

CASE LAW

A. Court of Justice

EU judicial independence decentralized: *A.K.*

Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and others v. Sąd Najwyższy (the independence of the Disciplinary Chamber of the Polish Supreme Court)*, Judgment of the Court of Justice (Grand Chamber) of 19 November 2019, EU:C:2019:982

1. Introduction

The judgment in *A.K. and others v. Sąd Najwyższy* was eagerly awaited as another “red line”¹ for the EU rule of law² drawn during a “defining moment in the history of integration”.³ The judgment related to the fundamental issues of trust⁴ and EU values.⁵ It provided a test for assessing the independence of national courts in their capacity as EU courts. It responded to questions referred by a three-judge panel of the Polish Supreme Court relating to judicial reforms in Poland, deemed undemocratic,⁶ unconstitutional,⁷ and

1. von Bogdandy et al., “Guest Editorial: A potential constitutional moment for the European rule of law: The importance of red lines”, 55 *CML Rev.* (2018), 994–995.

2. Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117; Case C-216/18 PPU, *Minister for Justice and Equality*, EU:C:2018:586; Case C-441/17, *Commission v. Poland (Białowieża Forest)*, EU:C:2018:255; Case C-619/18, *Commission v. Poland (Indépendance de la Cour suprême)*, EU:C:2019:615.

3. Lenaerts, “New horizons for the rule of law within the EU”, 21 *GLJ* (2020), 34.

4. For more on trust as a framework for the EU rule of law, see von Bogdandy, “Ways to frame the European rule of law: Rechtsgemeinschaft, trust, revolution, and Kantian peace”, 14 *EuConst* (2018), 692–699.

5. von Bogdandy, “Tyranei der Werte? Probleme und Wege europäischen Schutzes nationaler Rechtsstaatlichkeit”, MPIL Research Paper Series No. 2019-04 (Heidelberg, 2019), 10.

6. Sadurski, *Poland’s Constitutional Breakdown* (OUP, 2019), Chs. 1 and 3.

7. Wyrzykowski, “The vanishing constitution”, (2018) *European Yearbook on Human Rights*, pp. 16–17.

“undermining judicial independence”⁸ by many commentators. The referring court’s concerns specifically related to a new regime of disciplinary action against judges. In this regime, the Minister of Justice (who is now also the Prosecutor General⁹) has been given the authority to appoint disciplinary investigators from among judges and give them binding instructions.¹⁰ He also assigns judges to first-instance disciplinary courts.¹¹ Furthermore, in 2018, the parliamentary majority selected judges to fill the elective seats at the National Council of the Judiciary (“NCJ”),¹² even though these judges are supposed to be elected by their peers¹³ under well-established constitutional interpretation.¹⁴ These judges were moreover selected in a non-transparent procedure from among those having close connections to the Minister of Justice or those seconded to his Ministry.¹⁵ Subsequently, the new NCJ nominated the candidates to the newly established¹⁶ Disciplinary Chamber of the Supreme Court (“DC”), the highest instance in judicial disciplinary matters.¹⁷ New disciplinary investigators are now prosecuting rank-and-file

8. Venice Commission Opinion No. 977/2019 of 16 Jan. 2020, para 59. See also arguments raised by the Venice Commission regarding the earlier stages of judiciary reforms in Poland (Opinion No. 904/2017).

9. Act of 28 Jan. 2016 – Law on the Prosecutor’s Office, *Polish Official Journal* (“OJ”) 2017, 177.

10. Art. 112b of the Act of 27 July 2001 – Law on Courts of General Jurisdiction, OJ 2019, 52.

11. Art. 110a and Art. 110c, *ibid.*

12. Act of 8 Dec. 2017 Amending the Act on the National Council of the Judiciary and Others Acts, OJ 2018, 3. See more on history and competences Śledzińska-Simon, “The rise and fall of judicial self-government in Poland: On judicial reform reversing democratic transition”, 19 GLJ (2018), 1847–1851.

13. As was observed: “Until 2017, the 15 judicial members in the Council were allocated as follows: 2 members were judges of the Supreme Court; 2 members – the judges of administrative courts; 2 members – the judges of appellate courts; 8 members – the judges of regional and district courts; and, 1 member – a judge of a military court. As a result, judges of higher courts were overrepresented, while the district court judges did not have an adequate number of representatives (for example, in the last term of the NCJ there was only one judge from the district court).” Śledzińska-Simon, *op. cit. supra* note 12, 1850.

14. See e.g. Garlicki, “Uwagi do art. 187” in Garlicki (Ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 5 (Wydawnictwo Sejmowe, 2005), p. 5; Naleziski, “Uwagi do art. 187” in Tuleja (Ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 1st ed. (Wolters Kluwer, 2019), p. 558. See also Case K 25/07, judgment of 18 July 2007, Constitutional Tribunal.

15. For more, see Grabowska-Moroz, Łakomicz, “‘Data Wars: The Phantom Menace’ – personal data protection in the context of rule of law backsliding”, *RECONNECT BLOG* (10 Feb. 2020): <reconnect-europe.eu/blog/data-wars-the-phantom-menace-personal-data-protection-in-the-context-of-rule-of-law-backsliding/> (all websites last visited 20 May 2020).

16. Act of 8 Dec. 2017 on the Supreme Court, OJ 2018, 5.

17. The DC acts as a first instance and second instance disciplinary court for the Supreme Court judges, and as a second instance court for other judges from courts of general jurisdiction.

judges for public statements in defence of judicial independence¹⁸ or even the substance of their judicial decisions, including making preliminary references to the ECJ.¹⁹ The new disciplinary regime puts at risk the public appearance of independence of the entire judiciary, as any judge may currently fear prosecution by the executive for politically unpopular decisions. On top of that, the NCJ still nominates candidates to vacant judicial offices, who are then appointed by the President of Poland. The lawfulness of a few hundred recent judicial appointments, and consequently an immense number of rulings, may be called in question. At the same time, the current parliamentary majority has no intention of withdrawing from its “reforms”.²⁰

In the annotated judgment, the ECJ delivered much-awaited guidance as to whether and how domestic courts should verify the independence of other domestic courts, such as the DC. At first, the judgment was deemed disappointing by some commentators,²¹ while government representatives portrayed it as a step back in the ECJ’s stance on the Polish judicial reforms.²² The ECJ did not assess the independence of the DC on its own. Instead, it elaborated a test for the “appearance” of judicial independence, drawn from the case law of the European Court of Human Rights (“ECtHR”).²³ The referring court and an extended formation of the Supreme Court subsequently applied the test, finding insufficient appearance of independence of the DC and, indirectly, of another new chamber recently added to the Supreme Court.

We will argue that in contrast to a bold stance by Advocate General Tanchev, the ECJ demonstrated sensible self-restraint. It did not prescribe

18. Berendt, “In Poland, a stubborn defender of judicial independence”, *The New York Times* (10 Jan. 2020).

19. See further the report of the Polish Judges’ Association “Iustitia” and the “Lex Super Omnia” Association of Prosecutors, Kościerzyński (Ed.), “Justice under pressure – repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015–2019”, Warsaw 2020: <ruleoflaw.pl/wp-content/uploads/2020/02/Raport_EN.pdf>; the report of Helsinki Foundation of Human Rights, Szuleka et al. (Eds.), “The time of trial. How do changes in justice system affect polish judges”, Warsaw 2019, <www.hfhr.pl/wp-content/uploads/2019/07/czas-proby-EN_EMBARGO_24072019.pdf>.

20. Appelbaum, “The disturbing campaign against Poland’s judges”, *The Atlantic* (28 Jan. 2020); Berendt, “Polish government pushes legislation to tighten control over judges”, *The New York Times* (29 Dec. 2019).

21. As noted by Grabowska-Moroz, Jaraczewski, “High expectations: The CJEU decision about the independence of Polish Courts”, *Verfassungsblog* (19 Nov. 2019), <doi.org/10.17176/20191120-001955-0>.

22. Wójcik, “Ziobro nie zrozumiał wyroku TSUE. Piłka jest po polskiej stronie, ale arbiter podał europejskie reguły gry”, *OKO Press* (19 Nov. 2019), <oko.press/ziobro-nie-zrozumial-wyroku-tsue-pilka-jest-po-polskiej-stronie-ale-arbiter-podal-europejskie-reguly-gry/>.

23. ECtHR, Appl. No. 22107/93, *Findlay v. the United Kingdom*, judgment of 25 Feb. 1997, para 73; Appl. No. 54723/00, *Brudnicka and Others v. Poland*, judgment of 3 March 2005, para 38; Appl. No. 23614/08, *Henryk Urban and Ryszard Urban v. Poland*, judgment of 30 Nov. 2010, paras. 45–46.

ready-made institutional solutions aimed at securing judicial independence. It thus avoided the risk of a judge-made harmonization of domestic judicial organization based on scant and indeterminate Treaty provisions on the matter.²⁴ At the same time, it shouldered the referring court with a difficult task to make a discretionary assessment of the anti-constitutional legislation altering the judicial organization in Poland.²⁵ Under the ECJ's test, the referring court should weigh and compare the relevance of legal and factual circumstances that enhance or impair the appearance of the DC's independence in the eyes of reasonable individuals. The test offers an imperfect, although not unverifiable (i.e. not arbitrary) – and, perhaps, the only available – method for assessing the organization of judiciaries across the EU. Most importantly, it allows the existing plurality of judicial models to be maintained. Interestingly, while applying the ECJ's test, the Polish Supreme Court incidentally reviewed the constitutionality of the legislative framework governing judicial appointments.²⁶ It held that the DC and other judges appointed to the Supreme Court after 2018 do not guarantee sufficient appearance of independence, so they should abstain from adjudication. The Supreme Court also demonstrated self-restraint. It did not recuse hundreds of recently appointed judges of lower courts. Instead, it passed the ball to the lower courts, and to the parties to individual cases pending before these courts, who must now strive to prove the insufficient appearance of judicial independence on a case-by-case basis.

24. On the problem of so-called “over-constitutionalization” in the EU, see Davies, “Does the Court of Justice own the Treaties? Interpretive pluralism as a solution to over-constitutionalisation”, 24 ELJ (2018), 358; Grimm, “The democratic costs of constitutionalisation: The European case”, 21 ELJ (2015), 461.

25. This task was all the more difficult for the Supreme Court after the unconstitutionally composed Constitutional Tribunal had confirmed the constitutionality of crucial parts of the judicial reforms. The Constitutional Tribunal had confirmed the constitutionality of its own composition, the premature dissolution of the previous NCJ, the deprivation of judges of their right to the judicial review of NCJ's decisions, and the new rules regarding the election of the First President of the Supreme Court (judgments of 20 June 2017, Case K 5/17; 24 Oct. 2017, Case K 1/17; 25 March 2019, Case K 12/18; 24 Oct. 2017, Case K 3/17; 17 July 2018, Case K 9/17).

26. According to the system of constitutional review envisaged by the Polish Constitution, in case of doubts as to the constitutionality of the legislative framework for judicial appointments, the Supreme Court, any other court or the independent NCJ should refer the doubts as to constitutionality to the Constitutional Tribunal. As a result of the Tribunal's ruling, the unconstitutional legislative framework would become void with *erga omnes* effect. The ruling of the Supreme Court formally produces only *inter partes* effect, but may be followed by lower courts due to its persuasiveness, the Supreme Court's authority, and the need for legal certainty.

2. The factual and legal background

By late 2016, the current parliamentary majority packed the Constitutional Tribunal with their appointees, blatantly breaching the Constitution.²⁷ The new judges elected the Tribunal's new President also in an unlawful procedure.²⁸ More recently, disturbing information came to light about, among other things, the new President's manipulations in case allocation.²⁹ These irregularities led many commentators and former constitutional judges to believe that the Tribunal no longer fulfils the function of an independent guardian of the Constitution.³⁰

Having captured the Constitutional Tribunal, the body which normally puts a halt to any unconstitutional legislation, the parliamentary majority carried out controversial judicial reforms aimed at,³¹ in brief, the increased control of

27. As clearly stated by the Constitutional Tribunal (Case K 34/15, judgment of 3 Dec. 2015). For more on changes regarding the Constitutional Tribunal and the consequences, see Garlicki, "Die Ausschaltung des Verfassungsgerichtshofes in Polen? (Disabling the Constitutional Court in Poland?)" in Szmyt and Banaszak (Eds.), *Transformation of Law Systems in Central, Eastern and South-Eastern Europe in 1989–2015*, (Gdansk University Press, 2016), pp. 63–79; Sadurski, "Polish constitutional tribunal under PiS: From an activist court, to a paralysed tribunal, to a governmental enabler", 11 *HJRL* (2018), 63–84; Łętowska and Wiewiórowska-Domagalska, "A 'good' change in the Polish Constitutional Tribunal?", (2016) *Osteuropa Recht*, 79; Chmielarz-Grochal and Sułkowski, "Appointment of judges to the Constitutional Tribunal in 2015 as the trigger point for a deep constitutional crisis in Poland", (2018) *Przegląd Konstytucyjny*, 93–99; Radziejewicz, "On legal consequences of judgments of the Polish Constitutional Tribunal passed by an irregular panel", 31 *Review of European and Comparative Law* (2107), 45–64.

28. The Tribunal's current president was elected with a violation of the principles established by the Constitutional Tribunal (Case K 44/16, judgment of 7 Nov. 2016). Ziółkowski, "Przywracanie praworządności w TK po kryzysie konstytucyjnym: wybór i powołanie Prezesa TK", Warsaw 2019: <archiwumosiatynskiego.pl/images/2019/10/AO_Prezes-TK_ekspertyza_MZio%CC%81%C5%82kowski-1.pdf>.

29. Ziółkowski, "Zmiany składu orzekającego Trybunału Konstytucyjnego" in Łakomicz (Ed.), *Funkcjonowanie Trybunału Konstytucyjnego w latach 2014–2017* (Batory Foundation, 2018).

30. The open letter of 10 Feb. 2020 of 22 retired judges of Poland's Constitutional Tribunal: <ruleoflaw.pl/constitutional-tribunal-has-virtually-been-abolished-announce-retired-judges/>.

31. It was called "Statutory anti-constitutionalism". Bernatt and Ziółkowski, "Statutory anti-constitutionalism", 28 *Washington Int. L.J.* (2019), 487. According to the authors "counterintuitively – an unconstitutional result marking an illiberal transformation may also be achieved by means of a series of statutory amendments outside the constitutional amendment procedure. In other words, a change of the constitutional order may be achieved by way of statute. This process of achieving an unconstitutional result via statute can be described as 'statutory anti-constitutionalism'. In particular, by means of ordinary statutes the ruling majority tries to take control over guardianship of the constitutional order (i.e., the Constitutional Tribunal) and the ordinary judiciary. Once this is achieved, the government can adopt laws that are unconstitutional or act beyond the limits imposed by law, endangering the rule of law and fundamental rights", 493.

the judicial branch by the executive or legislative branches to the extent that judicial independence might be at risk.³² At the core of these reforms lay the Minister of Justice's supervision over the disciplinary actions against judges³³ and over the court presidents,³⁴ as well as the election of the NCJ by the parliamentary majority rather than judges themselves. A particular innovation was the DC, a last-instance court in disciplinary matters against judges, and importantly, also other matters pertaining to the status of the Supreme Court judges, bestowed with an unprecedented organizational autonomy, separate from the rest of the Supreme Court and its First President.³⁵

The main proceedings in the annotated case concerned three joined cases brought by Supreme Court and Supreme Administrative Court judges. These judges had reached the recently lowered retirement age, but wished to remain in service. According to the legislation in force at that time, but later deemed incompatible with EU law by the ECJ,³⁶ these judges could declare their wish to remain in service to the President of Poland. Their declarations were to be evaluated, based on unspecified criteria, by the NCJ. One of the said judges received a negative opinion, and the remaining two refused to submit the declarations, so the President informed all of them of their retirement. The judges appealed to the Supreme Court's Chamber of Labour Law and Social Security. They alleged a breach of their judicial independence under Article 19(1) TEU and Article 47 of the EU Charter of Fundamental Rights, as well as age-based discrimination prohibited by Article 9(1) of the Council Directive on equal treatment in employment and occupation.³⁷

The referring court noted that under the new law on the Supreme Court, the DC should hear the case.³⁸ However, having regard to the controversial legal and factual circumstances surrounding its establishment, the referring court had doubts as to whether the DC can even be deemed an independent court. The referring court noted, in particular, that the DC's main appointing body –

32. Sadurski, op. cit. *supra* note 6, Ch. 3.

33. *Supra* notes 10, 11 and 19.

34. Mikuli, "Tug of war between the judiciary and the Minister of Justice: On court administration in Poland" in Mikuli (Ed.), *Current Challenges in Court Administration* (Eleven International Publishing, 2017), pp. 167–186.

35. See further, Mikuli, "The right to a fair trial in the context of new regulations concerning the judicial power in Poland" in Novaković and Kostić (Eds.), *The Position of the Individual in Modern Legal Systems* (Institute of Comparative Law in Belgrade, 2019), pp. 69–77.

36. Case C-192/18, *Commission v. Poland*, EU:C:2019:924.

37. Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16–22.

38. When the case started before the Supreme Court, the DC had not yet been fully appointed. The claimants did not want to wait for the unconstitutional appointments and appealed to the Labour Law and Social Security Chamber instead of the DC.

the NCJ – had close links to the executive, especially the Minister of Justice. It also noted the non-transparent and hasty selection of candidates to the DC, and the lack of action by the NCJ in defence of judicial independence. The referring court, therefore, asked the ECJ whether the DC could be considered an independent court or tribunal within the meaning of EU law and, in case of a negative answer, whether the referring court should disregard the national provisions conferring upon the DC the jurisdiction to examine the cases at issue and hear them itself. Due to the key role played in the current regime of disciplinary actions by the DC and its potential impact on the appearance of independence of the entire judiciary, the case was subject to the expedited procedure.

3. Opinion of the Advocate General

According to Advocate General Tanchev, what was crucial in the case was the independence of the NCJ as a body having a decisive impact on the DC's composition.³⁹ He attempted to infer from the ECtHR case law normative standards regarding institutional and procedural arrangements that may objectively be deemed sufficiently protective of judicial independence. He noted that judicial councils, although highly diversified and not established in all the EU Member States, are usually essential in de-politicizing judicial appointments. Relying on international guidelines, he held that at least the majority of seats in a judicial council should be reserved for judges elected by their peers to avoid external political pressures.⁴⁰ He also found that while a Member State enjoys discretion to choose whether to establish a judicial council or not, if it does establish the council, it must follow the said minimal institutional design.⁴¹

Referring to the Polish context, Advocate General Tanchev found that the election of the NCJ's judicial members by the parliamentary majority entailed a possible political influence on the NCJ's subsequent actions.⁴² Consequently, the DC – as a body whose members were *de facto* selected by the NCJ – does not offer sufficient guarantees of independence.⁴³ Advocate General Tanchev highlighted additional reasons why one may doubt the DC's independence, such as its extensive organizational autonomy within the Supreme Court and its exclusive jurisdiction to deal with delicate matters

39. Opinion of A.G. Tanchev in Joined Cases C-585/18, C-624/18 & C-625/18, *A.K. and Others v. Sąd Najwyższy*, EU:C:2019:551.

40. *Ibid.*, para 126.

41. *Ibid.*, paras. 129 & 143.

42. *Ibid.*, para 134.

43. *Ibid.*, para 137.

relating to the status of Supreme Court judges and the disciplinary action against judges.⁴⁴

4. Judgment of the Court

After dealing with a few issues pertaining to jurisdiction and admissibility,⁴⁵ the ECJ recalled that the right to effective judicial protection is guaranteed by Article 47 EUCFR, that this right must be interpreted consistently with the case law of the ECtHR under Article 6 ECHR, and that the requirement of judicial independence forms part of this right's "essence".⁴⁶ The ECJ also recalled its well-established case law on the two aspects of judicial independence. The external aspect requires that the court concerned exercise its functions wholly autonomously, without being subordinated or subject to any hierarchical constraint, without taking external instructions, and be protected against external pressure.⁴⁷ The internal aspect – which is "linked to impartiality", as the ECJ puts it – seeks to ensure an equal distance of the judges from the parties to the proceedings and their interests.⁴⁸ The ECJ case law requires in this respect rules as to "the composition of the judicial body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it".⁴⁹

44. *Ibid.*, para 139.

45. In particular, after the preliminary reference was sent, the Polish legislature adopted new legislation under which the retired judges would re-enter active service and they should be considered as having continued without interruption. In this way, Poland executed interim measures imposed by the ECJ in another case (Orders of 19 Oct. 2018 and 17 Dec. 2018, Case C-619/18 R, *Commission v. Poland*, EU:C:2018:852 and EU:C:2018:1021). Consequently, the case of the first judge (Case C-585/18) was declared inadmissible, as the legal regime under which this judge would have been re-assessed by the NCJ had already been repealed (judgment, paras. 107–109). As regards the cases of the two remaining judges, the ECJ deferred to the view of the referring court which held that the law executing the interim measures only introduced a "legal fiction" as to the continued nature of the applicants' terms of office, rather than confirming that the applicants in fact never took retirement and remained fully in their posts during the entire period. This distinction, according to the referring court, might have consequences for the applicants' rights and obligations in respect of the Supreme Court (judgment, para 96).

46. Judgment, para 120.

47. Judgment, para 121.

48. Judgment, para 122.

49. Judgment, para 123. The ECJ also highlighted that the rules in question must rule out the possibility of direct and indirect influence.

The ECJ approached the application of the said case law in an entirely different way than Advocate General Tanchev. It borrowed explicitly from the case law of the ECtHR a concept of “appearance of independence”.⁵⁰ According to this concept, what one must consider while assessing whether a tribunal is “independent” is the perspective of reasonable observers of court proceedings and whether their possible concerns about the independence of a judicial body can be objectively justified.⁵¹ While Advocate General Tanchev also mentioned the appearance of independence,⁵² the ECJ made this concept a central tenet of its test. To carry out the test for the appearance of independence, according to the ECJ, the referring court should weigh all available arguments pertaining to the composition, appointment and dismissal of the body whose independence is assessed.⁵³ The test does not, therefore, entail a prescription or exclusion of any specific institutional or procedural arrangements. In this respect, the ECJ recalled that Article 6 ECHR does not impose any particular constitutional model of judicial independence. Rather, it must be appraised whether the procedure for the setting up of the DC might give rise to “reasonable doubts in the minds of individuals” as to the actual independence of this body from external factors.⁵⁴

In the remaining paragraphs, the ECJ listed legal and factual circumstances pertaining to the setting up of the DC that the referring court should specifically consider. The ECJ justified the delegation of this task to the referring court by invoking formal limits of its jurisdiction, i.e. the conceptual distinction between the *interpretation* of EU law delivered by the ECJ and its subsequent *application* by the referring courts to the facts of the main proceedings.⁵⁵ The ECJ listed circumstances pertaining both to the NCJ – as the appointing body – and the DC itself. In particular, the ECJ noted that the previous NCJ had been prematurely dissolved. The judicial members of the current one were in turn selected by the parliamentary majority rather than by judges themselves. The ECJ also ordered the referring court to examine serious controversies regarding how the NCJ performs its primary task of protecting judicial independence and whether the NCJ’s acts can be subject to effective judicial review.⁵⁶ The ECJ noted, moreover, that the DC had been set up as an entirely new chamber within the Supreme Court – the judges of which were recruited from outside the Supreme Court –, that the DC was

50. Judgment, para 153.

51. Judgment, para 129.

52. Opinion, para 120.

53. Judgment, paras. 140, 141 & 152.

54. Judgment, para 134.

55. Judgment, para 132.

56. Judgment, paras. 143–145.

granted exclusive jurisdiction in delicate matters of Supreme Court judges' status,⁵⁷ and that it was bestowed with unprecedented organizational autonomy. If the referring court deemed the DC not sufficiently independent, it should disapply the DC's jurisdictional provisions and re-apply its own jurisdictional provisions *previously in force*.⁵⁸

5. Comments

5.1. *The ECJ's self-restraint towards domestic judicial independence*

The annotated ruling is bound to become a landmark, as it confirms the power of domestic courts drawn from Article 47 EUCFR to verify the “appearance of independence” of other domestic courts if the latter could be called to hear cases based on EU law. This decentralized peer review of judicial independence is supposed to guarantee the individual right to an effective remedy and a fair trial before an independent and impartial court in the EU while eschewing an ECJ-led harmonization of judicial organization. In our view, the ECJ refrained from directly assessing the independence of the DC to avoid a signal being sent as to an allegedly preferred model of judicial organization in the EU. The institutional and procedural arrangements for judicial appointments and dismissals vary considerably across the EU.⁵⁹ These arrangements reflect deeply-rooted conceptions of judicial legitimacy, and the balance of power between the executive, legislative and judicial branch.⁶⁰ In this respect, the ECtHR highlights that even though the separation of powers in the context of fair trial rights is gaining growing importance in its case law, it cannot impose any specific constitutional model governing the relationship and interactions between the executive, legislative and judicial

57. At the same time, the retirement age of Supreme Court judges was lowered, which was later deemed contrary to EU law by the ECJ, in Case C-619/18, *Commission v. Poland (Indépendance de la Cour suprême)*.

58. Judgment, para 166, our emphasis. The ECJ authorized the referring court to examine the case itself to avoid a legal vacuum in national provisions on the jurisdiction of the particular chambers of the Supreme Court. It is highly unclear, however, how the ECJ justifies the “resurrection” of previous national provisions, rather than instructing the referring court to look for some general national provisions on default jurisdiction. See, more generally, Dougan, “Primacy and the remedy of disapplication”, 56 CML Rev. (2019), 1459.

59. Regarding the concerns about the ECJ's potential activism in this regard, see von Bogdandy, op. cit. *supra* note 5. It seems, however, that the annotated judgment does not substantiate these concerns.

60. See e.g. Zamboni, “The positioning of the Supreme Courts in Sweden: A democratic oddity?”, 15 EuConst (2019), 668.

branch.⁶¹ Interventions by executive and legislative authorities in the process of judicial appointments, provided for and constrained by law, may help secure the modicum of democratic legitimacy for the judiciary. Moreover, under the well-established case law of the ECtHR, the appointments of judges by executive and legislative authorities do not give rise to reasonable doubts as to judicial independence, if the judges, once appointed, benefit from safeguards against arbitrary dismissals.⁶² In a series of recent cases, the ECtHR found a violation of Article 6 ECHR because national councils of the judiciary were predominantly composed of the representatives of executive and legislative authorities.⁶³ However, in all those cases, the key issue was that councils of the judiciary carried out disciplinary action against judges, rather than acting as judicial appointment bodies. Moreover, the ECtHR did not “require” at least half of the membership of the councils to be composed by judges, but only held that where this is the case, there is a strong presumption of impartiality.⁶⁴ The ECtHR has therefore set standards for the fairness of disciplinary action rather than institutional standards for judicial councils as such.⁶⁵

61. Judgment, para 130. See also ECtHR, *Thiam v. France*, Appl. No. 80018/12, judgment of 18 Oct. 2018, paras. 59 & 62 (and the earlier case law cited therein) as well as paras. 80–85.

62. *Ibid.*, para 59. See also ECtHR, Appl. No. 23614/08, *Urban v. Poland*, para 49.

63. ECtHR, Appl. No. 76639/11, *Denisov v. Ukraine*; Appl. Nos. 55391/13, 57728/13 & 74041/13, *Ramos Nunes de Carvalho E Sá v. Portugal*; Appl. No. 21722/11, *Oleksandr Volkov v. Ukraine*.

64. ECtHR, Appl. No. 76639/11, *Denisov*; Appl. Nos. 55391/13, 57728/13, *Ramos Nunes*, paras. 68, 76–77 and 79; Appl. No. 21722/11, *Oleksandr Volkov*, para 109.

65. Cf. Leloup, “An uncertain first step in the field of judicial self-government”, (2020) *EuConst* (forthcoming, available online in First View), 11–12. According to Leloup, it was the first opportunity for the ECJ “to address . . . judicial councils and to elaborate on any standards to which they should adhere”, 11; however, the ECJ failed to develop criteria for judicial appointments and finally offered “protection that is lower than the one found in the case law of the Strasbourg Court”, 11. In our view, even if the test for the appearance of independence turns out to be difficult in practice, this would not mean that the ECJ has lowered the standard of fundamental rights’ protection for the judicial appointments. The test of appearance may turn out in practice to be highly demanding, even though it focuses on questions rather than answers. It should be understood as a judicial technique, like the test of equality or proportionality, which rationalizes, frames, structures, and consequently legitimizes judicial reasoning. Its argumentative nature is an advantage, since there are no universal arrangements for judicial appointments among the EU Member States or in the ECtHR’s case law, as demonstrated by *Denisov* and *Volkov* (cited *supra* note 63). The ECtHR analysed in detail the factual circumstances of these cases and took into account the “structural deficiencies” and “functioning” of national authorities. It found the general principles relating to the requirements of an independent and impartial court (*Denisov*, paras. 60–65; whereas independence and impartiality are “closely linked”, *Volkov*, para 107) to be universally applicable, but it did not indicate a model of institutional arrangements to fulfil these requirements. The fulfilment of these requirements depends on a combination of factors (which the ECtHR denotes as

The EU's concept of judicial independence is continuously being hammered out.⁶⁶ The independence of national judicial bodies was hitherto discussed as part of the issue of admissibility of preliminary references. The ECJ elaborated on the criteria of "external" and "internal" independence to recognize various court-like bodies, which formally operated outside the national judicial organization, nonetheless as "courts or tribunals" authorized to make preliminary references under Article 267 TFEU.⁶⁷ This case law was "transplanted" in *Wilson* in order to interpret the secondary law requirement of effective judicial protection and, specifically, the impartiality of a body in question towards the interests before it which raised doubts due to the body's specific composition.⁶⁸ One of the questions that arose before the Court in the annotated case was whether the case law on the notion of the "court or tribunal" under Article 267 TFEU could be applied to assess the independence of the DC.⁶⁹ The problem was that in this case law, the ECJ had occasionally applied the criteria of external and internal independence in a rather lenient way in order to accept preliminary references from national bodies vested with significant interpretive authority in specialized areas of law, but not with fully-fledged safeguards of independence. In particular, the Court classified as "courts or tribunals" formally administrative or quasi-judicial bodies whose members were appointed directly by executive and legislative authorities⁷⁰ and who did not even enjoy unwavering legal safeguards from

"objective" and "subjective", *Volkov*, para 104) assessed on a case-by-case basis. The stance of the ECJ in the present judgment is consistent with the stance of the ECtHR.

66. On different meanings of "internal" and "external" independence, see Swart, "Independence of the Judiciary", in *Max Planck Encyclopedia of Comparative Constitutional Law*, para 10: <oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e339?rskkey=gnt3er&result=1&prd=MPECCOL>. On the notion of "internal" judicial independence, understood as the independence from actors within the judicial structure, e.g. court presidents, see Sillen, "The concept of 'internal judicial independence' in the case law of the European Court of Human Rights", 15 *EuConst* (2019), 104.

67. According to the ECJ's settled case law, in order to determine whether a body making a reference is a "court or tribunal" for the purposes of Art. 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law, and whether it is independent. Case 61/65, *Vaassen-Göbbels*, EU:C:1966:39; Case C-53/03, *Syfait and Others*, EU:C:2005:333, para 29; and Case C-503/15, *Margarit Panicello*, EU:C:2017:126, para 27 and the case law cited.

68. Case C-506/04, *Wilson*, EU:C:2006:587, para 58.

69. Opinion of A.G. Colomer, Case C-17/00, *François De Coster*, EU:C:2001:651.

70. E.g. Joined Cases C-110-147/98, *Gabalfrisa*, EU:C:2000:145, paras. 23 & 40; Case C-17/00, *De Coster*, EU:C:2001:651, para 18; Case C-136/11, *Westbahn Management*, EU:C:2012:740, paras. 14 & 28.

dismissals by such authorities.⁷¹ The Polish Government argued that the DC satisfied the more lenient criteria.⁷² Advocate General Tanchev noted in this respect that the ECJ's assessment of the criterion of "independence" to determine whether a court-like body can make a preliminary reference, is a "qualitatively different exercise" than the assessment of whether the requirements of effective judicial protection have been observed. It may turn out that the requirement of independence in the preliminary reference procedure is lower than the standard of judicial independence for the effective judicial protection of individual rights.⁷³

The Court avoided addressing this problem in its judgment. However, it did so in another recent case, in which it arguably expressed its willingness to apply the standards of independence under Article 267 TFEU consistently with those applicable under Article 47 of the EU Charter and 19(1) TEU.⁷⁴ In *Banco de Santander* the ECJ revised its earlier case law and rejected a reference from the Spanish Central Tax Tribunal, a body previously recognized as sufficiently independent to make preliminary references.⁷⁵ This body had strong links to tax administration, and its members could be dismissed by a minister. In arriving at its conclusion, the ECJ applied its case law relating to the requirement of judicial independence under Article 47

71. E.g. Case C-385/09, *Nidera Handelscompagnie*, EU:C:2010:627, para 18 (mentioning that a member of the body in question can be dismissed if he "seriously violates his work duties") and paras. 34–30; Case C-456/11, *Forposta*, EU:C:2012:801, paras. 17–18. Under the applicable legislation, the members of the body in question in the latter case could be dismissed by the prime minister on nebulous grounds of "losing the authority guaranteeing proper performance of the duties of a member of the Chamber". Grzeszczak, Krajewski, "Sąd w świetle przepisów art. 47 KPP i art. 267 TFUE", *Europejski Przegląd Sądowy* (2014), 4. Many more links of the body in question to the supervised administration have been identified in the literature. Grzymisławska-Cybulska, "Krajowa Izba Odwoławcza jako niezawisły organ sądowy", 429 *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu* (2017), 189.

72. The statement of observations submitted by Poland in the judgment, paras. 71–74, received from the Commission in response to a request for public access to documents GestDem 2019/6730 on 15 Jan. 2020, on file with the authors.

73. Opinion, para 114. A similar reasoning was presented by A.G. Wahl in Joined Cases C-58 & 59/13, *Torresi*, EU:C:2014:265, paras. 45–54, who pointed out that in the past the ECJ accepted preliminary references from court-like bodies dealing with labour law cases composed, among others, of representatives of employers and employees, even though such a composition might give rise to doubts as to the impartiality of the body with regard to conflicts of interests before it. Also A.G. Bobek in Case C-551/15, *Pula Parking*, EU:C:2016:825, para 81, recalled that the "Article 267 TFEU definition was developed in a different context and with different purposes", i.e. maintaining the uniformity of case law rather than the judicial protection of individuals. In para 104, he observed that under Art. 267 TFEU the ECJ accepts an "if in doubt, it's admissible" approach, which should not be adopted when the judicial protection of individuals is at stake.

74. This move may have the effect of moderating, at least to some extent, a further increase in the number of preliminary references that the ECJ already has difficulty addressing.

75. Joined Cases C-110-147/98, *Gabalfrija*, EU:C:2000:145.

EUCFR and Article 19(1) TEU.⁷⁶ On the one hand, the preservation of two slightly different standards of independence under Articles 267 TFEU and 19(1) TEU or 47 EUCFR might, paradoxically, enable national courts, whose independence has been undermined, to directly seek rescue at the ECJ.⁷⁷ On the other hand, it might at the same time legitimize judges appointed with violations of national provisions or whose independence is questionable for any other reason.⁷⁸

Article 19(1) TEU did not play a role in the annotated judgment. This provision was recently rediscovered in the legal literature within the debate about national standards of judicial independence. It has been argued that by using Article 19(1) TEU, the ECJ created a new sphere of the application of EU law to domestic judicial organization, liberating itself from constraints allowing it to make only discrete, incremental changes to national procedural laws or judicial systems.⁷⁹ It is therefore debatable whether the ECJ actively crafted or assigned a new role to the second paragraph of Article 19(1) TEU⁸⁰ or simply drew logical conclusions from the purpose and context in which this provision was inserted in the Treaty. However, the ECJ spelled out Article 19 TEU's objective of enhancing individual judicial protection in the EU many years earlier, in the case law regarding different rules on direct access to the Union Courts and national courts. It clarified that under this provision, national authorities must enable individuals to access national courts to trigger

76. Case C-274/14, *Banco de Santander SA*, EU:C:2020:17, paras. 55–63. The A.G. also pointed to the need to raise the standards of independence under Art. 267 TFEU to make them consistent with the standards under Arts. 47(2) Charter and 19(1) TEU. Opinion of A.G. Hogan in Case C-274/14, *Banco de Santander SA*, EU:C:2019:802, paras. 55–63. Butler, “Independence of non-judicial bodies and orders for a preliminary reference to the Court of Justice”, 45 *EL Rev.* (2020), forthcoming.

77. Pech and Platon, “Judicial independence under threat: The Court of Justice to the rescue in the *ASJP* case”, 55 *CML Rev.* (2018), 1827, 1842.

78. A reference from a Supreme Court judge appointed after 2018 who asks about the independence of judges appointed by the Council of State in the communist Poland before 1989 and between 1997–2015 (trying to prove that the appearance of independence test is a double-edged sword) is currently pending before the ECJ, Case C-143/20.

79. Bonelli and Claes, “Judicial serendipity: How Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juizes Portugueses*”, 14 *EuConst* (2018), 622. The ECJ had hitherto avoided demanding changes to national judicial organization. See Case C-175/11, *H.I.D. v. Refugee Applications Commissioner*, EU:C:2013:45, where the Court deliberately avoided the assessment of an Irish administrative tribunal, noting that its decisions can in any case be challenged before ordinary courts.

80. Cf. Torres Perez, “From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence”, 27 *MJ* (2020), 105, 110–111.

the validity review of certain EU legal acts.⁸¹ The history and context of adding the second part of Article 19(1) TEU in the Treaty of Lisbon support, in our view, the ECJ's mandate to assess judicial independence in the context of legal protection at the national level.⁸² Article 19(1) TEU was introduced in the Treaty of Lisbon to emphasize the Member States' duty to guarantee effective judicial protection when such protection cannot be offered directly by the ECJ. The ECJ had therefore good reasons to apply Article 19(1) TEU in *Associação Sindical dos Juizes Portugueses* to assess a national measure affecting the salary and, as a consequence, the independence of national judiciary. In that case, the ECJ did not look for any other link to EU law which could trigger the application of Article 47 of the Charter.⁸³ Later, this provision was applied in the infringement proceedings to assess the proportionality of Polish legislation lowering the retirement age of Supreme Court judges, as well as the exclusion of the judicial review of the Polish President's discretionary decision as to whether or not to prolong the mandates of retired Supreme Court judges.⁸⁴

In the annotated judgment, however, not only did the ECJ refrain from prescribing ready-made solutions for domestic judicial organization, but it also confined its reasoning to Article 47 of the Charter. It expressly held that a distinct analysis of Article 19(1) TEU, let alone Article 2 TEU, was not necessary as it could only reinforce the conclusions reached under Article 47 EUCFR.⁸⁵ The ECJ thus confirmed that Articles 47 EUCFR and Article 19(1) TEU contain exactly the same normative requirements and merely have a different scope (or manner) of application. The difference is that unlike Article 19 TEU, Article 47 EUCFR requires a direct link with a specific EU law provision in an individual case.⁸⁶ In the preliminary reference procedure, the two provisions are likely to be applicable in parallel.⁸⁷

The added value of Article 19(1) TEU, in terms of the scope of application of EU law, hitherto consisted of providing a general legal basis for the

81. E.g. Case C-583/11 P, *Inuit Tapiriit Kanatami*, EU:C:2013:625, paras. 101 and 106 and many subsequent rulings.

82. von Bogdandy and Spieker, "Countering the judicial silence of critics: Article 2 TEU values, *reverse solange*, and the responsibilities of national judges", 15 *EuConst* (2019), 391, 415; Krajewski, "Who is afraid of the European Council? The Court of Justice's cautious approach to independence of domestic judges", 14 *EuConst* (2018), 792, 808 et seq.

83. Even though such a link might have been present, as the contested domestic measure implemented an EU act, Case C-64/16, *Associação Sindical dos Juizes Portugueses*.

84. Case C-192/18, *Commission v. Poland*.

85. Judgment, para 169.

86. Bonelli and Claes, op. cit. *supra* note 79, 638.

87. A.G. Tanchev (in Joined Cases C-558 & 563/18, *Miasto Łowicz*, EU:C:2019:775, paras. 90–94) seems to favour a much broader interpretation according to which national judges could ask the ECJ about their independence in any case.

Commission's infringement actions against systemic breaches of judicial independence standards.⁸⁸ This provision also gave national judges an EU legal basis or, in other words, a "subjective right" to demand the protection of their independence as EU judges.⁸⁹ Thus, the Portuguese judges in *ASJP* were able to demand a preliminary reference from a national court to which they referred, regarding the compliance of the national measure decreasing their salaries with the EU principle of judicial independence. In the annotated case, the applicants, as judges, could also rely on their "subjective rights" to judicial independence.⁹⁰ And yet, the ECJ based its response on the fact that the equal treatment Directive and, consequently, Article 47 EUCFR, was also applicable.⁹¹ It avoided a direct reference to Article 19(1) TEU, given that the "standard solution" of applying a specific substantive EU legal norm coupled with the EU Charter was available. It is thus evident that the ECJ is not as activist as is sometimes portrayed in stretching the boundaries of its jurisdiction through Article 19(1) TEU. Commentators argue that Article 19(1) TEU might still demonstrate some further added value by providing the *unsuccessful candidates* to judicial offices with a "subjective right" to demand the judicial review of judicial appointment processes.⁹² The ECJ will soon have the possibility to clarify this issue in a preliminary ruling.⁹³ In that case, however, the ECJ might face more significant pressure from national courts to intervene in the carefully crafted balance of power between political and judicial or independent authorities in the judicial appointment systems. Once the ECJ confirms that the judicial appointment process *must* be amenable to judicial review, it might soon be requested to specify the details of this review – such as specific criteria, time, remedies, etc. In this scenario, a partial judge-made harmonization of judicial appointment systems under EU law might seem more likely. The annotated judgment admittedly mentions the

88. Case C-791/19, *Commission v. Poland*, pending.

89. Taborowski, *Mechanizmy ochrony praworządności Państw Członkowskich w Prawie Unii Europejskiej. Studium przebudzenia system ponadnarodowego* (Wolters Kluwer, 2019), p. 329.

90. Decision of 30 Aug. 2018, Case III PO 7/18, para 4 (order of reference in Case C-585/18).

91. Judgment, para 114.

92. On the potential of Art. 19, see Bogdanowicz and Taborowski, "The Polish Law on the Supreme Court in light of rulings of the Court of Justice of the European Union", *Rule of Law in Poland* (28 June 2018); Bogdanowicz and Taborowski, "Regulacje dotyczące stanu spoczynku jako narzędzie służące odsunięciu określonej grupy sędziów od pełnienia urzędu na stanowisku sędziego Sądu Najwyższego – uwagi na tle wyroku Trybunału Sprawiedliwości z 24.06.2019 r., C-619/18, Komisja Europejska przeciwko Rzeczypospolitej Polskiej", 12 *Europejski Przegląd Sądowy* (2019), 18–20. Regarding the ECJ's approach to identifying EU "rights" and corresponding national "remedies", see A.G. Bobek, Case C-403/16, *El Hassani v. Minister Spraw Zagranicznych*, EU:C:2017:659, paras. 74–85.

93. Case C-824/18, *Krajowa Rada Sądownictwa*, pending.

judicial review of the appointment process in an opaquely worded formula but, given this formula's place in the overall reasoning, it might be understood as one of the factors to be considered in the test for the appearance of independence.⁹⁴

5.2. *The power of appearances*

The ECJ did not follow the path suggested by Advocate General Tanchev and did not provide a minimum template for judicial councils and judicial appointments. In fact, a growing scholarship on judicial councils warns against strong judicial councils dominated by judges themselves.⁹⁵ Depending on specific circumstances, such councils may be captured by political forces and judicial elites, actually weakening judicial accountability⁹⁶ or even decreasing the independence of individual judges.⁹⁷ In some EU Member States, moreover, the executive authorities and political criteria play a dominant role in the appointment of judges, which is seen as crucial in providing the judges with the necessary level of democratic legitimacy.⁹⁸ Finally, there is a weak consensus on the specific substantive requirements of Articles 19(1) and 2 TEU.⁹⁹ Although the recognition in the EU of the fundamental right to effective judicial protection and Poland's constitutional breakdown have inescapably led the ECJ to specify the EU requirements of judicial independence – and Article 19(1) TEU bestows upon the ECJ a sufficient mandate in this respect – the vague notions of the said provisions should not encourage judicial crafting of specific institutional arrangements. Otherwise some Member States, or their constitutional courts, might bring counterclaims based on the concepts of constitutional or national

94. Judgment, para 145.

95. Benvenuti, "The politics of judicial accountability in Italy: Shifting the balance", 14 *EuConst* (2018), 369.

96. Kosař, "Beyond judicial councils: Forms, rationales and impact of judicial self-governance in Europe", 19 *GLJ* (2018), 1567, 1611–1612. See also other contributions to this special issue.

97. Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press, 2016), pp. 406–408.

98. Regarding e.g. Germany, see Sanders and von Danwitz, "Selecting judges in Poland and Germany: Challenges to the rule of law in Europe and propositions for a new approach to judicial legitimacy", 19 *GLJ* (2018) 769, 794–804 (note that in Germany the judicial review of judicial appointments decisions made by the executive is limited); regarding Sweden, see Zamboni, *op. cit. supra* note 60 (in Sweden it has until recently been expected that a new judge will have prior experience in the administration and, especially, the Ministry of Justice).

99. E.g. Smith, "Staring into the abyss: A crisis of the rule of law in the EU", 25 *ELJ* (2019), 561–576.

identity.¹⁰⁰ Mindful of its recent struggles with the Italian Constitutional Court in the *Taricco* saga (caused by the ECJ's accidental interference with basic constitutional guarantees of legal certainty¹⁰¹) or its struggles with the Danish Supreme Court (over the interference of EU law in the national welfare State¹⁰²), the ECJ should proceed with caution.

The prescribed test aims at answering whether reasonable citizens will have objective reasons to be concerned about the actual independence of courts as a result of introducing the contested national measures. The results of the test are not bound to be inherently subjective. The subjective perspective of the parties is only one factor to be considered. A court carrying out the test must rather assume the role of an external, but well-informed, observer and decide whether doubts as to judicial independence are objectively justified in light of specific legal and factual circumstances.¹⁰³ The focus on objective “appearance” is justified as it is impossible to penetrate the minds of judges, for instance the judges of the DC, and verify the deep and real motives behind their decisions in particular cases. The only reality available to the outside world is the reality of the appearance of independence. The question is whether the legal framework in which judges operate, for their appointments, privileges and removals, as well as their behaviour, safeguard their objectivity and neutrality towards the interests before them and exclude “reasonable

100. In the Polish case, however, the judicial “reforms” undermine rather than stem from the Polish constitutional identity. See Ziółkowski and Grabowska-Moroz, “Enforcement of EU values and the tyranny of national identity – Polish examples and excuses”, *Verfassungsblog* (26 Nov. 2019): <verfassungsblog.de/enforcement-of-eu-values-and-the-tyranny-of-national-identity-polish-examples-and-excuses/>. See also the arguments relevant for Hungary, in Scheppele and Halmai, “The tyranny of values or the tyranny of one-party States?”, *Verfassungsblog* (25 Nov. 2019): <doi.org/10.17176/20191126-002348-0>. Nevertheless, the ECJ might have already attracted preliminary references from other national courts asking it to enhance their own independence *vis-à-vis* national executive authorities. For instance, a German court had asked in 2019, before the annotated judgment was rendered, if the German system of judicial appointments and promotions by State ministries of justice complies with the EU concept of judicial independence. Case C-272/19, *Land Hessen*, pending (order of reference available at curia.europa.eu, paras. 30–35). The referring court also asks whether the administrative oversight by State ministers of justice of State courts complies with the EU conception of judicial independence. In Cases C-811/19, *Ministerul Public*, and C-547/19, *Asociația “Forumul Judecătorilor din România”*, both pending, the question is the independent status of the Constitutional Court of Romania in light of the dominant role of politicians in the process of appointing constitutional judges. In Case C-564/19, *IS*, pending, a Hungarian court asked whether it can still be considered independent in view of a reform of judicial salaries.

101. Rauchegger, “National constitutional rights and the primacy of EU Law: *M.A.S.*”, 55 CML Rev. (2018), 1521.

102. Šadl and Mair, “Mutual disempowerment: Case C-441/14 *Dansk Industri*, acting on behalf of *Ajos A/S v Estate of Karsten Eigil Rasmussen* and Case no. 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A’*”, 13 EuConst (2017), 347.

103. Sudre, “Le mystère des «apparences» dans la jurisprudence des la Cour européenne des droits de l’Homme”, (2009) *Revue trimestrielle des droits de l’Homme*, 633, 644.

doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges”.¹⁰⁴ In other words, the question is whether reasonable citizens, having familiarized themselves with the legal regime of the judicial organization, including the procedures for judicial appointments and removals, have objective reasons to trust that the judge in their case will remain objective and free from external influences. In assessing the appearance of judicial independence, according to the ECJ, it is necessary to appraise all legal and factual circumstances surrounding controversial judicial reforms and appointments and *balance* the arguments pertaining to the circumstances which may preserve or impair the appearance of judicial independence.¹⁰⁵

The ECJ’s solution, in contrast to that proposed by Advocate General Tanchev, is not based on straightforward syllogistic reasoning: an abstract reconstruction of higher-order standards for judicial organization and their subsequent application to the specific judicial organization at issue. The ECJ’s solution calls for argumentation and balancing. It is apt to preserve the plurality of judicial models across the EU, since it involves both the margin of appreciation for the referring court and decentralized judicial review.¹⁰⁶ The assessment of the appearance of independence of entire judicial structures, such as the DC, requires in-depth knowledge and understanding of the legal and factual circumstances surrounding their establishment and operations, as well as the national history, traditions and shared meaning of specific institutional and procedural arrangements.¹⁰⁷ Members of society may reasonably disagree as to whether a specific institutional arrangement puts judicial independence at risk. Therefore, those assessing the appearance of independence inescapably enjoy considerable epistemic and axiological discretion.¹⁰⁸ Because of this discretion, the arguments supporting the negative assessment of a given judicial body or category of judges must be particularly strong and, as such, are more likely to be formulated convincingly

104. Judgment, para 134.

105. Judgment, paras. 124, 146, 152–153.

106. On the distinction, see Zgliniński, “The rise of deference: The margin of appreciation and decentralized judicial review in EU free movement law”, 55 CML Rev. (2018), 1341.

107. It should be noted that all the circumstances listed by the ECJ that the referring court could subsequently consider, had already been indicated in a detailed order of reference by the referring court itself. The list of circumstances provided by the ECJ was not exhaustive and the ECJ did not *directly* state in what direction a given circumstance may point.

108. The character of this appraisal is normative rather than sociological. In other words, the appraisal pertains to how reasonable members of the society *should* perceive a given judicial authority, rather than how they actually perceive it. Otherwise, the appraisal could be verified with some large-scale sociological evidence which, just like the normative appraisal, would entail controversies and methodological problems.

by a judge whose own independence is beyond doubt and who knows and comprehends the intricacies of the legal order and judicial organization at issue.

For instance, the election of judicial members to the NCJ by their peers, to secure the judiciary's separation from politics, was an important matter agreed upon as part of the Round Table in Poland in 1989.¹⁰⁹ One could therefore argue that a sudden and merely legislative (rather than constitutional) change of this arrangement, despite unequivocal opposition by judges and legal academics, should raise concerns in at least a part of Polish society regarding the possibility of an increased political control of judicial appointments and, consequently, regarding the actual independence of newly-appointed judges.

Therefore, it is because of the highly contextual logic of the test for the appearance of independence, in our view, that the ECJ opted to authorize the referring court to carry it out. The referring court, i.e. a three-judge panel of the Supreme Court, unlike the ECJ itself, may be reasonably expected to possess the necessary knowledge and understanding of national traditions. The ECJ itself offered a very different reason to support the decentralized peer review of judicial independence. It invoked the division of tasks in the preliminary reference procedure, in which the "interpretation" of EU law falls to itself and its "application" to the referring court.¹¹⁰ However, over several decades of the functioning of the preliminary reference procedure, the ECJ has become increasingly concerned about the *effet utile* of interpreted EU law provisions, which has led to a blurring of the lines separating the interpretation and application of EU law. The ECJ has not shied away from directly assessing national laws or facts at issue, provided that they have been sufficiently clarified by the referring court.¹¹¹ Moreover, in the annotated judgment, the ECJ is not so much concerned with an abstract interpretation of what judicial independence involves. The ECJ did not add much beyond its previous case law on the meaning of judicial independence. In this respect, it confined itself

109. Act of 20 Dec. 1989 on the National Council of the Judiciary, OJ 1989, No. 73, 435. According to Śledzińska-Simon, op. cit. *supra* note 12, 1842, "... the most remarkable concession of the Communist Party in the Round Table agreements was the introduction of the National Council of the Judiciary. It thus appears as a bottom-up initiative put forward by legal experts and judges related to the 'Solidarity' trade unions in the early stage of the democratic transition, rather than a solution mandated by international organizations or the accession to the EU".

110. Judgment, para 132.

111. Lenaerts, "Form and substance of the preliminary ruling procedure" in Curtin and Heukels (Eds.), *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schrems* (Brill, 1994), pp. 355, 378; Broberg and Fender, "Preliminary references" in Schütze and Tridimas (Eds.), *Oxford Principles of European Union Law* (OUP, 2018), p. 981, at p. 1007; Lenaerts et al., *EU Procedural Law* (OUP, 2014), p. 231.

to repeating its well-established case law and that of the ECtHR. Instead, the added value of the judgment consisted of pointing out – non-exhaustively – specific legal and factual circumstances that might (but did not have to) lead the referring court to the conclusion that the DC lacked the sufficient appearance of independence. The ECJ proposed how to qualify specific legal and factual circumstances under the test, which seemed closer to application rather than mere interpretation of EU law. In other words, the ECJ judgment constituted a “preparatory judgment” for the referring court, without, however, curtailing the latter’s discretion.

As already mentioned, one paragraph of the annotated judgment could be interpreted as imposing a specific obligation regarding the organization of national judicial appointments, departing from the argumentative and balancing character of the ECJ’s reasoning.¹¹² Here, the ECJ mentions that the referring court needs to make sure whether the part of the judicial appointment process which ends up with the presentation of a candidate to the President of Poland, can be subject to judicial review at least in terms of an *ultra vires* or improper exercise of authority, error of law or manifest error of assessment. Rather than a clear-cut obligation, it is possible to interpret this paragraph as merely referring to one of the possibilities to make the appointment process more objective and less political, which may overall contribute to enhancing the appearance of judicial independence.¹¹³ Arguably, this is how the ECtHR, to which the ECJ referred in the same paragraph, treated the judicial review of appointment decisions.¹¹⁴ This interpretation would be coherent with the ECJ’s focus in the judgment on the overall appearance of judicial independence, rather than specific institutional and procedural arrangements. According to the well-established case law, moreover, EU law does not require the creation of new legal avenues unless effective judicial protection cannot be secured otherwise.¹¹⁵ But the appearance of independence of individual judges can be assessed on a case-by-case basis before higher-instance courts, or while examining motions to recuse a judge.¹¹⁶

112. Judgment, para 145.

113. See Bogdanowicz and Taborowski, “How to save a Supreme Court in the rule of law crisis: The Polish experience: Court of Justice of the European Union (Grand Chamber), Judgment of 24 June 2019, Case C-619/18, *European Commission v Republic of Poland*”, forthcoming, (2020) EUConst.

114. ECtHR, *Thiam v. France*, paras. 25, 74–75 & 81.

115. Case C-432/05, *Unibet*, EU:C:2007:163, paras. 40 & 41; Case C-583/11 P, *Inuit Tapiriit Kanatami*, paras. 103–104.

116. However, if the former interpretation were confirmed (a clear-cut obligation), a distinct question would be why to exclude, under EU law, the direct judicial review of the very appointment act by the head of State.

Nonetheless, due to specific circumstances occurring in the Polish case currently pending before the ECJ,¹¹⁷ the judicial review of appointment processes by a court whose independence is beyond doubt, might turn out to be indispensable under Article 19(1) TEU to maintain the appearance of independence of the judges appointed in these processes. This is because of sudden and arguably unconstitutional changes in Polish legislative provisions governing the judicial review of the NCJ's selection processes and decisions. Undoubtedly, these changes might give rise to reasonable doubts as to whether the appointment process is currently oriented towards the selection of internally independent rather than politically convenient candidates to judicial offices. That the appointment processes and decisions of the NCJ, under the Constitution, must be amenable to judicial review was the well-established case law of the Polish Constitutional Tribunal before 2015. In the specific Polish context, the judicial review of the NCJ's decision was a significant guarantee for the objectivity of appointment processes and the equal constitutional right of access to public offices.¹¹⁸

The competence to review the NCJ's decisions used to be assigned to the Supreme Court. Then, it was partly transferred to the Supreme Administrative Court in 2018.¹¹⁹ But the latter's jurisdiction in this type of matters was suddenly deemed unconstitutional by the current Constitutional Tribunal, on dubious grounds, on a motion lodged by the NCJ and a group of senators supporting the government.¹²⁰ Also, under new legislation, the action for the judicial review of an NCJ decision lost its suspensory effect, so the selected candidates might be appointed by the President of Poland regardless of pending litigation regarding their selection.¹²¹ As a result, certain candidates to the Supreme Court might be denied the right to judicial review, and the preliminary references of the Supreme Administrative Court regarding the review of judicial appointments under Article 19(1) TEU were intended to be discontinued.¹²² Finally, the jurisdiction to review the NCJ's decision was transferred to the other of the Supreme Court's new chambers¹²³ – the independence of which is doubtful – and completely excluded with regard to the NCJ's nominations to the Supreme Court itself.¹²⁴ It remains to be seen

117. Case C-824/18, *Krajowa Rada Sądownictwa*, pending.

118. Case SK 57/06, judgment of 27 May 2008 (the Constitutional Tribunal).

119. Art. 44(1a) of the Act of 12 May 2011 regarding the National Council of the Judiciary, OJ 2019, 84, as amended, currently repealed.

120. Case K 12/18, judgment of 25 March 2019 (the Constitutional Tribunal).

121. Arts. 44(1b) and 44(4), Act of 12 May 2011, cited *supra* note 119, currently repealed.

122. The case is still pending.

123. Art. 27, Act of 8 Dec. 2017 on the Supreme Court, cited *supra* note 16.

124. Art. 44(1), Act of 12 May 2011 on the National Council of the Judiciary, cited *supra* note 119.

whether the ECJ will authorize the referring panel of the Supreme Administrative Court to consider all the said circumstances in light of the test for the appearance of judicial independence, and possibly to assume the jurisdiction to review the NCJ's decisions, so as to protect the systemic appearance of independence of the entire judiciary. In any case, it seems that Article 19(1) TEU may not contain an unconditional duty to provide for the judicial review of judicial appointments.

5.3. *In a judicial multiverse*

The ECJ left substantial questions open, and the Polish Supreme Court itself had to find answers. First, is the test for the appearance of independence applicable only to the DC or also to several hundreds of new judges appointed with the involvement of the NCJ to the Supreme Court and ordinary courts after 2018? If the NCJ itself lacks sufficient appearance of independence, does this affect all the candidates to judicial offices that it selects? And, is the test applicable to the Supreme Court's Chamber of Extraordinary Control and Public Affairs (CECPA), the other new chamber set up from scratch and bestowed with the jurisdiction to hear, among other things, a new type of extraordinary appeal against final rulings?¹²⁵

The referring panel of the Supreme Court gave positive answers to all these questions.¹²⁶ It held that the NCJ had not been independent from political authorities since its creation in 2018. It also ruled that the new NCJ was established in violation of constitutional provisions;¹²⁷ interestingly, without making a reference to the Constitutional Tribunal. It moreover considered other factors impinging upon the NCJ's independence: the election of the NCJ's current members was non-transparent;¹²⁸ the independence of the NCJ was questioned publicly many times by NGOs, lawyers' associations, and the judges of ordinary courts;¹²⁹ the NCJ members were promoted by the Minister of Justice to the positions of court presidents or vice-presidents, or to other

125. See remarks by Bernatt on CECPA activity, "Rule of law crisis, judiciary and competition law", 46 LIEI (2019), 345–362.

126. Case III Po 7/18, judgment of 5 Dec. 2019 (Supreme Court).

127. *Ibid.*, paras. 40–41. The new law dismissed the elective members of the NCJ before the end of their terms and changed the rules of the election. The elections by judges, among judges of different types and levels of courts, were replaced by the ultimate power of Parliament to elect 15 members of the NCJ. Since the Sejm would decide on the majority within the NCJ, the balance between the three branches of power, constitutionally provided in Art. 187(1) of the Constitution, has been distorted.

128. *Ibid.*, paras. 46–48.

129. *Ibid.*, para 56.

superior judicial offices;¹³⁰ the NCJ members also publicly supported¹³¹ the government's judicial "reforms".¹³²

Subsequently, the referring court determined that the DC cannot be considered a court within the meaning of EU law.¹³³ The DC was introduced into the structure of the Supreme Court as a brand new organizational structure. It was also vested with extraordinary organizational autonomy and powers. Its members were all appointed from among candidates from outside the Supreme Court by the non-independent NCJ.¹³⁴ These members have evident and strong connections to the legislature and the executive.¹³⁵ They supported manifestly unconstitutional reforms of the judiciary and criticized Polish judges for making references to the ECJ.¹³⁶ The candidatures proposed to the DC by the NCJ were not subject to judicial review.¹³⁷ The referring court stated, last but not least, that the appearance of independence test should be applied by all courts in individual cases to verify, by any available means, the appearance of independence of judges appointed after 2018, since the candidatures proposed by the NCJ cannot be directly subject to judicial review.¹³⁸

130. Ibid., para 49.

131. The NCJ adopted a new interpretation of the code of judicial ethics that indirectly warned judges against wearing T-shirts with the word "Constitution" in public, which became a symbol of civic resistance against the violation of constitutional law after 2015 (NCJ resolution of 12 Dec. 2018). On another occasion, the NCJ supported the government misinterpretation of the ECJ judgment in Joined Cases C-585/18, C-624/18 and C-625/18, *A.K.* (NCJ resolution of 21 Nov. 2019). Recently, acting hand in glove with the Ministry of Justice, the NCJ publicly criticized and undermined the authority of the Supreme Court for making preliminary references to the ECJ (NCJ Resolution of 13 Dec. 2019).

132. Case III Po 7/18, paras. 50–51.

133. Ibid., paras. 67–68. The court ignored the fact that the DC considered itself to be an independent court (Case II DSI 54/18, resolution of 10 Apr. 2019). It should be noted that the DC heard cases against judges prosecuted for making preliminary references to the ECJ or directly applying the Constitution, Case I DO 16/19 (decision of 7 Feb. 2019).

134. Ibid., para 66.

135. Ibid., para 66.

136. Case I DO 16/19, decision of 7 Feb. 2019 (DC of the Supreme Court). The DC recognized itself as an independent court without awaiting the ECJ judgment – Case II DSI 54/18, resolution of 10 Apr. 2019 (DC of the Supreme Court).

137. The rules and principles regarding the appointment of the DC members were modified mid-procedure twice. Both modifications were made to exclude other candidates from the procedure and deprive them of the right to appeal to the independent court. The NCJ was given a guarantee that its choice of candidates to the DC could not be questioned before any court (Case III Po 7/18, paras. 67–68.)

138. The referring court fully applied the *Simmenthal* doctrine and subsequent judgments of the ECJ in Case C-409/06, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, EU:C:2010:503; Case C-81/05, *Cordero-Alonso*, EU:C:2006:529; and Case C-314/08, *Filipiak*, EU:C:2009:719.

However, the CECPA (the other of two new chambers introduced to the Supreme Court) also decided to apply the ECJ judgment. Unsurprisingly, it gave negative answers to all the said questions.¹³⁹ At first, it admitted that the composition of its fellow DC might raise reasonable doubts.¹⁴⁰ But it also held that the ECJ judgment was addressed primarily to itself, as having exclusive jurisdiction to review the acts of the NCJ before they are submitted to the President of the Republic.¹⁴¹ Moreover, the CECPA held that the test must be applied with respect for the Constitution¹⁴² and considering the limits of EU competences regarding the judicial organization.¹⁴³ It stressed that neither Article 19 TEU nor any other provision of EU law specified the criteria for judicial appointments and the appointing entity, or released the Member States from the obligation to guarantee some degree of the democratic legitimacy of judges.¹⁴⁴ It consequently held that the status of a judge could not be put in question by any court in Poland, as the appointment of a judge is the presidential “prerogative”, i.e. a competence the exercise of which cannot be subject to judicial review.¹⁴⁵ Polish law does not provide for any procedure in which the presidential prerogative could be reviewed.¹⁴⁶ Any irregularity made before a judicial appointment has no bearing upon the validity of this appointment. The lack of independence of the NCJ could be incidentally taken into account by the CECPA while reviewing the acts of the NCJ,¹⁴⁷ before these acts are submitted to the President of Poland, but not after the President has already appointed the judge. As regards courts other than the CECPA, they can apply the ECJ’s test of the appearance of independence only to consider the behaviour of judges which occurred *after* their appointment.¹⁴⁸

The split within the Supreme Court continued. On the one hand, the Labour and Social Insurance Chamber followed the judgment of the referring court.¹⁴⁹ On the other hand, a judge of the Civil Chamber appointed after 2018, who had previously worked at the Ministry of Justice followed the CECPA ruling¹⁵⁰ and held that, under Polish constitutional provisions, judges could not be recused from individual cases based on alleged irregularities in their

139. Case I NOZP 3/19, resolution of 8 Jan. 2020 (CECPA of the Supreme Court).

140. *Ibid.*, para 15.

141. *Ibid.*, para 59.

142. *Ibid.*, paras. 18 & 21.

143. *Ibid.*, para 19.

144. *Ibid.*, para 24 *in fine*.

145. *Ibid.*, paras. 32, 36–37.

146. *Ibid.*, para 32.

147. Arts. 44–45c of the Act of 12 May 2011, cited *supra* note 119.

148. Case I NOZP 3/19, para 32 *in fine* and para 33.

149. Cases III PO 8/18 and III PO 9/18, judgments of 15 Jan. 2020 (Supreme Court).

150. Case V CSK 347/19, decision of 18 Dec. 2019 (Civil Chamber of the Supreme Court), paras. 32–33.

appointment processes.¹⁵¹ At the same time, other courts referred questions to the Supreme Court asking for further guidance as to the application of the test.¹⁵²

The disagreement between the Supreme Court chambers seems to be more than an ordinary inconsistency in case law. The disagreement is, first and foremost, *fundamental* as it is underpinned by a division in the membership of the Supreme Court between judges appointed before and after the reform of the NCJ of 2018. The two groups of judges, appointed in different procedures, enjoy, as a result, different kinds of legitimacy and claims to authority. Moreover, those appointed after 2018 have a personal interest in narrowing down the scope of the ECJ judgment to retain their judicial posts. Both sides use mirror forms and concepts. They claim to implement the ECJ judgment, but reach opposing solutions, interpreting the ECJ's judgment more broadly or more narrowly.

The divergent rulings of the Supreme Court chambers are moreover characterized by *diametrically opposing assumptions* regarding the relationship between the EU and national constitutional orders, the fundamental right to judicial protection, the nature of presidential prerogatives, and the extent of domestic judicial power. The CECPA emphasizes the absolute and unconditional primacy and supremacy of the Polish Constitution over EU law, and the limited nature of powers conferred upon the EU. The Labour Law and Social Security Chamber, in turn, emphasizes the primacy of EU law, the unconditional duty to enforce ECJ judgments and the duty of each Member State to organize their judicial systems in a way that safeguards fair trials.

The disagreement is also *extraordinary* as it relates to independence as the core legitimacy asset of judicial authority, as well as the possible extent of this authority. Under the ECJ's test, judges may assess the appearance of independence of fellow judges without, however, invalidating their appointments; the test leads rather to excluding specific judges from adjudication in EU law-related cases, but their formal status (including e.g. salary) is a matter of national law.¹⁵³ However, on the one hand, the DC and

151. *Ibid.*, para 31.

152. Case V AGa 380/18, decision of 11 Dec. 2019 (Appellate Court in Katowice); Case VI Ka 618/19, decision of 17 Dec. 2019 (Regional Court in Jelenia Góra); Case IX Cz 739/19, decision of 7 Jan. 2020 (Regional Court in Olsztyn).

153. However, it should not be assumed that the ECJ judgment has no bearing upon the right of judges who do not have sufficient appearance of independence to perform extra-judiciary tasks relating to e.g. court administration or institutional matters, such as the election of court presidents. In the Polish debate, it was too easily assumed, in our view, that the Supreme Court judges appointed after 2018 might participate in the election of the new First President of the Supreme Court, as the ECJ judgment related only to adjudicatory tasks. The ECJ noted in its

CECPA argue that the test must be circumscribed due to Polish constitutional law, according to which the judicial appointments are presidential prerogatives, and the merits of these appointments cannot be assessed even indirectly. The ECJ's test can, therefore, only be used to evaluate the circumstances pertaining to individual judges after their appointment. On the other hand, the Labour Law and Social Security Chamber argue that the "decentralized" competence of every court to assess the "appearance of independence" of another court, on a case-by-case basis, can be derived from Article 47 EUCFR and Article 6 ECHR, even if national law does not dedicate specific procedures for this purpose. The latter Chamber also stresses the primacy of EU law, the unconditional obligation to enforce ECJ judgments and to organize the judiciary in a Member State in accordance with the requirements of EU law.

The judicial multiverse might have been avoided, had the Constitutional Tribunal not lost public confidence.¹⁵⁴ The Supreme Court could have referred to the former the issue of the constitutionality of the legislative provisions governing the system of judicial appointments, the NCJ, DC, and CECPA. The Constitutional Tribunal's judgment might have rendered these provisions invalid with the *erga omnes* effect, including on the grounds of the constitutional principle of judicial independence.¹⁵⁵ However, after six years of "statutory anti-constitutionalism" in Poland, the system for the protection of the Constitution is no longer operational. There are serious doubts about the membership of the Constitutional Tribunal and the actual independence of at least its leadership from the parliamentary majority.¹⁵⁶ The actions by the Parliament and the President also aggravated the risk of a judicial multiverse. The Parliament sought to solve the problem of the independence of judges appointed after 2018 by simply prohibiting the judges from carrying out the ECJ's test. A piece of legislation that entered into force on 14 February 2020¹⁵⁷ provided for disciplinary sanctions for judges who questioned the independence of their peers, the Constitutional Tribunal, or the NCJ.¹⁵⁸ The President, last but not least, carried on appointing new judges in 2018, despite

case law that heads of independent authorities should also be independent as they may influence the decision-making by organizational and technical means. See Case C-614/10, *Commission v. Austria*, EU:C:2012:631, paras. 52 & 58–61.

154. Wyrzykowski, *op. cit. supra* note 7; Sadurski, *op. cit. supra* note 6.

155. In that case, the closed appointment proceedings before the NCJ might be reopened under Art. 190(4) of the Constitution. A remaining question is whether the legislature might have adopted a slightly modified version of the unconstitutional provisions.

156. Ziółkowski, *op. cit. supra* note 28; see also the open letter cited *supra* note 30.

157. Act of 20 Dec. 2019 Amending the Act on System of Courts of General Jurisdiction, the Act on the Supreme Court as well as Other Acts, OJ 2020, 190.

158. The envisaged sanction is being moved to another court or removal from office (see Art. 42a and 107 of the Act of 27 July 2001; as amended).

an interim measure of the Supreme Administrative Court awaiting the judgment of the ECJ.

To eschew the risk of the judicial multiverse and to secure the implementation of the ECJ's judgment, the three "old" chambers of the Supreme Court¹⁵⁹ – rather than opting for the "traditional" solution of referring the case to the Constitutional Tribunal – adopted a so-called "interpretive resolution",¹⁶⁰ which was formally binding upon the Supreme Court.¹⁶¹ This and the implementing judgment of the referring panel have recently provided support for the ECJ's interim measure freezing the DC's operation.¹⁶² The scope of matters tackled in this resolution may be genuinely astonishing for Polish constitutional law scholars. In the future, it may constitute an authoritative point of reference for assessing the constitutionality of the actions of the current parliamentary majority, the NCJ and other actors.¹⁶³ In the resolution, the Supreme Court did not confine itself to assessing the appearance of independence of the DC and CECPA, and providing guidance as to the further application of the ECJ judgment by lower courts. Going beyond that, the Supreme Court put itself in the shoes of a constitutional court. It carried out an autonomous interpretation of several constitutional provisions on judicial independence, impartiality, and fair trial.¹⁶⁴ In an unprecedented manner, it also declared unconstitutional several legislative and other acts pertaining to the NCJ and DC,¹⁶⁵ even though it formally lacked competence to render such acts void or even generally inapplicable. It applied, at the same time, a reasoning typical for a continental constitutional court based on the interpretation of contested provisions,¹⁶⁶ the

159. The Supreme Court moreover excluded the judges of the Civil Chamber appointed in 2018 on the basis of the *nemo iudex in causa sua* principle.

160. Case No. BSA I-4110-1/20, resolution of 23 Jan. 2020 (The Supreme Court sitting as a panel of the Civil Chamber, the Criminal Chamber and the Labour Law and Social Security Chamber).

161. It is a rarely used competence of the Polish Supreme Court and Supreme Administrative Court to adopt "resolutions" upon the motion of their First President (the Supreme Court) or President (Supreme Administrative Court). Such a resolution has no connection to any ongoing litigation, but seeks to settle inconsistencies in the case law of these courts or lower courts in a general and abstract manner. The SC last used this competence in an extended formation of mixed chambers in 2007 (Case No BSA I-4110-5/07) and in 2014 (Case No BSA-I-4110-4/13).

162. Case C-791/19 R, *Commission v. Poland*, EU:C:2020:277, para 77.

163. The Supreme Court even assessed the way in which the President of the Republic exercised his power of judicial appointment, which under a well-established constitutional law doctrine cannot be subject to judicial review (Case No. BSA I-4110-1/20, para 34).

164. Different from that adopted by the Constitutional Tribunal (Case K 5/17, judgment of 20 June 2017).

165. Case No. BSA I-4110-1/20, paras. 3, 31–32, 34, 35, 45–46, 55.

166. *Ibid.*, paras. 31, 32, 34, 35, 46.

abstract interpretation of relevant constitutional provisions,¹⁶⁷ and the vertical comparison of both.¹⁶⁸ This incredibly bold “constitutional part” of the resolution directly aimed to strengthen the subsequent conclusion regarding the appearance of independence of judges appointed after 2018.¹⁶⁹

The Supreme Court held that the judges of the DC, CECPA, and other Supreme Court judges appointed after 2018 may never give sufficient appearance of independence due to the especially high expectations of judicial independence that should be expressed towards an apex court. The judges of lower courts, at the same time, should be assessed on a case-by-case basis. The Supreme Court separated the constitutional status of judges (including their various privileges) from their status in particular proceedings. The Supreme Court did not, therefore, invalidate judicial appointments, as it did not have the competence to do so. It merely stated that the rulings issued by judges deemed to be lacking the appearance of independence may be considered unlawful and quashed in subsequent proceedings.

Importantly, the Supreme Court directly assessed the appearance of independence of Supreme Court judges only. As regards the judges of lower courts, it held that this issue must be resolved on a case-by-case basis under the procedural law provisions on the composition of judicial benches.¹⁷⁰ The parties to any proceedings may object to individual judges or question their impartiality – including within higher-instance or any review proceedings – by invoking the ECJ’s test for the appearance of judicial independence. One may see this move as an expression of self-restraint. But to object to individual judges, the parties must now show that the lack of independence may have an impact on the substance of the judgment. Proving this point seems possible only in cases with an evidently political context. The Supreme Court’s stance in this respect may, therefore, also be seen as being motivated by fear concerning the possible paralysis of already overburdened courts, where groups of judges would generally be barred from adjudication. Moreover, the distinction between the standards of independence applicable to the Supreme Court and lower courts, may also raise doubts, as it may lack a basis in the Constitution or EU law. Finally, it may lead certain judicial proceedings in individual cases to be transformed into the review of judicial appointments.

The captured Constitutional Tribunal has just written the latest chapter of this never-ending story. It held that the ruling of the Supreme Court’s mixed

167. *Ibid.*, paras. 31, 34, 36, 37–38, 45, 60.

168. The Supreme Court also took into account how the legislative provisions were applied in practice, *ibid.*, paras. 1, 6, 33, 35.

169. In that part of the reasoning the Supreme Court followed arguments adopted in the judgment of 5 Dec. 2019, *ibid.*, para 42.

170. *Ibid.*, paras. 22–29 & 47.

chambers is a law-making act¹⁷¹ and, as such, can be subject to constitutional review. It then declared the ruling unconstitutional, arguing that the Supreme Court had usurped the legislative competence to lay down the organization of the judiciary.¹⁷² The Tribunal held that the Supreme Court had no power to assess the independence of the DC, CECPA, and NCJ. According to the Tribunal, the effectiveness of the Polish constitutional provision on the President's prerogative, the exercise of which is not amenable to judicial review, overrides EU law that demands access to judicial review for an affected individual. Once the appointment by the President has been made, the status of the judge cannot be questioned. In the Tribunal's view, the Supreme Court should have taken this factor into account when applying the ECJ's test, as the ECJ requested the consideration of all relevant factors. Therefore, in the Tribunal's view, the Supreme Court has not properly implemented the ECJ's judgment and has breached the principle of loyal cooperation, laid down in Article 4(3) TEU, which demands the interpretation of EU and domestic law in a way that avoids clashes between the legal orders. However, it should be noted that by insisting on the supremacy of the Polish constitutional order and the effectiveness of the presidential prerogative – which, in the Tribunal's view, should trump all other relevant factors in the test for the appearance of judicial independence – the Tribunal in fact made the test redundant and inapplicable, as it potentially violated Polish constitutional law.

Regardless of the Tribunal's judgment, in our view, the Supreme Court's ruling provides the interpretation of relevant national provisions which may still help ordinary courts to implement the ECJ's test for the appearance of independence. Independent judges may still refer to and apply this interpretation. Under the well-established case law of the ECJ, national judges may not be bound by higher-level court rulings which prevent them from implementing EU law.¹⁷³

6. Conclusion: The paradox of EU judicial self-restraint and national empowerment

The test for the appearance of independence prescribed by the ECJ, based on Article 47 of the EU Charter, may help assess judicial independence in Poland. At the same time, it may maintain the plurality of solutions relating to the organization of the judiciary in the EU Member States. The test allows courts

171. Case Kpt 1/20, decision of 21 April 2020 (the Constitutional Tribunal).

172. Case U 2/20, judgment of 20 April 2020 (the Constitutional Tribunal).

173. See Case C-416/10, *Križan and others*, EU:C:2013:8, paras. 62–73, and the earlier case law cited.

to consider a broad context in settling disputes regarding the independence of individual judges or judicial bodies. However, it also confers broad discretion upon domestic courts, should they need to carry out a peer review of judicial independence. Importantly, the ECJ did not decide to reach for a much more far-reaching test of the tribunal “established by law” which could lead to a more definitive conclusion that judges appointed with the involvement of the unconstitutionally formed NCJ cannot at all be considered lawful judges.¹⁷⁴ How that test should be applied is currently being decided by a grand chamber of the ECtHR. But it might also be used in future cases by the ECJ.

In the Polish case, it was important that the referring court, as well as an extended panel of the Supreme Court, swiftly applied the test to minimize the risk of the judicial multiverse, by providing a negative assessment of Supreme Court judges appointed after 2018. Whether the recused judges and chambers will abstain from adjudication is a matter of facts rather than law. At the same time, however, the Supreme Court did not exclude the judges of lower courts from adjudication, arguably not to paralyse the functioning of already overburdened courts. The lower courts may nevertheless face serious hurdles applying the test, which is likely to prolong judicial proceedings anyway. The test for the appearance of judicial independence, in and of itself, as well as preliminary references and Article 47 of the EU Charter, may turn out to be insufficient in returning stability to the Polish judicial system.

What is also worth noting is that the ECJ judgment led the Supreme Court to fully embrace its competence to interpret the Polish Constitution and assess the constitutionality of legal acts, to the extent that a constitutional assessment is necessary to interpret how the right to a fair trial before an independent judge – recognized by the ECtHR, the EU Charter and the Polish Constitution – should be realized. The CECPA took the opposite view. The different stances of the Supreme Court chambers with regard to the ECJ judgment are much more than ordinary inconsistency in case law, which may occur from time to time in a court of several dozen judges. The different rulings of the Supreme Court chambers are characterized by diametrically opposing assumptions: regarding the relationship between the EU and the Polish constitutional order; regarding the scope of court powers and responsibilities stemming from the fundamental right to judicial protection; and regarding the nature of presidential prerogatives. These differences are, first and foremost, underpinned by a division in the membership of the Supreme Court between judges appointed before and after the reform of the NCJ of 2018. Those appointed after 2018 have a personal interest in narrowing down the scope of the ECJ judgment to retain their judicial posts. The judges from both sides claim to implement the ECJ judgment, but they achieve opposing results

174. ECtHR, Appl. No. 26374/18, *Astráðsson v. Iceland*.

depending on whether they interpret the ECJ's judgment in a broader or narrower way. The "old" judges of the Supreme Court seek support from the ECJ, whereas the "new" judges (as well as the government and parliamentary majority) seek support from the captured Constitutional Tribunal. The outcome of this judicial clash scarcely depends on legal arguments.

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