzeczypospolitej Polskiej w świetle prawa Unii Europejskiej*, https://www.batory.org.pl/wp-content/uploads/2021/10/P.Bogdanowicz_Opinia-prawna_nt.skutow.orzeczeniaTK.ws_.TUE_.pdf (access: 28.11.2023); W. Wróbel, *Skutki rozstrzygnięcia w sprawie K 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych*, "Europejski Przegląd Sądowy" 2021, no. 12; M. Florczak-Wątor, *(Nie)skuteczność wyroku Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21. Ocena znaczenia orzeczenia z perspektywy prawa konstytucyjnego*, "Europejski Przegląd Sądowy" 2021, no. 12.

[51] Order of the Court of 8 April 2020, case C-791/19 R, ECLI:EU:C:2020:277.

[52] The doctrine considers such action to be inappropriate because the *ultra vires* claim should refer only to legal acts issued on the basis of the Treaty (secondary EU law, or directly to the judgments of the CJEU). Therefore, the allegation of an *ultra vires* act against the provisions of the TEU should be

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that when conducting the *ultra vires* review, it only examines compatibility of the effect produced by the order of the Court of Justice of 8 April 2020 with the Constitution of the Republic of Poland. The Tribunal does not attempt to determine the normative meaning of a provision of EU law, but only aims to compare the content of international acts and agreements with the provisions of the Constitution. The element analyzed in the discussed case was the content of the provisional measure of the Court of Justice applied against Poland (P 7/20, point 6.5).

Another judgment of the Constitutional Tribunal (K 3/21) was issued at the request of the Prime Minister. In this judgment the Tribunal examined compatibility of the interpretation of selected provisions of the TEU adopted in the jurisprudence of the CJEU with the Constitution of the Republic of Poland. The subject of the application were the provisions of Article 1 TEU, Article 4 (3) (1)–(2), Article 19 (1) (2) in conjunction with Article 4 (3), as well as Article 19 (1) (2) in conjunction with Article 2. It was alleged that the above provisions are understood in such a way that they authorize or oblige the body applying the law to depart from applying the Polish Constitution or order it to apply legal provisions in a manner inconsistent with the Constitution, including application of a provision which, pursuant to the judgment of the Constitutional Tribunal, has lost its binding force as incompatible with the Polish Constitution. Moreover, the above-mentioned provisions of the TEU authorize the CJEU to review independence of the judges appointed by the President of the Republic of Poland and to review the resolutions of the National Council of the Judiciary regarding submission of an application to the President to appoint a judge. The provisions that were adopted as a standard for the review are Article 2, Article 7, Article 8, Article 90 (1), Article 91 (2) and Article 178 (1), as well as Article 186 (1) of the Polish Constitution. As a result, the Tribunal found that the interpretation of the provisions of the TEU made by the Court of Justice reaches a "new stage" where its bodies operate beyond the limits of the competences granted by Poland in the Treaties, where the Polish Constitution is not the supreme law of the state that has priority in validity and application, and where the Republic of Poland cannot function as a sovereign and democratic state, therefore this interpretation is incompatible with Article 2, Article 8 and Article 90 (1) of the Polish Constitution.

In the judgment P 7/20, the Tribunal clearly defined EU action that went beyond the scope of competences conferred on it (an *ultra vires* action or act). However, in the theses in the judgment K 3/21, the Tribunal did not refer directly to the *ultra vires* formula, but the references to the scope of unconstitutionality suggest such a standard for the review.[53]

considered inadequate. See A. Kustra-Rogatka, *Kontrola konstytucyjności aktu prawa pierwotnego Unii Europejskiej w wyroku Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21*, "Europejski Przegląd Sądowy" 2021, no. 11, p. 8.

[53] *Ibidem*, p. 9.

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In the literature on the subject, it is deemed that the judgment of the Constitutional Tribunal K 3/21 does not produce any legal effects because it was issued with the participation of individuals who were not authorized to adjudicate, i.e. the so-called understudy judges,[54] and due to the incorrectly defined subject of this decision.[55] Apart from these issues, attention should be paid to the legal effect that the above judgments are intended to have. The correct observation made in the literature is that the purpose of the Constitutional Tribunal judgments K 3/21 and P 7/20 was not to produce legal effects in terms of validity of the law, but only its application.[56]

CONCLUSIONS

The considerations presented this article indicate that the problem of competence of the Court of Justice to review the concept of a national court developed in parallel with the process of deepening European integration. As shown, three basic standards have emerged that the Court uses in this area. Firstly, a review of the premises developed in the context of questions referred for a preliminary ruling, which includes functional and systemic premises. As noted, the above-mentioned premises have been developed since the beginning of the European Communities and were related to the activity of national courts, which, in the course of adjudicating, submitted legal questions regarding validity or interpretation of EU law. The institution of preliminary ruling supports national courts in the process of application of EU law. Consistently, the Court of Justice reviewed the concept of a court primarily in order to extend it to quasi-judicial entities, while assuming that each national court is a court within the meaning of EU law. Secondly, under Article 47 CFR, which specifies three premises: independence, impartiality and appointment of a court by statute, the Court of Justice has developed a model of independence that is based on two dimensions: external and internal. The external dimension is understood as ensuring the court's autonomy in making decisions, lack of hierarchical subordination and lack of orders or guidelines from any source, and the internal one means keeping equal distance from the parties to the dispute. As one of the provisions of the CFR, the right to an independent and impartial court applies within the scope of EU competences, i.e. these premises are generally examined when a given court applies EU law. The third standard for review, indicated by the Court of Justice in the judgment in case C 64/16, is of a different nature. It was applied to the reforms of the justice system in the Member States and

[54] Judgment of the Polish Constitutional Tribunal of 3 December 2015, K 34/15, OTK-A 2015, no. 11, item 185.

[55] M. Florczak-Wątor, *op. cit.*, p. 11; A. Kustra-Rogatka, *op. cit.*, pp. 9–10.

[56] M. Dąbrowski, *Glosa do punktu 2 lit. b wyroku Trybunału Konstytucyjnego z dnia 7 października 2021 r., K 3/21*, "Studia Iuridica" 2022, vol. 95, p. 97.

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is based on the combined interpretation of three provisions: Article 2, Article 4 (2), and Article 19 (1) TEU. The Court assumed that, firstly, each national court is a part of the EU system of protection of EU law and can potentially adjudicate on the basis of EU law. Secondly, it emphasized that the EU is also a union of law based on the assumption that each court of a Member State meets the premises of independence, and they determine the implementation of the principle of the rule of law, which is one of the fundamental values of the EU. Thirdly, the Member States, in accordance with the principle of loyalty, take the necessary actions to implement treaty obligations, which also includes adopting a system of measures to guarantee the effectiveness of EU law. The indicated standard was the cause of a lively discussion undertaken by the constitutional tribunals of the Member States (the case of Poland and Romania). In principle, they do not question the right of the Court of Justice to review the concept of a court under the first and second standard. However, in relation to the reforms of the justice system, they emphasize their own competence granted to them by their national constitutions. It should be noted that the main problem that appears in the jurisprudence of both the Polish Constitutional Tribunal and the Court of Justice is the protection of primacy of the constitution and irrefutability of the judgments of constitutional tribunals by the Court of Justice.

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ABSTRAKT

Celem artykułu jest wykazanie ewolucyjnego podejścia Trybunału Sprawiedliwości (TS) do kryteriów kontroli pojęcia sądu w rozumieniu prawa unijnego. Wykazano, że wykształciły się trzy zasadnicze wzorce, z jakich korzysta Trybunał w tym obszarze. Pierwszy z nich to badanie przesłanek wypracowanych w ramach pytania prejudycjalnego, które obejmuje przesłanki funkcjonalne i ustrojowe. Drugi opiera się na art. 47 Karty Praw Podstawowych Unii Europejskiej, który wskazuje trzy przesłanki: niezawisłość, bezstronność oraz powołanie sądu na mocy ustawy. Odmienny charakter ma trzeci wzorzec kontroli, jaki wskazał TS w wyroku w sprawie C-64/16. Został on zastosowany do reform wymiaru sprawiedliwości w państwach członkowskich i opiera się na łącznej interpretacji trzech postanowień art. 2, art. 4 ust. 2 i art. 19 ust. 1 Traktatu o Unii Europejskiej. Wskazany wzorzec stał się przyczyną ożywionej dyskusji, jaką podjęły trybunały konstytucyjne państw członkowskich (sprawa Polski i Rumunii). Zasadniczo nie podważają one prawa TS do kontroli pojęcia sądu w ramach pierwszego i drugiego wzorca, natomiast w odniesieniu do reform wymiaru sprawiedliwości podkreślają własną kompetencję, jaką nadaje im konstytucja krajowa. Należy zauważyć, że podstawowym problemem, jaki zarysowuje się w orzecznictwie polskiego Trybunału Konstytucyjnego oraz TS jest ochrona prymatu konstytucji oraz niepodważalność przez TS wyroków trybunałów konstytucyjnych.

Słowa kluczowe: Trybunał Sprawiedliwości; Trybunał Konstytucyjny; zasada niezawisłości sędziowskiej; sądy krajowe