Drifting Case-law on Judicial Independence

A Double Standard as to What Is a 'Court' Under EU Law? (CJEU Ruling in C-132/20 Getin Noble Bank)

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Introduction

In a preliminary ruling of 29 March 2022, in case C-132/20 *Getin Noble Bank*, the CJEU answered questions on judicial independence of judges appointed under an undemocratic regime and of judges appointed before 2018 in an allegedly flawed process. Taking a highly formalistic approach, the Court seeks to preserve judicial dialogue between itself and the national judges – at the expense of the rule of law and judicial independence.

The case before the Polish courts originally concerned abusive clauses in a credit agreement, yet the questions did not relate to the merits of domestic dispute, but to aspects of independence of judges who ruled on the case at a lower instance. The referring authority questioned their independence on the grounds that either (a) the appointment during the communist-era regime or (b) the appointment based on a recommendation made by the previous National Council of the Judiciary (before 2018), the composition of which was declared unconstitutional (Constitutional Tribunal case K 5/17). The Luxembourg Court did not share the doubts of the referring body and held that the independence of such judges cannot be put into question for the reasons set out in the reference (see *Anna Wójcik*, Keeping the Past and the Present Apart).

The CJEU's substantive response supplements the case law on judicial independence, though it is in no way a landmark judgment in this context. A more interesting issue is the admissibility of the reference made by a judge appointed in 2018 in a defective procedure. The legitimacy of the court composed of such a person to initiate dialogue with the CJEU raised serious doubts.

Recalling the classic formula of a 'court', the CJEU affirmed, in general, that the referring body must be an independent court established by law. Yet, it refused to make an autonomous assessment of the legality (appointment) of the judge who constituted the referring court, that is, whether the referring person can be considered as court established by law. This created a discrepancy between the requirements of a 'court' which may initiate a preliminary reference procedure and a 'court' which may rule on questions of EU law and with respect to which it must meet the requirements of effective judicial protection. As a result, a national court may be authorised to submit a question to the Luxembourg Court, and yet the same court cannot apply the answer received from the CJEU as it is not a court established by law (see also *Laurent Pech* and *Sebastien Platon,* How Not to Deal with Poland's Fake Judges' Requests for a Preliminary Ruling).

The Referring Body

The questions were posed by the Polish Supreme Court in a single judge formation composed of a person who was appointed to a judicial position in *manifest* breach of national law and European standards. He was nominated in 2018 on the recommendation of the National Council of the Judiciary (NCJ), which had lost its independence from the legislature and the executive, as ruled by both the Supreme Court[1] itself and the ECtHR.[2] Moreover, the person was appointed despite the fact that the NCJ resolution recommending him had been appealed to the Supreme Administrative Court (SAC), which had stayed the resolution. The

appointment was made while the appeal was still pending before the SAC, despite the absence of a preparatory act as required by the Polish Constitution, and in blatant disregard of a binding interim decision issued by the SAC.

For these reasons, the procedure for the judicial appointment of the referring person was in blatant breach of domestic constitutional requirements and European legal standards. The reference made by the said irregularly established judge led to the suspicion that the questions posed were not really made in order to obtain an interpretation of EU law to assist in the resolution of the domestic dispute, but rather in order to 'authenticate' him as a judge of the Supreme Court; challenge previous judicial appointments as a 'counterbalance' to the questioning, by other judges, of the status of 'new' judges appointed since 2018; as well as to support the Government's claim of the need to 'decommunise' the Polish courts as a *rationale* for changes in the judiciary.

A 'Court' Within the Meaning of Article 267 TFEU

The Polish Supreme Court may decide questions concerning the application or interpretation of European Union law. Thus, in line with the *Portuguese Judges* case, it should meet the requirements of effective judicial protection, including the requirements of lawful establishment and independence. They form an integral part of the 'court' formula consolidated in the *Dorsch* judgment[3] and frequently repeated in subsequent case-law.

The concept of a 'court' is based on Article 6 ECHR which constitutes also a minimum standard of the EU's effective judicial protection. Developing this concept, the Strasbourg Court has held that the requirement of a court 'established by law' includes not only the legislation providing for the establishment of judicial organs,[4] their competence,[5] but also the process of appointing judges,[6] and the participation of judges in the examination of the case.[7] EU law includes the same standard of what is a 'court' under Article 19 (1) (2) TEU and Article 47 EU's Charter as confirmed in CJEU case-law: *A.K.*,[8] *Simpson*,[9] *et subseq*.

If the application of criteria and methodology indicated in the CJEU and the ECtHR case-law for the assessment of establishment and independence of a 'court' leads to the conclusion that the irregularities in a judicial appointment process nullifies its effect – a body comprising of a person irregularly appointed cannot be regarded as meeting the requirements of a 'court'. Consequently, such an authority should not, as such, be able to initiate dialogue with the CJEU.

Furthermore, in *Banco de Santander*, in 2020, by stating that preliminary ruling mechanism may be activated only by a body responsible for applying EU law, the CJEU suggested that the requirements of a 'court' under Article 267 TFEU are the same as under Article 19 TEU and Article 47 EU's Charter.[10] Two years later, in *Getin Noble Bank*, the Court appears to have departed from its previous position. It refused to make an autonomous assessment of the 'establishment by law' of the judge constituting the referring body. It restricted this requirement to the existence of the institution itself (the Supreme Court), that is, to verifying if the 'court' as such (as as an institution), was established by law. This approach was in line with the position taken by Advocate General Bobek as well as the Commission's submissions at the hearing.

True, from the institutional perspective, it cannot be denied that the Supreme Court as such is established by a legislative act. Yet, already some parts of the Supreme Court's structure, notably the two new chambers established in 2018, have raised serious concern since their creation. Eventually, they both have been negatively evaluated by the CJEU (see C-791/19 *Commission v. Poland* – for the Disciplinary

[1] Resolution of the Supreme Court of 23.01.2020 in the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, BSA I-4110-1/2.
[2] ECtHR judgments: *Reczkowicz v Poland*, 43447/19; *Dolińska-Ficek and Ozimek v. Poland*, 49868/19, 57511/19; *Advance Pharma v. Poland*, 1469/20.
[3] CJEU judgment of 17.07.1997, C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH*, para. 23.
[4] ECtHR judgment of 5.10.2010, *DMD Group, A.S. v. Slovakia*, para. 59; ECtHR judgment [GC] of 1.12.2020 *Ástráðsson v. Iceland*, para. 212.
[5] ECtHR judgment of 28.11.2002 *Lavents v. Latvia*, para. 114; *Ástráðsson* [GC], para. 212.

Chamber; and C-487/19 *W.Ż.* – for the Chamber for Extraordinary Control and Public Affairs). Likewise, the process of appointing judges to the Supreme Court as from 2018 has been found to breach domestic and European legal standards. Nevertheless, despite its awareness of serious defects in the appointment of Supreme Court judges, the CJEU has adopted a highly formalistic **presumption** that a national court satisfies the requirements of a 'court' irrespective of its actual composition (para. 69). A presumption, which, in principle, can only be rebutted by a final national or international judicial decision (para. 72).

Critique of the Court's Approach

The stance taken by the CJEU fails to persuade and may be viewed as doubtful for a number of reasons. *First*, the concept of 'court' was developed by the CJEU in the very context of the preliminary reference procedure and the exercise of its inherent power under Article 267 TFEU to verify if the request comes from an authorised body. This very understanding of the 'court' was then transposed into the principle of effective judicial protection. In *Getin Noble Bank*, the CJEU has taken a step backwards, deviating from a concept that was clear, and has decided to limit itself to a superficial review of the referring body. Indeed, the Court appears to have fractured the hitherto uniform, clearly delineated understanding of what is a 'court'. That said, it seems to be aware of some possible risks of so doing (see para. 74).

Second, the Court has failed to explain convincingly the reasons for partially abandoning the exercise of its powers. It recalled the division of tasks in the preliminary ruling procedure between itself and a national court. It invoked its case-law of the 1980s and held that it was not for the CJEU to determine whether reference was made in accordance with the rules of national law (para. 70). However, the principle of effective judicial protection also encompasses the guarantees of objectivity and fairness in the judicial appointment process.[11] Therefore, the issue whether the judge was lawfully appointed, in a process guaranteeing independence, is no longer a strictly national matter, but falls within the sphere of EU law. The Court was thus fully competent to assess for itself whether the requesting authority complied with the requirements of a court. In the *Simpson* ruling, the CJEU stated that the regularity of the composition of a judicial panel should be examined *ex officio* by the courts. In *Getin Noble Bank*, it departed from that view and itself waived such examination. Perhaps this is the first time that the CJEU has delegated its own task under EU law to a national or 'other' international court.

Third, the Court took a rigid temporal stance, by ruling that it would take into account only judicial decisions which are final at the time of the close of the oral part of the procedure (para. 73). That comes when the Advocate General delivers his/her Opinion in the case[12] which happened, in this case, on 8 July 2021. The Court itself, however, has not been entirely consistent here, as it did refer in its reasoning to the ECtHR *Reczkowicz* judgment (of 22 July 2021), which had already been made after the critical date of the closing of the oral stage of proceedings in Luxembourg (para. 128).

In *Getin Noble Bank*, the status of the person constituting the referring authority was not called into question by the CJEU, because the Court stated that at the critical date it had no knowledge of a final decision made in relation to him. Yet, on 3 February 2022, i.e. prior to delivering the ruling in C-132/20, the ECtHR issued a judgment in the case of *Advance Pharma*, explicitly stating that, i.a. the person who referred the questions in *Getin Noble Bank*, did not meet the

[6] *Ástráðsson*[GC], para. 220–227.
[7] ECtHR judgment of 20.10.2009, *Gorguiladzé v. Georgia*, para. 68; ECtHR ruling of 27.10.2009, *Pandjikidzé and others v. Georgia*, para. 104; *Ástráðsson*[GC], para. 212..
[8] CJEU judgment of 19.11.2019, C-585/18, C-624/18 and 625/18 *A.K. and others*.
[9] CJEU judgment of 26.03.2020 C-542/18 RX-II and C-543/18 RX-II *Simpson and HG*.
[10] CJEU judgment of 21.02.2020 C-274/14 *Banco de Santander*, paras. 55–56.
[11] *A.K. and others*, para. 134; *A.B. and others*, para. 123.
[12] Article 82 (1) of the Rules of Procedure.

requirements of a court established by law since he was appointed in manifest breach of domestic law.

In such a context, the CJEU was at liberty to reopen the oral part of the procedure so as to take account 'a new fact which is of such a nature as to be a decisive factor for the decision of the Court' (Article 83 of the CJEU Rules of Procedure). It could have done so 'at any time' before the delivery of the judgment. At the date of ruling in *Getin Noble Bank*, the *Advance Pharma* judgment was not final yet. However, in the light of the Polish government's stance supported by the rulings of the Constitutional Tribunal (cases K 6/21 and K 7/21), declaring the ECtHR judgments concerning changes in the Polish judiciary to be *ultra vires* – it would hardly be expected that the government apply for the case to be referred to the ECtHR Grand Chamber for re-examination (Article 43 of the ECHR).

Fourth, the CJEU failed to take into account judicial decisions that, prior to the critical date, ruled on the irregularity of the appointments to the Supreme Court made since 2018. When implementing the CJEU's *A.K.* judgment, the Supreme Court ruled that when its composition includes a person appointed to the Court on recommendation of the new NCJ such a Court's formation is unlawful.[13] This conclusion applied to all persons appointed to the Supreme Court since 2018, which included the person constituting the referring body in *Getin Noble Bank*. The 2020 Resolution of the Supreme Court was legally binding and final. Although it is of an abstract nature, with respect to new judges appointed to the Supreme Court, it indeed produces effects similar to those of a final judgment. It made specific findings with respect to those persons. In contrast to the appointment of common or military court judges (point 2 of the Resolution), it did not require any additional, individualised assessment in respect of SC judges. *Ergo*, the Resolution unambiguously and directly ruled on unlawfulness of these judges' appointment to the Supreme Court. The ECtHR relied on this very Resolution in a series of judgments in which it found a breach of Article 6 ECHR when a person newly appointed to the Supreme Court sat on the bench in the applicant's case (see *Reczkowicz; Dolińska-Ficek and Ozimek; Advance Pharma*).

Likewise, the CJEU did not take into account judgments of the Supreme Administrative Court of 6 May 2021, which had overturned the recommendation of the NCJ on the basis of which the referring judge was appointed to the Supreme Court. These judgments were implementing the CJEU ruling in C-824/18 *A.B. and Others*. The repeal of the NCJ resolution in the part containing the judicial recommendation signified the removal of the motion to the President of the Republic to appoint the recommended persons. Now, their appointment has no basis in the preparatory act required under Article 179 of the Polish Constitution.

Conclusions

Following the ruling in *Banco de Santander*, it could have been assumed that the requirements of a court, for the purposes of the preliminary ruling procedure, and the principle of effective judicial protection are the same. However, in *Getin Noble Bank*, the Court adopted a different formula that enables, at least temporarily, to engage in a judicial dialogue with irregularly appointed persons who – eventually – cannot adjudicate without violating EU and ECHR law as they are not courts established by law. As a result, a situation may well arise in which a national court will be allowed to make a preliminary reference – because the CJEU will not examine its composition – and yet that court will not be able to apply the Court's answer – because it will not meet the requirements of Article 19 TEU.

The CJEU now appears to differentiate between a 'court' under Article 267 TFEU and a 'court' under 19 TEU (Article 47 Charter). The Court's highly formalistic presumption results in weaker protection of the rule of law and judicial independence. The CJEU seeks to preserve judicial dialogue between itself and the national judges (or, indeed, anyone appointed to a court), even if this amounts to answering questions from manifestly irregularly appointed persons. The value of the rule of law is thus giving way to the value of ('judicial') dialogue.

[13] Point 1 of the Supreme Court Resolution of 23.01.2020.

Yet, irregularly appointed judges have not gained full protection by this ruling. In respect of the person who made the reference in *Getin Noble Bank*, the Strasbourg judgment in *Advance Pharma* has – in the meantime – become final. Hence, the condition for rebutting the CJEU presumption is satisfied. It is thus no longer possible for that person to bring any more referrals to the Luxembourg Court. Not being 'established by law', he does not satisfy the requirements of effective judicial protection and therefore cannot rule on EU matters. Thus, he cannot implement the ruling he asked for. A complaint to Strasbourg in relation to the future judgment of the referring body would be successful as the ECtHR has already established it is not a proper court.

Even if the referring body itself is not capable of implementing the CJEU's replies to its own questions, they still may be applied by other courts under the doctrine of *acte éclairé*. A positive aspect of the solution adopted by the CJEU is that it made it possible to answer questions about the independence of judges appointed prior to 2018. In result, it defeated the argument of the Polish government introducing changes to the judiciary, i.a. under the pretext of decommunisation.

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