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Dialogue Between the Court of Justice and Administrative Courts of the Member States in General and the Naczelny Sąd Administracyjny in Particular

Introduction

The dialogue between the Court of Justice and national administrative courts, which takes place by means of the preliminary reference mechanism, has contributed tremendously to the development of EU law.

Quantitatively, one can safely state that the lion's share of the preliminary references brought before the Court of Justice have been submitted by administrative courts. For the purpose of this contribution, administrative courts will be defined as courts that enjoy jurisdiction to rule on the validity of measures adopted by public authorities, including those relating to fiscal and social security matters.

Qualitatively, the dialogue between the Court of Justice and national administrative courts has been fruitful, giving rise to many of the founding principles of the EU legal order. To name just three examples, it was the Dutch *Tariefcommissie* – a Netherlands administrative court having final jurisdiction in revenue cases – that made the reference in *van Gend & Loos*, in response to which the Court of Justice affirmed for the very first time the direct effect and autonomous character of Union law.[1] Similarly, in *Internationale Handelsgesellschaft*, it was on the basis of a reference made by the German *Verwaltungsgericht* Frankfurt am Main that the Court of Justice ruled that the EU institutions are bound by fundamental rights as general principles of EU law.[2] Third and last, the reference made by the Portuguese *Supremo Tribunal Administrativo* in *Associação Sindical dos Juízes Portugueses* led to one of the most ground-breaking judgments of the last decade, in which the Court of Justice held that EU law protects judicial independence of national courts.[3]

The success of that dialogue may be explained by the fact that it is grounded in mutual trust, comity and respect. When administrative courts engage in a dialogue with the Court of Justice, there is no hierarchy, but rather cooperation based on a division of jurisdiction.

Whilst it is true that the dialogue between the Court of Justice and civil and criminal courts is also rooted in the same three principles, those courts are not necessarily confronted with the same specific legal issues as those that national administrative courts must overcome. Those specific legal issues arise, in part, because of the role that national administrative authorities are called upon to play in the implementation of EU law.

The purpose of this contribution is precisely to look at some of those specific legal issues and to argue that the preliminary reference mechanism is key in solving them.

First, I shall argue that the preliminary reference mechanism is a precious tool that enables national courts to clarify the complexities of decision-making processes involving both national authorities and EU institutions. In short, I shall examine the importance that the preliminary reference mechanism plays in composite administrative procedures.

Second, I shall look at the coherence of the EU judicial system and, in particular, at the interaction between the preliminary reference mechanism and actions for annulment. To that end, I shall examine the *TWD Textilwerke Deggendorf* and *Georgsmarienhütte and Others* line of case law.[4] Understanding that interaction is essential for the dialogue between the Court of Justice and national courts given that it determines the conditions under which a preliminary reference on the validity of an EU act may be declared inadmissible. That is all the more true for administrative courts, since that line of case law becomes particularly relevant in cases where EU acts are implemented at national level by administrative authorities.

Third, I shall touch upon 'the undesirable situation in which a case is repeatedly shuttled back and forth […] between [national] courts and administrative authorities'. This is what AG Bobek refers to as 'judicial or procedural ping-pong'.[5] That situation arises, in particular, where national law confers on administrative courts only the power to annul or to declare invalid an act adopted by administrative authorities, but does *not* grant them the power to alter such acts. In *Torubarov*, an asylum case, the preliminary reference mechanism played a vital role in that regard in enabling the Court of Justice to hold that the principle of effective judicial protection may militate in favour of giving the 'last word' to the administrative courts.[6]

Fourth and last, I will focus specifically on the rich dialogue that exists between the Court of Justice and the *Naczelny Sąd Administracyjny* as it celebrates its 100th anniversary this year.

I. Composite Administrative Procedures

In the EU legal order, it is for the Court of Justice to say what the law of the EU is and for national courts to apply that law to the case at hand. The Court of Justice has the final say when it comes to the interpretation of EU law. When it comes to the validity of that law, it has the *only* say.

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1 Judgment of 5 February 1963, *van Gend & Loos*, 26/62, EU:C:1963:1.

2 Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114.

3 Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117.

4 See judgments of 9 March 1994, *TWD Textilwerke Deggendorf*, C-188/92, EU:C:1994:90, and of 25 July 2018, *Georgsmarienhütte and Others*, C-135/16, EU:C:2018:582.

5 Opinion of Advocate General Bobek in *Torubarov*, C-556/17, EU:C:2019:339, point 2.

6 Judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626.

It follows that national courts, including national constitutional courts, lack jurisdiction to second-guess the meaning of an EU provision that has already been interpreted by the Court of Justice. Nor may those courts declare an act adopted by the EU institutions invalid. Instead, they should make use of the preliminary reference mechanism and engage in a dialogue with the Court of Justice, asking it, where appropriate, to clarify further its previous case law.

For their part, national courts are to provide the Court of Justice with a complete summary of the facts of the case and with an accurate description of the relevant provisions of national law. That information is necessary in order for the preliminary reference mechanism to work properly. Without it, the Court of Justice is unable to determine whether an answer to the questions referred by the national court may actually contribute to solving the case at hand.

The Court of Justice is bound by the interpretation of national law put forward by the referring court and by the facts set out in the order for reference. The national court is thus responsible for defining the factual and legislative context of the case at hand, the accuracy of which is not a matter for the Court of Justice to determine.

The division of jurisdiction put in place by the preliminary reference mechanism mirrors, to a great extent, the laws that each court is called upon to interpret. The role of the Court of Justice is to interpret EU law in a way that contributes to solving the case pending before the national court. For its part, the national court is to provide an accurate description of the factual and legal context and, after the judgment of the Court of Justice is delivered, to apply the relevant provisions of EU law – as interpreted by that judgment – to the case at hand.

However, where EU law entails the establishment of composite administrative procedures, it is less straightforward to draw the dividing line between EU law and national law and, in consequence, to determine the division of jurisdiction between the Court of Justice and administrative courts.

In the context of such composite administrative procedures, the preliminary reference mechanism is an indispensable tool enabling administrative courts to clarify the interpretation of EU law and, therefore, the limits of their own jurisdiction. Two examples taken from the case law illustrate that point, i.e. *Berlusconi and Fininvest* and *Iccrea Banca*,[7] involving two references made respectively by the *Consiglio di Stato* and by the *Tribunale amministrativo regionale per il Lazio*. In both cases, the Italian referring courts had to examine composite administrative procedures in the context of the EMU.

In the first case, the question was whether the *Consiglio di Stato* enjoyed jurisdiction to examine the lawfulness of a decision adopted by the Bank of Italy, in which it invited the European Central Bank (the 'ECB') to oppose the acquisition by Mr Berlusconi, through a private company, of a qualifying holding in the capital of a bank. In application of the relevant EU legislation, the Bank of Italy reasoned that Mr Berlusconi, having been convicted for tax fraud, did not fulfil the reputation-based criteria required for ownership of such a 'qualified' holding. The ECB followed suit and adopted a final decision opposing the acquisition. Mr Berlusconi challenged both the decision of the Bank of Italy before the *Consiglio di Stato* and that of the ECB before the European General Court.[8]

Before the *Consiglio di Stato*, Mr Berlusconi argued that the decision of the Bank of Italy was seeking to circumvent a previous ruling of that court that was endowed with the force of *res judicata*. However, the *Consiglio di Stato* had doubts as to whether it had jurisdiction to examine the lawfulness of such a decision, preferring instead to make a reference to the Court of Justice.

At the outset, the Court of Justice drew a distinction between two types of administrative procedures involving national authorities. On the one hand, where the EU institution exercises, alone, the final decision-making power without being bound by the preparatory acts or the proposals of the national authorities, it falls exclusively to the EU Courts to review the legality of the final decision adopted by that EU institution. In the course of such review, the EU Courts may examine 'any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision'.[9] In the context of administrative procedures based on the exclusive decision-making power of the EU institutions, preparatory acts or proposals adopted by national authorities cannot be subject to review by national courts. Otherwise, there would a risk of divergent assessments that might compromise the EU Courts' exclusive jurisdiction to review the legality of that final decision, in particular where such a decision follows the analysis or the proposal made by the national authorities.

On the other hand, the EU legislator may establish an administrative procedure based on a division of powers between the competent national authorities and the EU institutions. In that case, 'the act adopted by the national authority is a necessary stage of a procedure for adopting an EU act in which the EU institutions have only a limited or no discretion, so that the national act is binding on the EU institution'.[10] Accordingly, that act does not fall within the exclusive jurisdiction of the EU Courts, but within that of national courts.

In the case at hand, the Court of Justice found that in the context of the Banking Union's single supervisory mechanism, the ECB enjoys exclusive competence to decide whether or not to authorise the acquisition of, or an increase in, a 'qualifying' holding in a credit institution. The decision of the Bank of Italy at issue in the main proceedings was not binding on the ECB. Accordingly, the Court of Justice found that the *Consiglio di Stato* lacked jurisdiction to examine the lawfulness of that decision.

In *Iccrea Banca*, the questions referred were, to some extent, similar to those raised in *Berlusconi and Fininvest*. The Court of Justice was called upon to determine whether the referring court enjoyed jurisdiction to examine the validity of decisions and communications adopted by the Bank of Italy relating specifically to the calculation of the *ex ante* contributions that an Italian bank – Iccrea Banca – had to pay to the Single Resolution Fund (the 'SRF'). Those decisions and communications

7 Judgments of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, and of 3 December 2019, *Iccrea Banca*, C-414/18, EU:C:2019:1036.

8 Judgment of 11 May 2022, *Fininvest and Berlusconi v ECB*, Case T-913/16, EU:T:2022:279.

9 Judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, para. 44.

10 *Ibid.*, para. 45.

sought, on the one hand, to provide the Single Resolution Board (the 'Board') with the information necessary for calculating the amount of that *ex ante* contribution. On the other hand, the Bank of Italy was responsible for implementing the decision of the Board fixing that amount.

Drawing on its previous findings in *Berlusconi and Fininvest*, the Court of Justice found that the Board enjoyed exclusive competence to calculate the amount of *ex ante* contributions to the SRF. Whilst the Bank of Italy's role is to facilitate the determination of the amount of those *ex ante* contributions and to cooperate with the Board to that end, its findings are not binding on the Board. Nor did the Bank of Italy have the power to re-examine the calculations made by the Board. This meant that the referring court was not empowered to review the validity of the acts adopted by the Bank of Italy relating specifically to the calculation of the *ex ante* contributions.

Both *Berlusconi and Fininvest* and *Iccrea Banca* thus show the importance of the preliminary reference mechanism as a means of clarifying the division of jurisdiction between the Court of Justice and national administrative courts in the context of composite administrative procedures.

Where national administrative courts encounter difficulties in establishing the nature of the administrative procedure in question – i.e. where doubts arise as to whether the administrative procedure in question is based on the exclusive decision-making powers of the EU institutions or on a division of powers between national authorities and EU institution – those courts should have recourse to the preliminary reference mechanism.

II. The Coherence of the EU Judicial System

National courts lack jurisdiction to rule on the validity of EU acts. Such judicial review falls within the exclusive jurisdiction of the EU Courts, i.e. the Court of Justice and the General Court.

That said, there are two procedural avenues through which the EU Courts may review the validity of secondary EU law. On the one hand, applicants who have standing may, within a two-month time limit, bring an action for annulment against the EU act in question before the EU Courts. Applicants enjoy such standing in three different situations. First, where the EU act in question is addressed to them. Second, where it is not addressed to them but concerns them directly and individually. Third and last, where it is a 'regulatory act' that directly concerns them and does not require further implementing measures.

On the other hand, national courts may ask the Court of Justice to examine the validity of an EU act by having recourse to the preliminary reference mechanism. However, national courts may only do so provided that one of the two following conditions is fulfilled. The person who relies on the invalidity of the EU act in question – which constitutes the legal basis for a national decision concerning him or her – must have brought an action for annulment against that EU act before the EU Courts within the time limit prescribed by the EU Treaties. Alternatively, the failure of that person to bring such an action for annulment must be attributable to the fact that he or she did not have an 'undoubted right' to do so.

This means, in essence, that a person who undoubtedly has standing to bring an action for annulment before the EU Courts may not rely on the invalidity of the EU act in question before a national court. In those circumstances, references pertaining to the validity of that EU act will be declared inadmissible.

The rationale behind those two alternative conditions is, in essence, to preserve the effectiveness of the two-month time limit for bringing an action for annulment. Otherwise, applicants would be able to circumvent that time limit by challenging the national implementing measures before national courts on the ground that the EU act in question is itself invalid. Those two conditions protect legal certainty, since they prevent applicants from challenging the validity of EU acts indefinitely.

In *Georgsmarienhütte and Others*,[11] the Court of Justice confirmed its previous findings in *TWD Textilwerke Deggendorf*.[12] In so doing, it recalled the relevant elements that national courts must take into account before making a reference on the validity of an EU act.

First, the two conditions of admissibility apply even where the two-month time limit to bring an action for annulment has not yet expired at the time when the person concerned starts legal proceedings before the national court.[13] Second, applicants who fail to meet those two conditions may still challenge national implementing measures before the national court, in so far as the grounds put forward by them do not question the validity of the EU act in question.[14] Third and last, EU law does not preclude applicants from bringing concurrently two sets of legal proceedings before the EU Courts and before national courts, respectively. Should that be the case, then if it becomes apparent that the outcome of the dispute before the national court depends on the validity of the EU act in question, the national court must, in accordance with the principle of sincere cooperation, stay its proceedings pending final judgment in the action for annulment before the EU Courts.[15]

The critical question which then arises is what is to be understood by 'an undoubted right to bring an action for annulment'. In the light of *TWD Textilwerke Deggendorf* and *Georgsmarienhütte and Others*, it seems that that right exists in respect of the actual beneficiaries of individual aid, granted under an aid scheme, in respect of a Commission decision ordering the recovery of the aid granted under such a scheme. Those beneficiaries enjoy standing to bring an action for annulment against such a Commission decision before the EU Courts.

In the same way, in *Iccrea Banca*,[16] after determining that national courts could not examine the validity of acts adopted by the Bank of Italy pertaining specifically to the calculation of the *ex ante* contributions to the SRF that were at issue, the Court of Justice went on to examine whether the questions referred by the *Tribunale amministrativo regionale per il Lazio* were admissible in so far as they concerned those acts. To that end, it found that Iccrea Banca enjoyed an undoubted right to bring an action for annulment against the decision of the Board relating to the calculation of those *ex ante* contributions to the SRF. As a matter of fact, Iccrea Banca had brought an action for annulment against that decision before the General

11 Judgment of 25 July 2018, *Georgsmarienhütte and Others*, C-135/16, EU:C:2018:582.
12 Judgment of 9 March 1994, *TWD Textilwerke Deggendorf*, C-188/92, EU:C:1994:90.
13 Judgment of 25 July 2018, *Georgsmarienhütte and Others*, C-135/16, EU:C:2018:582, para. 16.
14 *Ibid.*, para. 22.
15 *Ibid.*, paras 24 and 25.
16 Judgment of 3 December 2019, *Iccrea Banca*, C-414/18, EU:C:2019:1036.

Court. However, it had done so out of time.[17] Accordingly, the Court of Justice declared inadmissible the questions referred that related specifically to the compatibility of decisions of the Bank of Italy with EU law rules governing the calculation of those *ex ante* contributions.

III. Putting an End to Judicial Ping-Pong

In the light of the principle of effective judicial protection, enshrined in Article 47 of the Charter, it is not desirable for an individual to have his or her case shuttled back and forth between administrative authorities and the courts.

In *Torubarov*,[18] the Court of Justice was confronted with just such an undesirable situation. The facts of the case may be summarised as follows. Mr Torubarov, a Russian national, submitted an application for international protection to the Hungarian Immigration Office (the 'Immigration Office'). That Office rejected the application on the ground that it was, in the light of the information gathered, unlikely that the applicant would be subjected to persecution. Mr Torubarov successfully challenged the decision adopted by the Immigration Office before the Administrative and Labour Court of Pécs (Hungary). In finding that the decision was both inconsistent and biased as well as lacking relevant information, the national court ordered the Immigration Office to conduct a new procedure and to take a new decision. In so doing, it provided the Immigration Office with detailed guidance as to the factors that it should take into account when examining the application.

In the context of the second administrative procedure, the Immigration Office *again* rejected the application of Mr Torubarov who *again* successfully challenged that new decision before the administrative court, which *again* ordered the Immigration Office to conduct a new procedure and to take a new decision. In so doing, the Administrative and Labour Court of Pécs (Hungary) observed that 'it was clear from the facts described in that decision that, contrary to the assessment made by the Immigration Office, Mr Torubarov had reasons to fear persecution and serious harm in Russia on account of his political opinions'.[19]

In the context of the third administrative procedure, the Immigration Office *again* rejected the application of Mr Torubarov without setting out, in support of that rejection, a ground for excluding the grant of international protection that had arisen in the meantime, or any new elements of fact or law requiring a new assessment. Mr Torubarov *again* challenged that decision before the administrative court, asking, this time, for this new decision to be modified so as to grant him refugee status. In its order for reference, the Administrative and Labour Court of Pécs (Hungary) noted that, since the entry into force of a new law in 2015, the power to modify an administrative decision had been withdrawn from Hungarian administrative courts. The referring court thus asked the Court of Justice whether EU law could provide it with power to grant such remedy.

At the outset, the Court of Justice recalled that EU asylum law has set the minimum standards under which a third country national may qualify for international protection, the Member States having no discretion in that regard. An asylum seeker qualifies for such protection where he or she has a well-founded fear of being persecuted for his or her political opinions.

Under the Asylum Procedures Directive,[20] a third country national has a right to an effective remedy before a court or tribunal against a decision taken on his or her application for international protection. In that regard, the Court of Justice observed that such a court or tribunal must carry out a full and *ex nunc* examination of 'all the facts [including new evidence] and points of law necessary in order to make an up-to-date assessment of the case at hand, so that the application for international protection may be considered in an exhaustive manner without it being necessary to refer the case back to the determining authority'.[21] However, since the Asylum Procedures Directive does not govern what happens *after* the administrative court annuls the decision under appeal, Member States enjoy discretion as to whether the grant of international protection is referred back to the competent administrative authority or decided by the administrative court itself.

That said, in exercising that discretion, Member States are implementing EU law and are therefore bound by the Charter. This means, in particular, that a referral back to the competent administrative authority must be consistent with the right to effective judicial protection as enshrined in Article 47 of the Charter, a right that produces direct effect. In the light of that protection, the competent administrative authority is, in the absence of new elements of fact or law, precluded from adopting a new decision that runs counter to the full and *ex nunc* assessment that was already carried out by the administrative court.

In the case at hand, the Court of Justice noted that, under Hungarian law, the referring court did not have power to grant any remedy enabling it to ensure compliance with its own judgment holding, in effect, that international protection should be granted to the applicant. In circumstances where the competent administrative authority does not comply with such judgment, the Court of Justice reasoned that in order to provide asylum seekers with effective judicial protection, the administrative court is required to vary the decision at issue, disapplying, if necessary, the national law prohibiting it from granting such relief.

In *Deutsche Umwelthilfe*,[22] the Court of Justice was confronted with a similar situation. The reference for a preliminary ruling was made in a dispute between *Deutsche Umwelthilfe*, a German environmental protection organisation, and the *Bundesland* of Bavaria arising from the latter's persistent failure to adopt, in implementation of Directive 2008/50 on ambient air quality,[23] the measures necessary in order for the limit value set for nitrogen dioxide to be complied with in the city of Munich. Following its refusal to observe not one, but two orders requiring Bavaria to comply with its obligations flowing from Directive 2008/50, a financial penalty was imposed on the

17 Order of the General Court of 19 November 2018, *Iccrea Banca v Commission and Single Resolution Board*, T-494/17, EU:T:2018:804.

18 Judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626.

19 *Ibid.*, para. 30.

20 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

21 Judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paras 52 and 53.

22 Judgment of 19 December 2019, *Deutsche Umwelthilfe*, C-752/18, EU:C:2019:1114.

23 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p. 1).

Bundesland by way of a third order, which it paid. Since Bavaria nonetheless continued to refuse to comply with the injunctions, and even went as far as to state publicly that it had no intention of doing so, *Deutsche Umwelthilfe* brought a new action, seeking the payment of a fresh financial penalty of 4 000 euros and, in addition, the detention, as a coercive measure, of the persons at the head of the *Bundesland* of Bavaria. While the first claim was upheld, the second was dismissed by order of the same day.

In proceedings brought by the *Bundesland* of Bavaria, the referring court, the *Bayerischer Verwaltungsgerichtshof* (Higher Administrative Court of Bavaria), first, upheld payment of the financial penalty and, second, decided to request a preliminary ruling from the Court of Justice regarding the issue whether coercive detention might be ordered. Since the referring court found that ordering the payment of financial penalties was not liable to result in an alteration in Bavaria's conduct, since such penalties are credited as income of the *Bundesland* and do not therefore result in any economic loss, and that the application of a measure of coercive detention was precluded for national constitutional reasons, it referred to the Court of Justice for preliminary ruling a question intended to determine, in essence, whether EU law, in particular the right to an effective remedy guaranteed in Article 47 of the Charter had to be interpreted as empowering, or even obliging, the national courts to adopt such a measure.

Building upon *Torubarov*, the Court of Justice first of all recalled that, when the Member States implement EU law, it is incumbent upon them to ensure that the right to effective judicial protection is observed, a right which is guaranteed both by Article 47 of the Charter and, in the environmental field, by Article 9(4) of the Aarhus Convention[24]. That right is all the more important because failure to adopt the measures required by Directive 2008/50 would endanger human health. National legislation which results in a situation where the judgment of a court remains ineffective fails to comply with the essential content of that right and deprives it of all useful effect. The Court of Justice recalled that, in such a situation, it is for the national court to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives pursued by those provisions or, failing that, to disapply any provision of national law which is contrary to directly effective provisions of EU law.[25]

However, the Court of Justice also explained that compliance with the latter obligation cannot result in the infringement of another fundamental right, the right to liberty which is guaranteed by Article 6 of the Charter and on which coercive detention places limits. Since the right to effective judicial protection is not absolute and may be restricted, in accordance with Article 52(1) of the Charter, the fundamental rights at issue must be weighed against one another. In order to meet the requirements of Article 52(1) of the Charter, a law empowering a court to deprive a person of his or her liberty must, first of all, be sufficiently accessible, precise and foreseeable in its application in order to avoid any risk of arbitrariness, a matter which is for the referring court to determine. Furthermore, since the ordering of coercive detention entails depriving an individual of his or her liberty, it follows that, in accordance with the requirements stemming from the principle of proportionality, recourse may be had to such an order only where there are no less restrictive measures – such as high financial penalties that are repeated after a short time and the payment of which does not ultimately benefit the budget from which they are funded, rendering them circular – a matter which is also for the referring court to examine. It is only if it were to be concluded that the limitation on the right to liberty which would result from coercive detention complies with those conditions that EU law would not only authorise, but require, recourse to such a measure. The Court added, however, that an infringement of Directive 2008/50 may also be found to exist by the Court in an action for failure to fulfil obligations under EU law and may give rise to State liability for the resulting loss or damage.[26]

IV. The *Naczelny Sąd Administracyjny* in dialogue with the Court of Justice

There has been a fruitful dialogue between the Polish administrative courts in general and the *Naczelny Sąd Administracyjny* in particular. I will illustrate this with three examples from the case law of the Court of Justice.

The first case I would like to mention is *Kraft Foods Polska SA*.[27] It was a VAT case, but not an ordinary one. Indeed, the focus of this case was not the interpretation of a provision of the VAT Directive[28] but rather the principle of proportionality.

The case concerned the reduction of the taxable amount for VAT purposes in circumstances where a price reduction had taken place after the supply of goods or services. Under Article 90(1) of the VAT Directive, 'the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States'. The applicable Polish legislation required that the taxable person provide proof of acknowledgment by the purchaser of the corrected invoice before any such reduction could be made.[29]

Upon a reference from the *Naczelny Sąd Administracyjny*, the Court of Justice ruled that such a national rule was in principle compatible with the VAT directive and respected the principle of proportionality. However, the Court added that where it is impossible or excessively difficult for the taxable person who is the supplier of goods or services to procure the acknowledgment of receipt within a reasonable timeframe, that person must be allowed to demonstrate through other means that he or she has taken the necessary steps to verify that the purchaser has indeed received the corrected invoice and that the latter reflects the transaction as it was actually carried out.[30]

The *Naczelny Sąd Administracyjny* has also put before the Court of Justice important questions regarding fundamental principles of EU law and the common values on which the EU is founded. This brings me to *A.B. and others*[31], which is one of the seminal cases of the Court of Justice concerning the rule of law.

24 Convention on access to information, public participation in decision-making and access to justice in environmental matters signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

25 Judgment of 19 December 2019, *Deutsche Umwelthilfe*, C-752/18, EU:C:2019:1114, paras 34-36 and 41-42.

26 *Ibid.*, para. 43.

27 Judgment of 26 January 2012, *Kraft Foods Polska*, C-588/10, EU:C:2012:40.

28 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

29 Judgment of 26 January 2012, *Kraft Foods Polska*, C-588/10, EU:C:2012:40, para. 9.

30 *Ibid.*, para. 42.

31 Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153.

In *A.B. and others*[32], the *Naczelny Sąd Administracyjny* made a reference to the Court of Justice so as to enable it to verify the compatibility of amendments modifying the Polish Law on the *Krajowa Rada Sądownictwa* (National Council of the Judiciary, 'the KRS')[33] with EU law.

At issue in the national proceedings were resolutions of the KRS not to present to the President of the Republic of Poland proposals for the appointment of five persons ('the appellants') to positions as judges at the *Sąd Najwyższy* (Supreme Court) and to propose other candidates for those positions instead. The appellants lodged appeals against those resolutions before the *Naczelny Sąd Administracyjny*. The legislation governing the appeals against such resolutions of the KRS was amended in 2018. Under these amended rules, it was provided that unless *all* the participants in a procedure for appointment to a position as judge at the Supreme Court challenged the relevant resolution of the KRS, that resolution became final with respect to the candidate proposed for appointment to that position, meaning that the latter could be appointed by the President of the Republic. Moreover, any annulment of such a resolution on an appeal brought by a participant who was not proposed for appointment could not lead to a fresh assessment of that participant's situation for the purposes of the assignment of the post concerned. A second amendment, introduced in 2019, made it impossible to lodge appeals against decisions of the KRS concerning the proposal or non-proposal of candidates for appointment to judicial positions at the Supreme Court. Appeals that were still pending were discontinued by operation of law.

In its judgment, the Grand Chamber of the Court of Justice held, first of all, that both the system of cooperation between national courts and itself, established by Article 267 TFEU, as well as the principle of sincere cooperation laid down in Article 4(3) TEU, preclude legislative amendments, such as those, cited above, carried out in Poland in 2019, where it is apparent that they have had the specific effect of preventing the Court of Justice from ruling on questions referred for a preliminary ruling such as those put by the referring court and of precluding any possibility that a national court may in the future put to the Court of Justice questions similar to those questions.[34] It was left to the referring court to determine whether, as a matter of fact, that was the case in the context of the proceeding pending before it.

Next, the Court considered that the Member States' obligation to provide remedies that are adequate to ensure effective legal protection for individuals in the fields covered by EU law, provided for in the second subparagraph of Article 19(1) TEU, may also preclude such legislative amendments. That is the case where it is apparent – which again it was for the referring to assess on the basis of all the relevant factors – that those amendments are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed on the basis of the KRS resolution to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them. Such amendments would then be liable to lead to those judges not being perceived to be independent or impartial, with the consequence that the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law would be prejudiced.[35] Although the lack of a judicial remedy against decisions concerning the appointment of judges at a national supreme court is not problematic *per se*, the position might be different where the conditions surrounding the appointment process in its specific national legal and factual context may indeed give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges that are appointed as a result of that process.[36]

With regard to the 2018 amendments to the Law on the KRS, the Court of Justice, having referred to its reasoning with respect to the 2019 amendments, held that it was for the referring court to rule whether the 2018 amendments were compatible with the second subparagraph of Article 19(1) TEU. However, it added, with regard to the considerations which the referring court had to take into account in that regard, that the national provisions concerning the judicial remedy available in the context of a process of appointment to judicial positions of a national supreme court may prove to be problematic in the light of the requirements arising from EU law where they undermine the effectiveness which existed until that point. The Court observed in that respect, first, that, following the 2018 legislative amendments, the appeal in question was devoid of any genuine effectiveness and offered no more than an appearance of a judicial remedy. Secondly, the Court stated that, in this instance, the contextual factors associated with all the other reforms that had affected the Supreme Court and the KRS must also be taken into account. In that regard, the Court noted, in addition to the doubts previously mentioned in relation to the independence of the KRS, the fact that the 2018 legislative amendments were made very shortly before the KRS in its new composition was called upon to decide on certain applications for posts, including those of the appellants, that were submitted in order to fill numerous judicial positions at the Supreme Court which had been declared vacant or newly created as a result of the entry into force of various amendments to the Law on the Supreme Court.[37]

The Court of Justice added that if the referring court reaches the conclusion that the 2018 and/or 2019 legislative amendments were adopted in breach of EU law, the principle of the primacy of that law requires the referring court to disapply those amendments, regardless of whether they are of a legislative or constitutional origin, and to continue to exercise the jurisdiction previously vested in it and thus to continue to hear disputes referred to it before those amendments were made.[38]

In the cases at hand, the *Naczelny Sąd Administracyjny* ruled that the KRS did not offer sufficient guarantees of independence from the legislative and executive branches of government in

32 *Ibid.*

33 ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011 (Dz. U. of 2011, No 126, item 714), as amended by the ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the National Council of the Judiciary and certain other laws) of 8 December 2017 (Dz. U. of 2018, item 3), and by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the system of ordinary courts and certain other laws) of 20 July 2018 (Dz. U. of 2018, item 1443).

34 *Ibid.*, para. 95.

35 *Ibid.*, paras 119 and 123.

36 *Ibid.*, para. 129.

37 *Ibid.*, paras 158 and 165.

38 *Ibid.*, para. 148.

the process of appointing judges and, consequently, annulled the resolutions of the KRS that were at issue.[39]

The *Naczelny Sąd Administracyjny* has also made a significant contribution to the case law of the Court of Justice in politically sensitive areas of law such as visa and immigration policy.

In that regard, I would like to mention the *M.A.* case.[40] That case concerned visa policy for third country nationals wishing to undertake tertiary level studies in the EU. The importance of this case becomes immediately clear when one considers that in 2018, the EU-27 was home to 1.3 million students from third countries[41] undertaking such studies in the block.[42]

The facts of the case were as follows: the applicant, a third-country national applied to the Polish Consul for a long-stay visa in order to be able to conduct postgraduate studies in Poland. After his application was rejected, he requested that the Consul re-examine his application. His application was once again rejected. The applicant then took his case before the *Wojewódzki Sąd Administracyjny w Warszawie* (Regional Administrative Court, Warsaw) which ruled that the Consul's decision was not amenable to judicial review. The applicant then appealed before the *Naczelny Sąd Administracyjny*.

In *El Hassani*,[43] the Court of Justice had previously held that a judicial appeal must be possible against the refusal to issue a Schengen visa.[44] In *M.A.,* the *Wojewódzki Sąd Administracyjny w Warszawie* had however, drawn a distinction between the facts in *El Hassani* and those in *M.A.*, as the former concerned an application for a short-term Schengen visa, while in the latter a long-term visa was requested.[45] Since it had doubts concerning the correct interpretation of EU law, the *Naczelny Sąd Administracyjny* asked the Court of Justice whether 'EU law, in particular Article 21(2a) of the Convention implementing the Schengen Agreement (the 'CISA'),[46] read in the light of Article 47 of the Charter, must be interpreted as obliging the Member States to provide for a judicial appeal against decisions refusing a long-stay visa for the purpose of studies'.[47]

The Court of Justice answered this question in the affirmative. It deduced an obligation to provide for judicial review not from Article 21(2a) of the CISA but rather from Article 34(5) of Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and *au pairing*, read in the light of Article 47 of the Charter. It recalled that applications for long-stay visas are not governed by EU law and that the provisions of the Charter, in particular Article 47, do not therefore apply to the refusal of such applications. It added, however, that Directive 2016/801 lays down the conditions of entry and residence for third-country nationals who wish to study in the EU.[48] If the referring court were to find that the visa application at issue fell within the scope of that Directive, the application of Article 47 of the Charter would be triggered, requiring compliance with the right to effective judicial protection, which means that the refusal to issue such a visa must be amenable to judicial review.[49]

In the case at hand, since the lower court did not examine whether the visa application fell within the scope of the Directive and consequently of the Charter, the *Naczelny Sąd Administracyjny* annulled the lower court's order and referred the case back to it.[50]

Conclusion

The preliminary ruling mechanism is a precious tool that enables national administrative courts – in cooperation with the Court of Justice – to ensure the uniform interpretation and application of EU law throughout the Union.

On the one hand, the preliminary ruling mechanism serves to draw the dividing line between the role of the Court of Justice (to say what EU law is) and that of national courts (to apply that law to the case at hand). As the keystone of the EU judicial system, the preliminary reference mechanism ensures compliance with that division of jurisdiction between national courts and the Court of Justice.

On the other hand, national courts may have recourse to the preliminary ruling mechanism in order to determine whether EU law grants those courts with the powers necessary to grant certain remedies that are required to guarantee the effective protection of EU rights but that they are not empowered to grant under national law. As *Torubarov* shows, the preliminary reference mechanism and effective judicial protection thus go hand-in-hand.

Given that the EU relies on the Member States in order to implement its policies and particularly, on national administrations, it is important for national administrative courts to understand the division of jurisdiction put in place by the preliminary reference mechanism and to provide effective judicial protection.

National administrative courts are vital for the development of EU law as they prevent public administrations from limiting EU rights arbitrarily. I would like to take this opportunity to congratulate the *Naczelny Sąd Administracyjny* on its wholehearted commitment to the protection of EU law rights. Indeed, as the cases to which I referred earlier illustrate, this court has always taken very seriously its role as a guarantor of those rights, which is essential if the rule of law is to be upheld.

39 Naczelny Sąd Administracyjny, judgments of 6 May 2021, II GOK 2/18, II GOK 3/18, II GOK 5/18, II GOK 6/18, II GOK 7/18 (PL); judgment of 13 May 2021, II GOK 4/18; judgments of 21 September 2021, II GOK 8/18, II GOK 10/18, II GOK 11/18, II GOK 12/18, II GOK 13/18, II GOK 14/18 (PL); judgments of 11 October 2021, II GOK 9/18, II GOK 15/18, II GOK 16/18, II GOK 17/18, II GOK 18/18, II GOK 19/18, II GOK 20/18.

40 Judgment of 10 March 2021, *Konsul Rzeczypospolitej Polskiej w N.*, C-949/19, EU:C:2021:186.

41 Including students from other EU-27 countries undertaking tertiary level studies in other EU-27 countries.

42 https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Learning_mobility_statistics as cited in Kosinska, A. (2021). The role of the CJEU in the strengthening of the participation of third-country nationals in academic life in the EU. Analysis of the ruling of the CJEU in case *M.A.* versus Consul of the Republic of Poland in N. Studia Prawnicze Kul, 4 (88) 92.

43 Judgment of 13 December 2017, *El Hassani*, C-403/16, EU:C:2017:960.

44 *Ibid.*, para. 43.

45 Judgment of 10 March 2021, *Konsul Rzeczypospolitej Polskiej w N.*, C-949/19, EU:C:2021:186, para. 16.

46 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), which was signed in Schengen on 19 June 1990 and entered into force on 26 March 1995, as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1).

47 *Ibid.*, para. 26.

48 *Ibid.*, para. 37-38.

49 *Ibid.*, para. 41.

50 Order of 13 April 2021, Sygn. akt II OSK 2470/19.