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THE APPLICATION OF EU LAW BY POLISH COURTS: GENERAL REMARKS ON 15 YEARS OF EXPERIENCE

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ABSTRACT

The Court of Justice of the European Union operates on a case-by-case basis. This means that its decisions normally relate to specific problems occurring in a specific Member State. Consequently it is often hard to ‘translate’ this case law into the national legal system of a different Member State. Nevertheless the case law of the Court of Justice has consequences not only for the individual Member States. It also has harmonising effects. In this sense, the principles of primacy and of direct effect of EU provisions, as well as the obligation to interpret domestic law in conformity with EU law, operate as the minimum requirements which the legal systems of Member States must fulfil. Poland joined the European Union in May 2004. At that time the number of Member States increased to 25. The existence of avenues of judicial protection in the EU raised a number of questions from the very beginning. Now, after 15 years of experience it is time to consider the standard of application of EU law by Polish courts.

KEYWORDS

national courts, application of EU law, principle of primacy, direct effect, consistent interpretation, preliminary rulings

INTRODUCTION

The application of EU law by national courts in their day-by-day judicial activities is crucial for ensuring full effectiveness of EU law in the EU Member States. This effectiveness rests on a decentralised judicial system, where the rights that individuals derive from EU law are protected by each and every court of each Member State, regardless of its level or jurisdiction. For that reason, national courts play a decisive role in the effective application of EU law. This role has been created and constantly shaped in the course of their cooperation with the Court of Justice of European Union. The CJEU in the course of 50 years of its functioning has developed several principles which enable national courts to ensure effective application of EU law. These are in particular the principles of primacy and of direct effect of EU provisions, as well as the obligation to interpret domestic law in conformity with EU law. The jurisprudence of the CJEU in this respect has been already a subject of constant interest and analysis in Polish academic literature.¹

The Polish judicial system rests on two pillars: the common courts, which decide in civil and criminal matters, and the administrative courts, which provide for judicial control of administrative decisions. The administration of justice in civil and criminal matters is also exercised by the Supreme Court, which (*inter alia*) ensures the conformity of law and coherence of jurisprudence of the common courts (and military courts) when deciding in review procedures, and adopting resolutions concerning legal issues fundamental for the system of justice in general. The judicial control of administrative decisions is exercised by the courts of two instances: Voivodeship Administrative Courts (first instance)

1 See in particular K Kowalik-Bańczyk, M Szwarc (eds), *Stosowanie prawa Unii Europejskiej przez sądy, vol. 2 Zasady – orzecznictwo – piśmiennictwo* [Application of EU Law by National Courts, vol. 2 Principles – Jurisprudence – Legal Doctrine] (Wolters Kluwer 2007); D Kornobis-Romanowska, *Sąd krajowy w prawie wspólnotowym* [National Court as an EU Court] (Wolters Kluwer 2007); A Wróbel (ed), *Stosowanie prawa Unii Europejskiej przez sądy* [Application of EU Law by National Courts] (2 ed Wolters Kluwer 2010); A Wróbel (ed), *Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym* [Ensuring Effectiveness to Judgments of International Courts in the Polish Legal Order] (Wolters Kluwer 2011); N Półtorak, *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych* [Protection of EU Rights in National Proceedings] (Wolters Kluwer 2010); P Brzeziński, *Unijny obowiązek odmowy zastosowania przez sąd krajowy ustawy niezgodnej z dyrektywą Unii Europejskiej* [EU Duty to Disapply National Act of Parliament Incompatible with an EU Directive] (Wolters Kluwer 2010); D Miąsik, *Podstawowe zasady stosowania prawa UE przez sądy powszechne w świetle orzecznictwa Sądu Najwyższego* [Fundamental Principles of Application of EU Law by Common Courts in the light of the Supreme Court's Jurisprudence] (2014) EPS 1, 66–70; M Domańska, *Implementacja dyrektyw unijnych przez sądy krajowe* [Implementation of EU Directives by National Courts] (Lex a Wolters Kluwer Business 2014); A Sotys, *Obowiązek wykładni prawa krajowego zgodnie z prawem unijnym* [The Duty of Consistent Interpretation of National Law] (Wolters Kluwer 2015).

and the Supreme Administrative Court (second instance). The third jurisdiction is the Constitutional Court, which is responsible for constitutional control as provided for in the Polish Constitution.

The Polish courts of all jurisdictions have already a long-standing and abundant tradition of applying EU law in their judicial activities – as Poland has been a Member State of EU since 1 May 2004. Since Poland’s accession to the EU, the courts actively serve their duties as Union courts – courts which are entrusted with the duty to apply the law, to ensure the effectiveness of the law, and to provide individuals with legal protection and enforcement of the rights granted to them by the Union, under the principle of loyal cooperation. In their jurisprudence, Polish courts refer to primary and secondary law, and the case-law of the CJEU. When resolving disputes, Polish courts also invoke provisions of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. They do so to indicate that particular rights of an individual are protected not only by the Polish Constitution, but also within supra-national systems of law.

Polish courts take also the opportunity to maintain a judicial dialogue with the Court of Justice by way of the preliminary rulings procedure, as enshrined in Article 267 of the Treaty on the Functioning of the European Union. The first preliminary question was referred by the Voivodship Administrative Court as early as 2005. As a result, the ruling of the Court of Justice in case *Brzeziński v Dyrektor Izby Celnej w Warszawie*² helped to establish a legal standard applicable in a significant number of administrative and judicial proceedings concerning taxation of imported cars. Since then, the Court of Justice has significantly contributed to the development and uniformization of the jurisprudence of the Polish courts. This is the experience not only of these Polish court which issued judgments directly after the CJEU’s judgment was delivered in reply to their preliminary references, but also of many other cases where Polish courts relied on CJEU’s rulings (in ‘Polish’ cases and others). In particular, the resolution of 16 October 2017 of the Supreme Administrative Court is worth noticing, as the court ruled that even a tax payer whose matter was not directly affected by the judgment of CJEU, may move to reopen the proceedings before a Polish court following the CJEU’s judgment.³

The impact of preliminary references made by Polish courts on the development of the EU law is significant. The references made so far concerned different pieces of EU legislation, ranging from EU Treaties, the Charter of Fundamental Rights, general principles of EU law, through to regulations, mostly directives, decisions and acts of soft law. Preliminary references have also been used by Polish courts to develop EU law in various areas, ranging from very traditional areas such as criminal law,⁴ copyright;⁵ commercial

2 Judgment of the CJEU C-313/05 EU:C:2007:33.

3 Judgment of the Supreme Administrative Court I FPS 1/17 [2017].

4 Resolution of the PSC V KK 179/10 [2010].

5 Resolution of the PSC V CSK 41/14 [2015].

law;⁶ tax law;⁷ consumer law;⁸ competition law;⁹ and state aid¹⁰ through to EU specific rules on judicial cooperation in civil matters,¹¹ coordination of social security systems,¹² damages for breach of EU law,¹³ and then from novel areas of EU law such as telecommunication law¹⁴ to – finally – the core values of the EU and the division of competences. In this last area, the references made by Polish courts, led by the PSC,¹⁵ may encourage the ECJ to develop through its caselaw a series of EU measures allowing national courts to defend the rule of law. The references made so far have allowed the Court of Justice to develop legal standards concerning the essence of the rule of law and judicial protection,¹⁶ interactions between EU and national competition rules,¹⁷ the powers of the national communication regulator;¹⁸ coordination of national social security schemes;¹⁹ state aid in the energy sector;²⁰ and consumer protection.²¹ The references made so far have covered both issues of interpretation of EU law, and the compatibility of national legislation with EU rules. The Supreme Administrative Court has also a long-standing tradition in particular of addressing preliminary rulings in cases concerning interpretation of EU directives harmonizing VAT and other indirect taxes.

It must also be emphasized that, at the urging of Polish courts, the CJEU has ruled on a couple of issues concerning the preliminary ruling procedure itself, such as the issue of referring questions concerning EU law to the CJEU or to the constitutional courts,²² the issue of what counts as a court in the meaning of Article 267 of the TFEU (whether the

6 Resolution of the PSC IV CSK 664/14 [2015].

7 Resolution of the PSC I CSK 543/17 [2018].

8 Ibid.

9 Resolution of the PSC III SK 2/09 [2009]; Resolution of the PSC III SK 39/16 [2017].

10 Resolution of the PSC III SK 53/13 [2014]; Resolution of the PSC III SK 30/14 [2015].

11 Resolution of the PSC V CSK 487/13 [2014].

12 Resolution of the PSC I UK 344/08 [2009]; Resolution of the PSC II UK 241/18 [2019]; Resolution of the PSC II UK 81/18 [2019].

13 Resolution of the PSC I CSK 435/18 [2019].

14 Resolution of the PSC III SK 27/08 [2008]; Resolution of the PSC III SK 16/09 [2009]; Resolution of the PSC III SK 59/12 [2013]; Resolution of the PSC III SK 66/12 [2013]; Resolution of the PSC III SK 28/13 [2013]; Resolution of the PSC III SK 18/14 [2015]; Resolution of the PSC III SK 51/14 [2016].

15 Resolution of the PSC III UZP 4/18 [2018]; Resolution of the PSC III CZP 25/19 [2019]; Resolution of the PSC III PO 6/18 [2018]; Resolution of the PSC III PO 7/18 [2018]; Resolution of the PSC III PO 8/18 [2018]; Resolution of the PSC III PO 9/18 [2019]; Resolution of the PSC II PK 153/17 [2018]; Resolution of the PSC II PO 3/19 [2019].

16 Judgment of the CJEU C-231/15 EU:C:2016:769.

17 Judgment of the CJEU C-375/09 EU:C:2011:270.

18 Judgment of the CJEU C-277/16 EU:C:2017:989; judgment of the CJEU C-397/14 EU:C:2016:256.

19 Judgment of the CJEU C-440/09 EU:C:2011:114; judgment of the CJEU C-115/11 EU:C:2012:606.

20 Judgment of the CJEU C-329/15 EU:C:2017:671; judgment of the CJEU C-574/14 EU:C:2016:686.

21 Judgment of the CJEU C-628/17 EU:C:2019:480; judgment of the CJEU C-260/18 EU:C:2019:819.

22 Judgment of the CJEU C-314/08 EU:C:2009:719.

National Appeals Chamber is a court within the meaning of Article 267 of the TFEU).²³ Moreover, the CJEU provided an interpretation of the notion of a court whose rulings may not be challenged, as a court obligated to refer questions for preliminary rulings on the grounds of the Polish civil procedure,²⁴ as well as the requirements for a national court to be considered as a court within the meaning of the EU law.²⁵

Despite the rich experience of Polish courts in the application of EU law in the domestic legal order, the analyses of their jurisprudence in this particular context are scarce and mostly in Polish.²⁶ For this reason the judicial experience of Polish courts, which is of high intellectual value, deserves comprehensive and systematic analysis.

1. PRACTICAL APPLICATION OF THE PRINCIPLES ENSURING THE EFFECTIVENESS OF EU LAW

The methodology of judicial application of EU law in the domestic legal order – with the aim to ensure its *effet utile* – consists of several steps to be taken consecutively, namely:

- identification of whether the court deciding a particular case is obliged to take EU law into consideration (a case with an EU law element);
- a decision whether interpretation of domestic law in conformity with EU law is possible (consistent interpretation);
- a decision on the direct effect of EU legal provisions in particular proceedings;
- a decision on the use of the principle of primacy of EU legal provisions over Polish provisions;
- a decision whether to use Article 267 TFEU and to address a preliminary reference to the Court of Justice.

While the jurisprudence of the CJEU has already been extensively commented on in European and Polish literature, the practice of national courts in their day-to-day activities concerning the application of the principles listed above has been scarcely reported.

1.1. 'A CASE WITH AN EU LAW ELEMENT'

The first preliminary issue necessary in the process of applying EU law in the domestic legal order is the identification of whether a particular case to be decided by the court involves the application of EU law at all. In other words, it is crucial to first answer the question of whether the facts which resulted in proceedings before the court fall within the temporal, personal and material scope of EU law.²⁷ Even if such a definition of 'a case

23 Judgment of the CJEU C-465/11 EU:C:2012:801.

24 Judgment of the CJEU C-119/15 EU:C:2016:987.

25 Judgment of the CJEU C-585/18 EU:C:2019:982.

26 See in particular D Miąsik, M Szwarc, *Stosowanie prawa Unii Europejskiej przez sędziów sądów powszechnych i prokuratorów* [Application of EU Law by Common Courts' Judges and Prosecutors] (Krajowa Szkoła Sądownictwa i Prokuratury 2012).

27 Ibid 17.

with an EU law element’ is not a legal one, it still gives the idea of proceedings in which the national court acts as an EU court in the functional meaning. From the established jurisdiction of the CJEU it may be inferred that the notion covers those proceedings, the subject matter of which falls within the scope of EC law, as defined by: 1) a cross-border element, 2) claims based on directly effective provisions of EC law, 3) secondary EC legislation, implemented by national law applied by the court, 4) reverse discrimination, 5) referral to EC law.²⁸ From the moment of Poland’s accession to the EU, Polish courts had no difficulties with identifying the necessity of taking into consideration an EU law element in cases brought before them. As an example the practice of the Supreme Court can be brought up, which, when assessing that a pending case has an EU law element, concludes that ‘the EU law contains regulations concerning the subject of the present case’²⁹, or that ‘having regard to the EU character of the present case, which stems from the fact that the applicable law implements the provisions of the EU directive’³⁰ or that ‘the facts of the case fall into the scope of application of directive 97/7’.³¹ However from time to time it happens that a community character of judicial proceedings, which opens the possibility for the injured party to seek damages after challenging the legality of a judgment of a national court as incompatible with EU law. A fine example is provided by a case in which lower courts had overlooked the ECJ’s judgment in *Nerkowska*,³² which in turn resulted in the Supreme Court’s ruling that the judgment of the lower court is contrary to the law.³³ On the other hand, it may also happen that a court sees an EU case where it is not present, because the subject matter falls outside the scope of application of EU law.³⁴

1.2. INTERPRETATION OF POLISH LAW IN CONFORMITY WITH EU LAW

The obligation of consistent (conforming) interpretation as a tool designed for national courts to apply EU law effectively has been extensively used by Polish courts. In most cases the use of this tool has been exercised as follows. First, the court searched for a judgment of the Court of Justice or a particular line of its case-law concerning the particular issue and the specific provisions of EU law. Having established the position of the Court of Justice regarding the exact meaning of the EU legal provision, the Polish court tried to achieve the same result by interpreting Polish law in conformity with EU law. When a Polish provision was drafted in an unclear, ambiguous or general manner, there was always plenty of room for judicial interpretation that would lead to a result compatible with EU law.

28 D Miąsik, *Sprawa wspólnotowa przed sądem krajowym [EU case before a national court]* 2008 EPS 9, 16–22.

29 Judgment of the PSC I UK 68/07 [2007].

30 Resolution of the PSC III SP 2/10 [2010].

31 Judgment of the PSC I UK 182/07 [2008].

32 Judgment of the CJUE C-499/06 EU:C:2008:300.

33 Judgment of the PSC I BU 6/09 [2009].

34 Judgment of the PSC I UK 59/11 [2011] pointing improper adjudication by the lower court by recourse to the EU law, which application was excluded in the circumstances of the case by virtue of an opt-out declaration of the Polish government in the field of coordination of social security systems.

However, when a provision was drafted in a straightforward and extremely clear manner, there was no room to make a consistent interpretation, and the courts had to resort to the principle of primacy of EU law.³⁵ Polish courts have generally respected the limits of consistent interpretation as drafted by the Court of Justice, which are the prohibition of an interpretation *contra legem* of the national provision, and of interpretation leading to the imposition of criminal liability.³⁶ However at least on two occasions Polish courts have adopted a more ‘adventurous’ approach to the principle of consistent interpretation.³⁷

Polish courts take into consideration that every EU citizen is entitled to the same rights and it is of paramount importance that national courts apply EU law in a uniform way. For example, in case II CSK 302/07³⁸ the Supreme Court assumed that it was obliged to apply EU law, because the national provisions which were the legal standard for pending case were implementing an EU directive, while the terms used in the directive were not defined in the national legislation. Consequently, in order to refer to the objections raised in the course of an appeal, the Supreme Court had to determine the interpretation of the following terms: ‘informed user’, ‘overall impression’, ‘degree of freedom of the designer in developing the design’, which – as new notions in the Polish legal system – had to be interpreted with regard to existing case law of the Court of Justice.

Polish courts also respect the conceptual autonomy of EU law in the cases they examine. Examples include judgments concerning such issues as: transfer of undertakings, businesses or parts of undertakings;³⁹ the working time of doctors performing on-call duty;⁴⁰ and determining the meaning of ‘damage’ in case of wasted holidays of a tour operator’s customer.⁴¹

An important line of reasoning in Polish courts is the application of the principle of equal authenticity of different language versions, and, following the guidelines provided in such rulings of the Court of Justice as: *Motor Industry*, *Van der Vecht*, *Ferriere Nold*, the courts have expressed the view that the provisions of EU law should be interpreted while taking into account all language versions, not only the Polish one. For example, the Supreme Court stated that the correct interpretation of a provision of EU law should include comparing the wording of an article of the directive in Polish, French and English.⁴²

An important input of Polish jurisprudence into the development of the doctrine of consistent interpretation is provided by the *Pawlak* litigation. Following the preliminary ruling of the ECJ,⁴³ the Supreme Court finally (after having set aside their initial reservations) decided that an element of the Polish civil procedure code can be interpreted

35 Judgment of the PSC I PK 64/09 [2009].

36 For example judgment of the PSC II PK 143/07 [2008].

37 Judgment of the PSC III UZP 3/17 [2019].

38 Judgment of the PSC II CSK 302/07 [2007] (2009) OSP 6, item 66.

39 Judgment of the PSC I BP 8/13 [2015] OSP 8, item 110.

40 Resolution of the PSC I PZP 11/07 [2008].

41 Resolution of the PSC III CZP 79/10 [2010] (2011) OSNC 4, item 41.

42 Judgment of the PSC III PK 30/06 [2006] (2008) OSP 7-8, item 82.

43 Judgment of the CJEU C-545/17 EU:C:2019:260.

consistent with directive 97/67.⁴⁴ What is even more important, the Supreme Court provided Polish courts with a comprehensive set of arguments, resulting in the use of different interpretative tools which may allow national courts to adopt a conforming interpretation of a national rule that otherwise would be considered as *contra legem*.

1.3. DIRECT EFFECT OF EU LAW PROVISIONS

The direct effect of EU law provisions has been recognised by Polish courts, mostly in close relation to the principle of primacy. For example the Supreme Court has ruled that the former article 18(1) of the Treaty establishing the European Community (which is now article 21 TFEU) is – according to article 91(1) of the Polish Constitution – directly applicable, and as a consequence takes precedence above the provision of Polish law. It resulted in the conclusion that provisions of Polish law which were incompatible with Article 18(1) TFEU could not be a legal basis for the suspension of an allowance, which was granted to a Polish citizen, who resided in a Member State other than Poland.⁴⁵

There are also a considerable number of cases in which Polish courts have applied the rules of direct effect of EU directives. In particular, it has already been recognized that directives are binding on the Member States to which they are addressed, and so they cannot impose obligations on individuals. As a consequence, the provisions of EU directives have no direct effect in disputes between individuals.⁴⁶ It has also been recognized that provision of an EU directive may be directly effective only when invoked by an individual in a dispute with the ‘state’,⁴⁷ and that this notion has to be interpreted widely as encompassing not only public administration bodies, but also any other public entity under the control of the State.⁴⁸

The recognition of the direct effect of EU law provisions is present also in the jurisprudence of administrative courts.⁴⁹ The Voivodship Administrative Courts have also recognized that not only courts are obliged to apply EU law provisions, as this obligation also rests on public administration bodies.⁵⁰

44 Resolution of the PSC III UZP 3/17 [2019].

45 Judgment of the PSC I BU 6/09 [2009].

46 For example judgment of the PSC IV CSK 133/11 [2011].

47 Judgment of the PSC II PZP 10/09 [2009].

48 Judgment of the PSC II PK 17/06 [2006]; judgment of the PSC II PK 228/09 [2010]; judgment of the PSC I PZP 11/07 [2008].

49 Judgment of the Voivodship Administrative Court in Warsaw III SA/Wa 2219/05 [2005]; judgment of the Voivodship Administrative Court in Białystok I SA/Bk 411/06 [2007]; judgment of the Voivodship Administrative Court in Warsaw III SA/Wa 4330/06 [2007].

50 Judgment of the Voivodship Administrative Courts in Białystok I SA/Bk 411/06 [2007]; judgment of the Voivodship Administrative Court in Warsaw III SA/Wa 4330/06 [2007].

1.4. PRIMACY OF EU PROVISIONS OVER POLISH PROVISIONS

In general, the principle of primacy of EU law and its consequences (in case of a conflict between domestic and EU norms), as it stands in the jurisprudence of the CJEU, is commonly accepted by Polish courts. The Supreme Court has accepted that

establishing that a provision of national law is contrary to EU law provisions results in conclusion that – according to the principles of primacy and direct effect of EU law – such a national provision may not be applied by Polish courts [...] The obligation to ensure the primacy of EU law is binding for each and every national court, deciding a case pending before it, without it being necessary to await the elimination of such a provision from the domestic legal system. For that reason decisions of national constitutional courts of Member States concerning conformity or non-conformity of domestic provisions with the national Constitution are not relevant for the obligation of national court to refuse to apply domestic provisions non-conform with EU law.⁵¹

It further concluded that

it is necessary to remember about the primacy of EU law over the laws, which means that the appellate court may by itself refuse to apply Polish provision (when it has no doubts on this point) or – when it may have doubts on this point – to refer the case to the Court of Justice of the EU.⁵²

The most recent example is provided by the judgment of the Supreme Court of December 5th 2019,⁵³ in which the Simmenthal rule was explicitly and definitively used by the Labour and Social Security Chamber of the Supreme Court to disapply the provisions of the national act which excluded its jurisdiction to hear the case and withheld this jurisdiction to the newly created unit within the Supreme Court which is not a court within the meaning of EU law.

The Constitutional Court has confirmed the acceptance of the primacy of EU law in the context of the Polish Constitution,⁵⁴ but there are still many interesting nuances of the consequences of primacy in particular cases.⁵⁵ This jurisprudence should also be subject to a thorough analysis, in order to synthesize and present the CC position on the matter.

51 Judgment of the PSC III CSK 112/05 [2006].

52 Resolution of the PSC III CZP 3/10 [2010].

53 Judgment of the PSC II PO 7/18 [2019].

54 In particular judgment of the Constitutional Court K 18/04 [2005]; judgment of the Constitutional Court K 32/09 [2010].

55 Judgment of the Constitutional Court SK 45/09 [2011].

The administrative courts also accept the primacy of EU law. The Supreme Administrative Court has confirmed that the refusal to apply a domestic legal provision, which was contrary to the EU law (which in turn was confirmed in the judgment of CJEU in case C-134/07 *Kawala v Gmina Miasta Jaworzna*), was justified on the grounds of the principle of primacy of EU law. According to the SAC, this applies not only to courts, but also to the application of law by public administration bodies.⁵⁶

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⁵⁶ Judgment of the Supreme Administrative Court I OSK 842/09 [2010].

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