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# EFFECTIVENESS OF EU DIRECTIVES IN NATIONAL COURTS – JUDICIAL DIALOGUE CONTINUES: THE COURT OF JUSTICE'S JUDGMENT IN *C-545/17 PAWLAK*

**Abstract:** *This commentary on the Court of Justice's ruling in the Pawlak case concentrates on questions of the judicial application of EU law, in particular EU Directives. On the basis of the recent jurisprudence of the Court the authors present three issues: 1) the incidental effects of EU law for the procedural provisions of Member States; 2) the inability to rely on an EU directive by a member state's authority in order to exclude the application of national provisions which are contrary to a directive; 3) the limits of the duty to interpret national law in conformity with EU law from the perspective of the Court of Justice and the referring court. Further, the article presents the judicial practice of the Polish Supreme Court, and in particular the follow-up decision of this Court not only taking into the account the ruling of the ECJ but also showing how the limitation of a conforming interpretation can be overcome in order to give full effect to EU law. In the authors' view, this case is worth noting as an example of judicial dialogue in the EU.*

**Keywords:** direct effect, effectiveness, EU directive, EU law, primacy of EU law

## INTRODUCTION

The judgment in the *Pawlak* case resulted from a request for a preliminary ruling referred to the Court of Justice in Luxembourg by the Polish *Sąd Najwyższy* (Supreme Court) in the context of a dispute between Mariusz Pawlak, a farmer, and *Kasa Rolniczego Ubezpieczenia Społecznego* (a unit governed by public law dealing with paying benefits for farmers (KRUS) concerning the refusal to pay compensation to the farmer for an accident at work. The substantive grounds for resolving that dispute, including the

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conditions of the right to compensation and the conditions for a refusal to pay such a compensation to the applicant concerned, were not covered by European Union law. Therefore, at the first glance this case should be regarded as not having an "element of EU law" and it seemed that the dispute needed to be resolved only in accordance with the applicable Polish law. However, the specific procedural circumstances led the Supreme Court to have doubts concerning the interpretation of EU law. In its opinion a clarification was needed as to the compatibility with EU law of a national procedural provision under which the date of receiving a document by the court is determined (i.e. whether the appeal was filed within the prescribed time limit). Depending on whether the national procedural provision at issue was found compatible or incompatible with EU law, the appeal would have to be, respectively, either rejected as lodged after the statutory time limit, or deemed to have been lodged within that time limit and, thus acceptable. Therefore, the outcome of that provision's assessment in the light of EU law had an impact on the access to the appeal procedure before Polish courts.

From the point of view of the judicial application of EU law, the judgment in the *Pawlak* case necessitates a closer analysis of three interesting issues, which are as follows: 1) the incidental effect of EU law for the procedural provisions of Member States; 2) the inability to rely on an EU directive by the member state's authority in order to exclude the application of national provisions which are contrary to a directive; and 3) the limits of the duty to interpret national law in conformity with EU law from the perspective of the Court of Justice and the referring court. The commentary on these issues is preceded by a brief presentation of the legal and factual background of the case and the main points of the Court's judgement.

## 1. FACTUAL AND LEGAL BACKGROUND

In accordance with Art. 165(2) of the Polish Code of Civil Procedure (*Kodeks postępowania cywilnego,* KPC) the posting of a procedural document at a Polish post office of the designated postal operator or at the post office of a postal operator providing a universal postal service in another Member State of the European Union is equivalent to the lodgement of that document directly with the court. In accordance with Polish law, *Poczta Polska S.A*, is the designated operator. The practical consequences of the provision concerned are that where a procedural document is posted at the post office of *Poczta Polska,* the court to which that letter is addressed will accept that the date of posting it is to be considered as if the letter was filed directly to the court. But when a letter with an appeal is posted at the premises of any other postal operator (other than *Poczta Polska*) the court to which the document is addressed considers the date of the actual receipt of that document by the court (instead of the date of posting it) as the date of its filing. Therefore, in practice, under Polish law the legal effects that the legislator attributed to the fact of posting a respective procedural document at a postal operator's office were different depending on whether it was posted at the designated operator's office or at any

other operator's; which in turn leads to privileging the designated operator in comparison with any other postal operator functioning on the postal services market.

In turn, in accordance with Art. 7(1) of Directive 97/67 on common rules for the development of the internal market of Community postal services,[1] Member States should refrain from conferring or maintaining in force exclusive or special rights as regards the establishment and provision of postal services. The exceptions to this rule are set out in Art. 8 of that directive, according to which

> [t]he provisions of Article 7 shall be without prejudice to Member States' right to organise the siting of letter boxes on the public highway, the issue of postage stamps and the registered mail service used in the course of judicial or administrative procedures in accordance with their national legislation.

As indicated above, the dispute between the farmer and KRUS related to the refusal to pay compensation for an accident at work. The court of the first instance accepted the farmer's complaint, and as a result the president of KRUS appealed against that judgment to the court of the second instance. However, the procedural document was posted at the post office of an operator other than the designated operator and was served on the court after the expiry of the statutory time limit for lodging the appeal. Since in that case the procedural document was served by a postal operator other than the designated operator, the date of its submission was determined by the date of its receipt by the court, and not by the "postmark date." Consequently, the appeal was dismissed inadmissible as a result of the failure to comply with the procedural time limit. The president of KRUS appealed to the Supreme Court against the decision of the court of the second instance, raising, *inter alia*, the incompatibility of Art. 165(2) KPC with EU law.

In considering the case, the Supreme Court took into account, first of all, the discrepancies included in its case law regarding the interpretation of that provision.[2] In that case law the prevailing standpoint did not take into account the EU context of the effects of posting a document at a post office. Accordingly, the posting of a procedural document at a Polish post office of an operator other than the designated operator was considered, in instances where that document was received after the expiry of the statutory time limit for carrying out a procedural act, as a failure to comply with the time limit, and as a result the procedural act was considered ineffective.[3] However, in some cases (albeit a minority), the adjudicating panels of the Supreme Court recognized the EU law element (Directive 97/67) and held that the posting of a document, within the prescribed time limit, at a Polish post office of an operator other than the designated operator had a legal effect equivalent to lodging that document with the court.[4] In

[1] OJ 1998 L 15, p. 14, OJ L 15, 21.1.1998, p. 14.

[2] Order of the Supreme Court of 19 July 2017, case III UZP 3/17.

[3] Orders of the Supreme Court: of 3 June 2015, case V CZ 33/15; of 8 June 2015, case III SW 41/15; of 14 July 2015, case II UZ 10/15; of 25 August 2015, case II UZ 16/15; of 14 April 2016, case IV CZ 15/16; of 20 April 2016, case II UZ 75/15 and of 17 May 2016, case II PZ 2/16.

[4] Orders of the Supreme Court: of 23 October 2015, case V CZ 40/15; of 17 March 2016, case V CZ 7/16.

those decisions the Supreme Court held that Art. 165(2) KPC should be interpreted in a manner consistent with EU law, although without any specific guidelines on how to apply the provision of Polish law in compliance with EU law, while in another case the Supreme Court restored the deadline for lodging the procedural document with the court.

Taking the foregoing into account, the Supreme Court decided to refer three questions to the Court of Justice as regards the interpretation of EU law. They concerned several issues dealing with the general question of the compatibility of the provision of Polish law with EU law. These specific issues included: 1) whether the legal problem submitted to the court fell within the scope of Directive 97/67, 2) whether Art. 165(2) KPC could be regarded as "a special right" within the meaning of Art. 7(1) in conjunction with Art. 8 of Directive 97/67 (the first question of the Supreme Court). Furthermore, the Supreme Court sought to establish the consequences of a finding that EU law precludes the application of Art. 165(2) KPC, should it be impossible for the national court to interpret it in conformity with EU law. To this end, the Supreme Court suggested the possibility of applying the so-called *Jonkmann* rule, i.e. accrual of the benefits – arising from the conferral of a special right on the operator designated in breach of Art. 7(1) of the directive – to all other postal operators, with the result that the posting of a procedural document at a national post office of an operator which provides a universal service but is not the designated operator must be regarded as equivalent to the lodgement of that document with the court (the second question). In the third question, the Supreme Court sought to determine whether Art. 7(1) of Directive 97/67 might be relied on by a party which is an emanation of a member state.

## 2. THE JUDGMENT OF THE COURT OF JUSTICE

First, the Court of Justice established that Art. 165(2) KPC conferred on the *Poczta Polska* operator an "exclusive or special right" within the meaning of Art. 7(1) of Directive 97/67.[5] However, since that concept has not been defined in the directive itself, the Court of Justice referred to settled case law relating to the interpretation of that concept included in Art. 106(1) TFEU. In that regard, it recalled that

> [a] State measure may be regarded as granting a special or exclusive right within the meaning of Article 106(1) TFEU where it confers protection on a limited number of undertakings and which may substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions.[6]

According to the Court of Justice, the provision of Polish law in question

[5] Case C-545/17, *Mariusz Pawlak v. Prezes Kasy Rolniczego Ubezpieczenia Społecznego*, EU:C:2019:260, para. 65.

[6] Case C-475/99, *Firma Ambulanz Glöckner v. Landkreis Südwestpfalz,* EU:C:2001:577, para. 24; Case C-327/12, *SOA Nazionale Costruttori*, EU:C:2013:827, para. 41.

> seems to confer a benefit on a limited number of undertakings, since it reserves to the designated operator, or another entity providing a universal service in another member state, the service of sending procedural documents to the court and the privilege of recognising the procedural documents lodged with that operator, or that other entity, to be the documents lodged with the court.[7]

It also considered that such a provision could substantially affect the ability of other undertakings to exercise their respective economic activities in the same area under substantially equivalent conditions, within the meaning of settled case law.[8]

Subsequently, after studying the content of Art. 8 of Directive 97/67, the Court of Justice held that the first sentence of Art. 7(1), in conjunction with Art. 8 of Directive 97/67

> precludes (…) the provision of national law which considers equivalent to lodging a procedural document with the court concerned, only lodging such a document at the postal office of one operator designated to provide a universal service, and without any objective justification based on the public order policy or public security considerations.[9]

As regards deciding what consequences should be drawn from the incompatibility of the national procedural provision with EU law by the national court in the dispute concerned, the Court of Justice recalled the requirement for the national court to interpret national law

> [a]s far as possible, in the light of the wording and the purpose of the directive in question, in order to achieve the result pursued by the directive and thereby comply with the third paragraph of Art. 288 TFEU. The requirement for national law to be interpreted in conformity with European Union law is inherent in the system of the Treaty, since it permits the national court, within the limits of its jurisdiction, to ensure the full effectiveness of European Union law when it determines the dispute before it.[10]

It also pointed out that the requirement to interpret national law in conformity with EU law is limited "[b]y the general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*."[11]

Emphasising the significance of the principle of legal certainty in the context of the provisions establishing procedural time limits, the Court of Justice recalled that "[t]he purpose of having time-limits for bringing legal proceedings is to ensure legal certainty by preventing Community measures which produce legal effects from being called in question indefinitely as well as on the requirements of good administration of justice and procedural economy."[12] and found that the same reasons underpinned the

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[7] Judgment *Pawlak*, para. 62.
[8] *Ibidem*, para. 63.
[9] *Ibidem,* para. 79.
[10] *Ibidem*, para. 83 and cases referred to therein.
[11] *Ibidem*, para. 85 and cases referred to therein.
[12] *Ibidem*, para. 87.

requirement to comply with the procedural time limits set out in the legal orders of respective member states. Consequently, the Court of Justice accepted that the principle of legal certainty and the prohibition against interpreting national law *contra legem* formed the limitations on the requirement to interpret national law in conformity with EU law.[13]

Subsequently, with reference to the possibility of relying on a provision of a directive for the purpose of not applying, in a dispute against an individual, a national provision which is contrary to the directive, the Court of Justice held that allowing for the possibility of relying, by an emanation of a member state, on the provisions of the directive which that state had not properly transposed into national law, against an individual, would amount to enabling that state to benefit from its breach of EU law.[14] As a consequence, since the president of KRUS should be regarded as an emanation of the state within the meaning of settled case law of the Court of Justice, it could not rely on the provision of the directive against the individual.

## 3. COMMENTARY

### 3.1. The shrinking scope of purely internal cases – the incidental effect of EU law for the procedural provisions of Member States

The first stage of the judicial application of EU law in any proceeding is to establish that the case to be decided by the national court involves an element of EU law, i.e. that the reconstruction of the legal basis for the adjudication of a given case requires taking into account not only the provisions of national law, but also the provisions of EU law. EU law may affect not only the substantive provisions underlying the final judicial decision to be delivered by national courts, but also the procedural provisions applicable for the purpose of claiming certain rights by individuals. As regards the latter aspect, the Court of Justice, as early as in the mid-1970s, formulated the principle of the procedural autonomy of member states, according to which "[i]n the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law."[15] However, this does not mean that national procedural provisions remain completely outside the scope of the application

[13] *Ibidem*, para. 88.

[14] *Ibidem*, para. 89.

[15] Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, EU:C:1976:188, para. 5; Case 45/76 *Comet BV v. Produktschap voor Siergewassen,* EU:C:1976:191, paras. 13, 16; *see also* A. Wróbel, *Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej* [Procedural autonomy of EU Member States: Principle of Effectivness and Effective Judicial Protection], 67(1) Ruch Prawniczy, Ekonomiczny i Społeczny 35 (2005); D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "Functionalized Procedural Competence" of EU Member States*, Springer, Heidelberg: 2010.

of EU law. In particular, the Court of Justice requires that "[s]uch legislative provisions may not discriminate against persons to whom Community law gives rights to equal treatment or restrict fundamental freedoms guaranteed by Community law."[16]

This is one of the perspectives[17] from which the Court of Justice interprets EU law when national courts refer questions in view of any doubts relating to national procedural rules. For example, in the context of assessing the compliance with EU law of the imposition on a foreign national not resident in the Member State where he initiates proceedings of an obligation to provide a security deposit to guarantee payment of the costs of the judicial proceedings which the person may be ordered to pay, the Court held that such a national procedural rule is liable to affect the economic activity of traders from other Member States on the market of the host member state. Even if such a procedural provision is not specifically intended to regulate an activity of a commercial nature, it still has the effect of placing such traders in a less advantageous position than the nationals of that State as regards access to courts.[18] In this regard, "[t]he possibility to bring actions in the courts of a Member State in the same way as nationals of this State is a corollary of the fundamental freedoms, in particular free movement of goods and services." This means that in principle any procedural provision of a member state which could put an EU citizen at a disadvantage compared to that state's treatment of its own citizens may fall within the scope of EU law. However, the assessment of national provisions in the light of EU law must be carried out individually in each case. For this reason, in the case of the security deposit, which was required only from nationals of member states other than those of the member state in which the proceedings were held, the Court of Justice had no doubts that it constituted discrimination on the grounds of nationality within the meaning of present Art. 18 TFEU, and therefore – in the absence of an objective justification – it had to be considered as discrimination prohibited by EU law.[19]

It is true that in *Pawlak* case the situation was different from the above. Member states regulate, by means of the provisions of secondary law, the market of postal services in such a way that not only shapes the provisions of substantive law, but also the procedural provisions affecting the course of the court proceedings. However, a similar rule was applied in this case, i.e. that the procedural autonomy of a member state was also subject to limitations if the procedural provisions concern a provision of secondary law incidentally applicable in the main proceedings and are contained in a piece of

[16] Case 186/87, *Ian William Cowan v. Trésor public,* EU:C:1989:47, para. 19.

[17] It has also been established that the national procedural rules must be in conformity with principles of equivalence and effectiveness *sensu stricto*, judgment *REWE*, EU:C:1976:188, para. 5; judgment *Comet*, EU:C:1976:191, paras. 13, 16.

[18] Case C-43/95, *Data Delecta Aktiebolag and Ronny Forsberg v. MSL Dynamics Ltd.,* EU:C:1996:357, para. 12; Case C-323/95, *David Charles Hayes and Jeannette Karen Hayes v. Kronenberger GmbH*, EU:C:1997:169, para. 15.

[19] Judgment *Data Delecta*, EU:C:1996:357, para. 12; judgment *David Charles Hayes*, ECLI:EU:C:1997:169, para. 17; Case C-122/96 *Saldanha*, EU:C:1997:458, paras. 17, 20; Case C-291/09, *Guarnieri & Cie*, EU:C:2011:217, para. 19.

legislation devoted to the functioning of the internal market, not to national procedural rules per se.

## 3.2. Principles for the application of directives by national courts in proceedings involving individuals

### 3.2.1. Relation between primacy and the direct effect of EU law

The Supreme Court, in the *Pawlak* case, sought to determine the consequences of recognising the solution provided for in Art. 165(2) KPC as a special right within the meaning of Art. 7(1) of Directive 97/67 The need to obtain the opinion of the Court of Justice in this regard was due to the Supreme Court's fear, at the stage of referral of the preliminary questions, that any possible interpretation of Art. 165(2) KPC in conformity with EU law would be considered a *contra legem* interpretation. That sparked the interest of the national court in the issue of the limits of admissibility of a refusal to apply a provision of national law, due to its noncompliance with a directive, in a dispute between an individual and an entity which is an emanation of the state.

As regards the possible refusal to apply national provisions on the grounds that they are contrary to an EU directive, the judgment in the *Pawlak* case is in line with case law of the Court of Justice relating to the relationship between the principle of primacy and the principle of direct effect which has developed over the last few years. The principle of the primacy of EU law, as stated by the Court of Justice in the judgment in the *Simmenthal* case,[20] operates in such a way that the national court "should not see" the national provisions which are contrary to EU law. This "invisibility" of those national provisions incompatible with EU law means, in practice, that the national court cannot include these provisions in the legal basis of its decision. They cannot constitute a normative model for it to apply in dispute resolution. In the *Pawlak* case, compliance with the rule resulting from *Simmenthal* judgment should have meant that the national court did not "see" the provisions requiring it to dismiss an appeal as lodged after the time limit when the appeal was posted within the time limit but through an operator not being the designated operator, and physically reached the competent court after the expiry of the time limit provided for in the national procedure. However, the first issue in the *Pawlak* case for the national court was whether the application of the national provision should be refused on the ground that it was contrary to the directive; and secondly whether the refusal to apply the provision would lead to issuing a judicial decision favourable to the party to the proceedings that was an emanation of the member state (i.e. the pension authority KRUS).

The Court of Justice a long time ago ruled out the possibility of deriving, from the directive, rights that could be claimed before a national court from another party

[20] Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, EU:C:1978:49, para. 21; for further developments *see* in particular Case C-187/00 *Kutz-Bauer*, EU:C:2003:168, para. 73; Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others*, EU:C:2005:270; Case C-314/08 *Filipiak,* EU:C:2009:719.

to a judicial proceeding that was not an emanation of the Member State.[21] In the absence of a national provision conferring on the individual the right provided for in the EU directive, it was only possible to seek compensation from a member state, since the Court of Justice deemed it admissible to claim the right before a national court only from a member state and its authorities, as broadly understood (emanations).[22] However, it still remained unclear whether the exclusion of the so-called horizontal direct effect of directives would not allow for use of the principle of primacy in disputes between individuals if it appeared that the national provisions applicable to decide the case proved to be contrary to the directive. The Court of Justice repeatedly and explicitly stated – in preliminary rulings issued in disputes between individuals – that certain national provisions were contrary to the directive, and therefore should not be applied by national courts. At the same time, in several cases Court acknowledged the so-called "incidental direct effect" of directives. On the basis of this approach, concepts were formulated in the legal scholarship for resolving apparent inconsistencies in the jurisprudence of the Court of Justice by separating the application of the principle of primacy from the principle of direct effect.[23]

It was only after some time that the Court of Justice clarified that in the context of a dispute between individuals regarding the provisions of a national law falling within the scope of application of an EU directive, the application of national provisions could not be refused because of their incompatibility with the directive if such refusal led to an individual who was one party to the proceedings obtaining a benefit not provided for in the national provisions "normally" applicable for the adjudication of a case, while at the same time charging the other party with an obligation under other provisions of national law which were in compliance with the directive.[24] It follows from the case law that in such circumstances a finding that a provision of national law is incompatible with a provision of the directive not only cannot give rise to the substitution effect in the disputes between individuals (meaning that instead of or in addition to national law a provision of a directive is included in the legal basis for deciding the case), but it cannot have an exclusionary effect either (meaning that national provisions incompatible with

[21] Case C-91/92, *Paola Faccini Dori v. Recreb Srl,* EU:C:1994:292, para. 20 – in the context of the right of cancellation which could not be invoked in proceedings between a consumer and a trader.

[22] Case C-122/17, *David Smith v. Patrick Meade and Others,* EU:C:2018:631, para. 45 and cases referred therein.

[23] M. Szpunar, *Bezpośredni skutek prawa wspólnotowego – jego istota oraz próba uporządkowania terminologii* [Direct effect of community law – its essence and the attempt to organize terminology], 2 Europejski Przegląd Sądowy 4 (2005); K. Lenaerts, T. Corthaut, *Of birds and hedges: the role of primacy in invoking norms of EU law*, 31(3) European Law Review 287 (2006).

[24] Case C-144/04, *Werner Mangold v. Rüdiger Helm,* EU:C:2005:709 – conclusion of a contract for indefinite duration instead of a fixed-term contract; Case C-555/07, *Seda Kücükdeveci v. Swedex GmbH & Co. KG.,* EU:C:2010:21 – a longer notice period resulting from taking into account the length of employment before the age of 25; Case C-351/12, *OSA,* EU:C:2014:110 – An obligation to pay a licence fee to a collecting society for making available to guests, through the tv sets in hotel rooms, works to which that society was entitled.

the directive are removed from the legal basis of the decision). However, that position can be treated as a fairly obvious consequence of the judgment in the *Faccini Dori* case – since if it is not possible to directly acquire a right against another individual on the basis of the directive itself, such right cannot be acquired indirectly either. The acquisition of such a right could result from the modification of the legal basis for deciding the case by removing from it the "normally" applicable national provisions contrary to the directive, and basing the decision on other "normally" applicable provisions of national law or on new provisions of national law which became applicable in the case only after the removal, from its legal basis, of the provisions of national law which, as a rule, had been ("normally") applied to resolve the respective category of disputes. However, it remained unclear, especially in the light of the judgments of the Court of Justice regarding the directive on the notification of technical regulations,[25] whether it was possible to use the directive as a model for control of the compliance of national provisions with EU law even if, as a result of the refusal to apply the national provisions incompatible with EU law, no obligation was imposed on an individual, but the individual, being a party to the proceedings, was deprived of a right he/she had been entitled to under national law or, for instance, the procedural situation of the other party was improved (e.g. as would be the case for KRUS in the *Pawlak* case by declaring that the appeal had been lodged within the time limit).

In the period between referring the request for a preliminary ruling by the Supreme Court and issuing the judgment by the Court of Justice in the case under comment, several important judgments were issued which included clarifications on this issue. In the *Smith*,[26] *Egenberger*[27] and *Cresco Investigation*[28] judgments the Court of Justice adopted the following reasoning: 1) since a directive in itself cannot create obligations for an individual, it cannot be relied on against the individual; 2) since a provision of a directive cannot be relied on against an individual, even a clear, precise and unconditional provision of the directive cannot be applied as such, at all, by the national court in a dispute exclusively between individuals; 3) since a provision of a directive may not be relied on in a dispute between individuals, it may not be used in such a dispute to exclude the application of a member state's rule contrary to that directive either; 4) a national court is obliged to refrain from applying a provision of national law that is contrary to a directive only where that directive is relied on against a member state, the organs of its administration, such as decentralised authorities, or organisations or bodies which are subject to the authority or control of the state or which have been required by a member state to perform a task in the public interest and, for that purpose, possess

[25] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p. 1.

[26] Judgment *Smith,* EU:C:2018:631, paras. 42-45.

[27] Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.,* EU:C:2018:257.

[28] Case C-193/17, *Cresco Investigation GmbH v. Markus Achatzi,* EU:C:2019:43.

special powers beyond those which result from the normal rules applicable to relations between individuals. The only derogation was provided for in Directive 2015/1535 (replacing Directive 98/34) since the "[d]irective, which created neither rights nor obligations for individuals, did not determine the substantive content of the legal rule on the basis of which the national court had to decide the case before it, meaning that the case law to the effect that a directive that has not been transposed may not be relied on by one individual against another was not relevant in such a situation."[29] Thus the Court of Justice finally ended a long-standing discussion that had been present in the legal scholarship, i.e. whether the concept of direct effect should be understood as a subjective direct effect (conferring a right) only, or also an objective one (the mere possibility of relying on a provision of EU law), finally supporting a dual understanding of the (nature) of direct effect, in accordance with the concepts of, among others, S. Prechal.[30]

The case law referred to also explained indirectly how the scope of application of the *Simmenthal* formula should be understood, since it was not clear to date from case law of the Court of Justice whether the national court was obliged to refuse to apply a provision of national law which was contrary to a "directly applicable"[31] provision of EU law or to a "directly effective" one. In addition, the Court of Justice repeatedly referred to the *Simmenthal* formula in the context of the need for national courts to ensure the effectiveness of EU law, without considering whether the provisions from which the normative model was reconstructed in a given case for the purposes of assessing the compliance of national law with EU law was itself directly effective.[32] However, in the light of the *Smith*, *Egenberger* and *Cresco Investigation* judgments, it should be found that the *Simmenthal* formula is applicable only if a provision of EU law is directly effective. This means, firstly, that for the applicability of the principle of primacy a respective provision of EU law must meet the conditions for direct effect (i.e. it must be clear, precise, unconditional and complete). Secondly, such a provision can be applied in a particular case only after considering in which act of EU law it has been included, because some of these acts (e.g. directives) can produce direct effect – irrespective of the way their provisions are worded – only in some proceedings before national courts.

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[29] Judgment *Smith,* EU:C:2018:631, para. 53.

[30] S. Prechal, *Directives in EC Law*, Oxford University Press, Oxford: 2005.

[31] *See e.g.* judgment *Simmenthal,* EU:C:1978:49, para. 17; Case C-378/17, *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v. Workplace Relations Commission*, EU:C:2018:979; para. 36; Case C-384/17, *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v. Budapest Rendőrfőkapitánya,* EU: C:2018:810, paras. 60-62.

[32] *See recently* Case C-234/17, *XC and Others v. Generalprokuratur,* EU:C:2018:853, para. 44; Case C-283/16, *M. S. v. P. S.,* EU:C:2017:104, para. 50; Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd,* EU:C:2017:987, para. 57; Joined cases C-52/16 i C-113/16 *'SEGRO' Kft. v. Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v. Vas Megyei Kormányhivatal,* EU:C:2018:157, para. 46.

### 3.2.2. Exclusion of the horizontal direct effect of EU directives

In addition, in its judgment in the *Pawlak* case the Court of Justice confirmed that the incompatibility of a national provision with an EU directive cannot be relied on effectively by a party which is an emanation of the member state (in *Pawlak*, the pension authority KRUS). The term "relying on" (or "invoking") used by the Court of Justice is not fully adequate, as it implies the initiative of the parties to the proceedings, whereas in the procedural rules of many member states, including Poland, it is the court that selects the relevant legal basis for the claim raised by the party against the factual background referred to (and evidenced) by it. Therefore, it would be better to take the point into account in such a way that the national court cannot apply the EU directive in a dispute between an individual and an emanation of a member state in the sense that it could not use the provisions of the directive as a legal basis to formulate an EU normative model for assessing the compliance of national law with it, if refusing to apply the national provisions because of their conflict with the directive would lead to conferring any benefit on a party being the "emanation of the State" in the meaning of EU law.

However, it does not matter at all whether the omission of national provisions incompatible with the directive leads to the imposition of any obligation on an individual. It should be noted that in the *Pawlak* case, if the application of the national provision was refused in the main proceedings, in the end it would just allow for recognizing that the appeal of the pension authority (the member state) had been lodged within the time limit. This would open up the possibility for the court of the second instance to hear, on substantive grounds, the appeal of that party to the proceedings that was an emanation of the member state. The outcome of the examination of the appeal is not determined in any way by the national provision to which the question in the *Pawlak* case referred. Therefore, following the reasoning of the Court of Justice applied in the judgment in *Smith* case, the individual's situation in terms of substantive law (his right to or, no right to, a pension) would not change in any way.

In addition, it follows from the Court of Justice's judgment in *Pawlak* case that for the purposes of the principles of the application of EU law by national courts in so-called "incidental proceedings" – which involve the resolution of a certain procedural issue where the dispute in fact is not between two parties to the civil proceedings but between one party (in this case a member state) and a court (an authority of a member state) – the *Portgas* rule is not applicable.[33] Therefore, the national court, acting in its procedural role, is not – for the purposes of the principle of direct effect and the principle of primacy – treated as a member state. A national court can have this status only as a party to the proceedings (e.g. in a case concerning the claims of a court employee).

Therefore, the Court of Justice explained in its judgment in the *Pawlak* case that where one party to the civil proceedings was a member state (i.e. an entity which was its emanation) and the other a private entity (an individual), the national court could

[33] Case C-425/12 *Portgás – Sociedade de Produção e Distribuição de Gás SA v. Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território,* EU:C:2013:829, paras. 24-25.

not refuse to apply a national provision if the principle of the EU law's primacy led to any benefit (even if it was procedural only) for the state (or its emanation). However, it remains unclear whether judgments such as *Smith* preclude the possibility of not applying Art. 165(2) KPC in a dispute between individuals on the ground that it is contrary to Art. 7 of Directive 97/67. On the one hand, the *Smith* judgment may result in the view that in disputes between individuals, the provisions of a directive cannot be applied independently at all, in the sense that the provisions thereof cannot constitute a binding legal basis for deciding the case, nor can they serve to remove the national provisions contrary to EU law from that basis. On the other hand however, one could wonder whether the regulation resulting from the first sentence of Art. 7(1) of Directive 97/67 has the status of a rule defining "the substantive content of the legal rule on the basis of which the national court had to decide the case before it", as referred to in paragraph 53 of the judgment in the *Smith* case, since it can be argued that the first sentence of Art. 7(1) of Directive 97/67 does not affect the rights and obligations of the parties to the national legal relationship under substantive law. Should this be the case, by reference to the reasoning of the Court of Justice on the grounds of Directive 2015/1535 (formerly Directive 98/34), it could be assumed that the provision of the directive referred to could be applicable to issuing a decision on formal issues (admittance of an appeal), which would be compatible with EU law. However, it appears that for the reason of systematic coherence such an option should be excluded and it should be assumed, ultimately, that in a dispute between individuals the application of any provision of national law, including a procedural law, cannot be refused due to its incompatibility with an EU directive.

This, in turn, means that the interpretation of the first sentence of Art. 7(1) of Directive 97/67 made by the Court of Justice in its judgment in the *Pawlak* case would have a very limited application in practice if the national court held that it could not interpret, in conformity with EU law, the national procedural provision conferring a special right on the designated postal operator in a manner incompatible with EU law.

### 3.3. The limits of the duty to interpret national law in conformity with EU law from the perspectives of the Court of Justice and the referring court

Taking the above into consideration, the judgment in *Pawlak* case deserves analysis also, and perhaps above all, because of the way in which the effectiveness of EU law in the national legal order is ensured by a national court fulfilling its duty of interpretation in conformity with EU law. Interpretation may give rise to a providing a different meaning to a national provision. As a result of such an interpretation in conformity with EU law, a party to the main proceedings may acquire rights and where an obligation is imposed on [that party] which would not bind an individual, under an "ordinary" (simple, mostly linguistic) interpretation. Moreover, the status of the party to the proceedings as an individual or a member state is not relevant. Therefore, the interpretation of national law in conformity with EU law can be made both in favour of and to the detriment of individuals and a member state (or its emanation).

The judgment in and of itself does not bring much new to the understanding of the duty to interpret national law in conformity with EU law. However, what draws attention is the specific dialogue in that respect between the national court and the Court of Justice. In one of the questions referred for a preliminary ruling, the Supreme Court emphasised that if the Court of Justice found that the rule provided for in that provision was a special right contrary to Directive 97/67, then it could not interpret Art. 165(2) KPC in conformity with EU law by applying ordinary interpretative rules recognised in national law. In the preliminary assessment of the Supreme Court, an interpretation of Art. 165(2) KPC in conformance with EU law would entail the need to give to this provision a completely different meaning than that resulting from its literal interpretation, since the provision literally states that only "posting a procedural document at a Polish post office of the operator obliged to provide a universal service [...] is equivalent to lodging it with the court", while EU law infers that "posting a procedural document at a Polish post office of any operator entitled to provide a universal postal service [...] is equivalent to lodging it with the court." In addition, in the reference for a preliminary ruling, the Supreme Court pointed out that in accordance with national law the provisions of a procedural law are subject to a restrictive interpretation, whereas the interpretation of Art. 165(2) KPC in conformity with EU law would require a broad interpretation.

In this context, it should be noted that the Court of Justice in its judgment in the *Pawlak* case explicitly accepted the limits of interpretation in conformity with EU law, which the referring court had drawn attention to in its reference for a preliminary ruling. According to settled case law of the Court of Justice, the prohibition against interpreting national law *contra legem* is such a limit, justified by the principle of legal certainty.[34] This general principle of EU law is one of the barriers to the principle of effectiveness.[35] The principle of legal certainty also implies the admissibility of the introduction by the national legislator of provisions regarding the time limits for appeals and the accompanying procedural time limits. The former are intended to prevent the risk of undermining the permanence of legal relationships shaped by acts of the individual application of law. The latter are intended for the purposes of procedural economy and the proper administration of justice, thus enforcing the right of the parties to have their case heard without unjustifiable delay. The rules regarding procedural time limits in EU proceedings have the same function.[36] Thus, the national provisions containing such a rule as Art. 165(2) KPC have been recognised by the Court of Justice as serving to ensure the principle of legal certainty.[37] In turn, such a qualification justified the acceptance by the Court of Justice of the impossibility to

[34] Judgment *Pawlak*, para. 85 and cases referred there.

[35] D. Kornobis-Romanowska*, Pewność prawa w UE. Pomiędzy autonomią jednostki a skutecznością prawa UE* [Legal certainty in the EU. Between autonomy of individuals and effectiveness of EU law], C.H. Beck, Warszawa: 2018, pp. 142-146.

[36] Judgment *Pawlak*, para. 87.

[37] *Ibidem*, para. 88.

interpret, in conformity with EU law, a national procedural provision intended for the implementation of the values falling within the regulatory scope of the principle of legal certainty.

The Supreme Court, when deciding the case after obtaining the response of the Court of Justice in its *Pawlak* judgment, did not make use of the permission of the Court of Justice to limit the principle of the effectiveness of EU law by the principle of legal certainty and adopt a restrictive interpretation of the national procedural law in question. In its decision resolving the problem of lodging an appeal within the time limit through an undesignated operator,[38] the Supreme Court found that the interpretation of Art. 165(2) KPC in conformity with EU law was admissible and proper and held that this provision should be understood as meaning that "the posting of a procedural document through a postal operator other than the designated operator is also equivalent to lodging the procedural document with the court." A similar change of opinion by the Supreme Court regarding the limits of the interpretation of national law in conformity with EU law has already occurred. In the question referred for a preliminary ruling in *Polkomtel*,[39] the Supreme Court also expressed doubts as to the admissibility of an interpretation of the provision of national telecommunication law in conformity with EU law. However, in the judgment[40] issued after the preliminary ruling had been issued by the Court of Justice, the Supreme Court finally interpreted the national provision in conformity with EU law, according to the guidelines of the Court of Justice. However, it did not explain in more detail what interpretative measures were used to achieve such an effect. The adjudicating panel of the Supreme Court in the main proceedings in the *Pawlak* case behaved differently, and its reasoning could be of interest to a reader interested in the limits of the interpretation of national law in conformity with EU law in the practical operation of national courts.

According to the classic formula that had already been used by the Court of Justice, the interpretation in conformity with EU law should be "based on interpretation methods recognised in that law" and with their assistance "decide whether, and to what extent, the interpretation of a provision of national law can be made in accordance with a respective directive without interpreting that national provision *contra legem*."[41] Whereas in the Polish legal writings it has been argued that should it be impossible to ensure a situation of compliance between national law and EU law by a linguistic interpretation, the possibility of departing from that interpretation's result (incompatible with EU law) by the application of the methodology offered by the concept of a derivative interpretation of law could be considered.[42]

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[38] Order of the Supreme Court (seven judge chamber) of 29 August 2019, case III UZP 3/17.

[39] Case C-397/14, *Polkomtel sp. z o.o. v. Prezes Urzędu Komunikacji Elektronicznej,* EU:C:2016:256.

[40] Judgment of the Supreme Court of 9 June 2016, case III SK 28/13.

[41] Judgment *Pawlak*, para. 84.

[42] A. Sołtys, *Obowiązek wykładni prawa krajowego zgodnie z prawem unijnym jako instrument zapewniania efektywności prawa Unii Europejskiej*, Wolters Kluwer, Warszawa: 2015, pp. 539-542 and the literature referred therein.

The methodology applied by the Supreme Court shows that the starting point for departing from the results of the linguistic interpretation of a procedural provision is the EU normative model, as decoded by the Court of Justice in its judgment. Undoubtedly, the interpretation of EU law by the Court of Justice in response to a question referred by a national court, which clearly shows the contradiction between the national solution and EU law, is a direct encouragement for the national court to explore more thoroughly the admissibility of modifying the results of the "ordinary" interpretation. It is apparent from the *Pawlak* judgment that Art. 165(2) KPC is contrary to Art. 7(1) of Directive 97/67. This noncompliance justifies the assumption, based on the principle of primacy confirmed in Art. 91(3) of the Constitution of the Republic of Poland, according to which a norm of national law (decoded after "ordinary" interpretation) is contrary to a norm of EU law placed higher in the hierarchy of sources of law of that legal order. Pursuant to the national constitutional rule and the *Simmenthal* rule such national norm should not be applied, absent any limitations on the direct effect of directives. However, departing from the results of the linguistic interpretation of Art. 165(2) KPC is justified in such a situation by the same systemic considerations (conflict of norms at EU/national level). It seems that an analogous approach should be taken in all cases of the *acte eclairé* doctrine's application. In particular, the interpretation of the same provision of EU law in response to a question raised by a court from another member state would also entitle the Polish court to apply such a measure.

Next, the clarity as to the EU normative model makes it possible to take into account other arguments, starting with the purpose for the introduction of this particular national rule. The Supreme Court ruled that it was introduced into national law to implement an EU directive properly and to enforce an earlier judgment of the Court of Justice.[43] That justifies departing from the linguistic interpretation of the provision of national law, since the intention of the legislator was to introduce a rule which was in full compliance with EU law. However, the judgment in *Pawlak* case, issued subsequently, showed that this intention was not fully and correctly implemented, because the national legislator had misread the EU normative standard resulting from Art. 7(1) of Directive 97/67. It was thus up to a national court to correct this legislative error.

Another argument that the Supreme Court took into account when extending the limits of admissibility of an interpretation in conformity with EU law is the national (internal) systemic interpretation and the assessment of the rationality of the interpreted provision. In Polish procedural laws, the privilege of a designated operator had been introduced simultaneously into all three procedures (civil, criminal and court-administrative procedure), and subsequently it was withdrawn from the criminal procedure only. In the context of that change, the legislator assumed that this privilege no longer had any rational justification. Also, during the proceedings in the *Pawlak* case, as was noted by the Court of Justice itself, the Polish Government was not able

[43] Case C-325/11 *Krystyna Alder and Ewald Alder v. Sabina Orlowska and Czeslaw Orlowski,* EU: C:2012:824.

to provide any rational justification for maintaining the special right at issue in that case. This finding allowed the Supreme Court to consider the solution adopted in Art. 165(2) KPC (interpreted strictly) as being unreasonable.

In consequence, a national court should consider whether the application of a strictly linguistically interpreted provision will not lead to issuing an unfair decision. It results from the Supreme Court's decision that it would be unfair to dismiss the appeal of the pension authority (KRUS) as lodged after the time limit, because the use of a postal operator other than the designated operator resulted from the imposition on the pension authority, by the national legislator, of an obligation to select a postal operator providing services to that authority under a tender procedure. That tender has been won by an undesignated operator. As a result, maintaining the results of the linguistic interpretation of Art. 165(2) KPC would lead to an unjustified deterioration of the procedural situation of public institutions using the services of an undesignated operator. They would be placed in a situation wherein the time limit for bringing any procedural document would have be reduced by the time needed by an undesignated operator to submit the procedural document to the court's office before the expiry of the time limit provided for in the procedural law. Therefore, the principle of equality of the parties to the proceedings, which is a guiding principle of civil procedure, would be violated. The reference to the principle underlying the national procedure resulted in the inability to refer to constitutional values, such as the right to a court or prohibition of discrimination in cases involving state authorities.

The last argument to be addressed when deviating from the results of the linguistic interpretation of a national provision falling within the scope of the directive is to establish the actual function of the national rule in the context of the applicable general principles. The Court of Justice treated Art. 165(2) KPC as a provision implementing the principle of legal certainty, the respect for which justifies the introduction of limitations on the principle of effectiveness of EU law. However, the provision should be regarded not so much as aimed at the introduction of time limits to enforce the requirement of legal certainty in relation to lodging the appeal remedies, but rather as a provision aimed at facilitating public access to court. This provision transforms *de iure* each office of the designated operator into an administrative office of the competent court. Since no rational and noteworthy objective arguments for maintaining the privileged status of the designated operator have been raised, the suggestion of facilitating the individuals' access to court additionally authorises the extension, by means of a non-linguistic interpretation, of the solution provided for in Art. 165(2) KPC to include other postal operators.

## CONCLUSIONS

It results from the above considerations that the *Pawlak* judgment rendered by the Court of Justice and the subsequent ruling of the Polish Supreme Court are noteworthy for several reasons. Firstly, this is so because of the interpretation of the term "exclusive

or special rights" within the meaning of Art. 7(1) of Directive 97/67 and Art. 106(1) TFEU. The Court of Justice, in answering the question referred for a preliminary ruling by the Polish Supreme Court, held that an exclusive or special right, within the meaning of the above-mentioned provisions of EU law, referred to granting a special procedural significance to the documents posted at the post offices of one postal operator, to the exclusion of all other operators. Thus the Court of Justice confirmed that the limitation of the procedural autonomy of member states could involve not only the principles of equivalence, of effectiveness or of non-discrimination on the grounds of nationality, but also a provision of EU secondary law requiring member states, as in this case, to regulate the market of postal services appropriately.

Secondly, these rulings further clarify the limits of the judicial application of directives and the interrelationships between the principles of direct effect and primacy. It must be assumed that the national court is not under an obligation to disapply national rules contrary to EU directives if such a disapplication leads to a result favourable for the Member State or its emanation.

Thirdly, a comprehensive use of a set of arguments resulting from the application of different interpretative tools allows national courts to defend a conforming interpretation of a national rule which otherwise – and at a first glance – should be considered as *contra legem*.

Last but not least, the *Pawlak* case deserves attention because of the dialogue between the Court of Justice and the Supreme Court dealing with the main proceedings. Firstly, the Supreme Court, before referring the questions for a preliminary ruling, reviewed its case law and found an inability to interpret the national law in conformity with EU law. This noncompliance justifies the assumption based on the principle of primacy confirmed in Art. 91(3) of the Constitution of the Republic of Poland, according to which a norm of national law (decoded after "ordinary" interpretation) is contrary to a norm of EU law placed higher in the hierarchy of sources of law of that legal order. Pursuant to the national constitutional rule and the *Simmenthal* rule, such a national norm should not be applied, absent any limitations on the direct effect of directives. It thus proposed a solution involving the application of the so-called *Jonkmann* rule. Next, the Court of Justice first confirmed the previous position regarding the possibility of relying on EU directives' provisions against individuals, and it subsequently accepted that the interpretation of national law in conformity with EU law – which could be used to remove a conflict of a national provision with EU law – might be subject to limitations (as indicated by the Supreme Court). However, in the end the Supreme Court, having regard in particular to the need to ensure the effectiveness of EU law, reconsidered the possibility of interpretation of the national procedural provision in question in conformity with EU law, and made such an interpretation. Thus it was the need to ensure the effectiveness of EU law that convinced the national court to overcome national limitations in applying the interpretation of national provisions in conformity with EU law.