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The Limits of the Protection of the Rule of Law in Preliminary Reference Procedures

The principle of effective judicial protection has evolved from a general principle of EU law into a principle of constitutional nature linked to the rule of law. The preliminary ruling procedure of the EU has played an essential role in this development, as the ECJ has adapted for the purpose of the protection of judicial independence, the rules on assessing its jurisdiction, and the admissibility of preliminary questions. The ECJ has adopted a broad meaning to the EU law relevance of the case required for the jurisdiction of the ECJ, while restricting its jurisdiction for the enforcement of effective judicial protection as a constitutional principle. Uncertainties regarding the admissibility of the preliminary questions indicate the limited nature of preliminary ruling procedure in overtaking the role of protecting EU values, as well as the challenges that direct effect of general principles can pose in practice.

Keywords: judicial independence, principle of effectiveness, rule of law, preliminary ruling procedure, preliminary reference, European Court of Justice, jurisdiction, direct effect of EU law, fundamental rights protection, Charter of Fundamental Rights

Introduction

The principle of effective judicial protection evolves dynamically in the practice of the European Court of Justice (ECJ). The importance of this principle and the ECJ's activism are well observed in legal literature. The principle of effective judicial protection has been described as “a pillar of the EU legal order”² and “an epitome of EU liberal-constitutionalism”,³ but also as a “sword”,⁴ “a legal weapon”⁵ used against Member States as well as an “unruly horse”.⁶ The president of the ECJ, Koen Lenaerts has also stressed on a number of occasions the role of effective judicial protection as a guarantee for the

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² ROEBEN 2020: 29.

³ GENTILE 2022: 685.

⁴ BONELLI 2023.

⁵ GENTILE 2023.

⁶ ARNULL 2011.

protection of the EU legal order, and, as part of the principle of the rule of law, a common value of the Member States, enshrined in Article 2 TEU.⁷

A significant part of the case law of the CJEU in relation to the protection of the rule of law as effective judicial protection is made up of preliminary rulings. The preliminary rulings procedure has been designed to assess the validity of EU acts and ensure that EU rules are applied uniformly and correctly in the Member States.⁸ The preliminary ruling competence of the ECJ is based on the idea that the ECJ is best placed to rule on the validity of EU law and to ensure its uniform interpretation in the Member States by providing an authentic interpretation of EU law.⁹ The ECJ's jurisdiction under Article 267 TFEU does not extend to interpreting national law or determining its compatibility with EU law,¹⁰ nor can it rule on the validity of national legislation.¹¹ In practice, however, the limits of the scope of this competence is not so clearly delimited. The ECJ may rephrase the questions to indirectly rule on the compatibility of national law with EU law. In particular, in cases concerning the principle of effective judicial protection as part of the rule of law, the ECJ's solutions seem to be creative.

Through the examination of the ECJ case law, this paper seeks to answer the question of how and to what extent the ECJ has extended and may in the future extend its preliminary ruling competence and the scope of the principle of effective judicial protection. I will also examine what objectives and principles the ECJ's practice serves to give effect to and whether, ultimately, the preliminary ruling procedure is suitable for achieving these objectives. To answer these questions, this study focuses specifically on the assessment of the jurisdiction of the ECJ and of the admissibility of preliminary references in cases concerning the principle of effective judicial protection.

Jurisdiction and admissibility

Preliminary remarks

The concepts of jurisdiction and admissibility are not difficult to distinguish in theory. While jurisdiction refers to a general class of cases in which the ECJ may act (the relevance of the case and the question raised to EU law, the status of the judicial body raising the question), admissibility in a specific case refers to a condition which allows the exercise of jurisdiction, the examination of the merits and the decision (sufficiency of information provided, the necessity of the question raised, the hypothetical nature of the case).¹² However, the case law of the ECJ is not entirely consistent when it comes

⁷ E.g. LENAERTS 2023; LENAERTS 2022; LENAERTS 2011.

⁸ E.g. Case 314/85 *Foto-Frost* (EU:C:1987:452) 17, C-72/14, C-197/14 *X and van Dijk* (EU:C:2015:564), 54, C-495/03 *Intermodal Transports judgement* (EU:C:2005:552), 29.

⁹ C-72/15 *PJSC* (EU:C:2017:236).

¹⁰ C-37/92 *Criminal proceedings against José Vanacker, André Lesage, partie civile SA Baudoux combustibles*, (ECLI:EU:C:1993:836) 7.

¹¹ C-97/91 *Oleificio Borelli SpA v Commission of the European Communities* (ECLI:EU:C:1992:491), 9.

¹² BLUTMAN 2003: 88.



to distinguishing between questions of jurisdiction and admissibility.¹³ The ECJ is also not clear on when a question concerning the scope of application of a provision shall be examined as a preliminary question of jurisdiction or as a question on the merit.¹⁴ Considering the inconsistency in this regard, for the purpose of this article, I will refer only to the specific aspects within the questions of jurisdiction and admissibility, irrespective of under which question the ECJ assessed them. I will also consider as a question of jurisdiction all assessments by the ECJ on the scope of application of the principle of effective judicial protection, especially in cases where such decision of the ECJ was decisive for the EU law relevance of the case.

The relevance of the case (and question) to EU law

As regards the jurisdiction of the ECJ, the question most often disputed is whether the relevance of the case or the questions to EU law can be established. Based on its settled case law, the ECJ does not have jurisdiction “if there is no element of Union law in the subject-matter of the case in the main proceedings”.¹⁵

The relationship of the case before national court to EU law, the relevance of the principle of effective judicial protection, can clearly be established, when the procedural rules of the Member States prevent the enforcement of EU substantive law.¹⁶ According to the second subparagraph of Article 19 (1) TEU, Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. This principle is strengthened by Article 47 of the Charter which provides for the right to an effective remedy and a fair trial, giving concrete expression to the principle of effective judicial protection. From this principle the ECJ derived the requirement that national procedural rules governing actions for safeguarding an individual’s rights under EU law must not make it impossible or excessively difficult in practice to exercise rights conferred by EU law (principle of effectiveness) and must not be less favourable than those governing similar domestic actions (principle of equivalence).¹⁷ The ECJ has also laid down a number of specific, substantive requirements in its case law.¹⁸ In the course of the development of the principle of effective judicial protection, the ECJ has not called into question that the ECJ has jurisdiction to rule on a reference for a preliminary ruling only if the main proceedings fall within the scope of EU law.¹⁹ This interpretation of jurisdiction is in line with the principle that the preliminary ruling procedure serves to ensure a consistent and uniform interpretation and effective application of EU law.

¹³ BLUTMAN 2003: 90, 95–96; VARGA 2017: 20.

¹⁴ E.g. C-617/10 *Åkerberg Fransson* (ECLI:EU:C:2013:105), C-896/19 *Repubblika* (ECLI:EU:C:2021:311), C-64/16 *Associação Sindical dos Juizes Portugueses* (ECLI:EU:C:2018:117).

¹⁵ C-466/11 *Currà and others* (ECLI:EU:C:2012:465) para. 19.

¹⁶ C-222/86 *UNECTEF v Heylens* (EU:C:1986:442) para. 14.

¹⁷ Case 33/76 *Rewe* (EU:C:1976:88) para. 5.

¹⁸ E.g. C-208/90 – *Emmott* (ECLI:EU:C:1991:333); C-6/90 – *Francovich and Bonifaci v Italy* (ECLI:EU:C:1991:428); C-213/89 – *The Queen v Secretary of State for Transport, ex parte Factortame* (ECLI:EU:C:1990:257); MUZSALYI 2020.

¹⁹ C-144/95 *Maurin*, (ECLI:EU:C:1996:235) para. 12; VARGA 2017: 207.



However, as a response to the rule of law backsliding in certain Member States, the ECJ has substantially reformed the principle of effective judicial protection. In the *Associação Sindical dos Juizes Portugueses judgment*²⁰ the question before the national court was whether certain salary-reduction measures infringed the EU principle of judicial independence. The ECJ did not assess as a preliminary question of jurisdiction the EU-law relevance of the case, although it was far from being evident. The Advocate General suggested an assessment of the jurisdiction of the ECJ, recognising that a connection of the case to EU law is necessary for the assessment of the jurisdiction of the ECJ.²¹ The ECJ, however, did not explicitly examine the question of relevance of the case to EU law, but established as regards the scope of Article 19 (1) TEU that it “relates to ‘the fields covered by Union law’, irrespective of whether the Member States are implementing Union law, within the meaning of Article 51 (1) of the Charter”.²² The ECJ then went on to state, that “every Member State must ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection”.²³ The decision undoubtedly allowed for a significant limitation of the autonomy of the Member States by extending the scope of the principle of effective judicial protection, and it has also raised a number of questions concerning the possible limits of the scope of application of the principle of effective judicial protection and the limits of the ECJ’s jurisdiction to give preliminary rulings. I set out below the more recent practice of the ECJ related to the questions left open by the *ASJP* judgement, in particular the conditions under which the ECJ establishes the applicability of the principle of effective judicial protection.

One of the questions raised by the *ASJP* judgement was whether the Charter of Fundamental Rights can be invoked in cases falling within the extended scope of Article 19 (1) TEU. The ECJ answered this question in the negative, in the *Repubblica* judgment,²⁴ excluding the scope of the Charter in cases where the case only shows a connection with EU law through Article 19 (1) TEU.²⁵ Given the ECJ’s previous practice, this solution was not clearly foreseeable. In several decisions, the ECJ has adopted an expansive interpretation of Article 51 of the Charter, by establishing the scope of the Charter in cases falling “within the field of EU law”.²⁶ A further argument in favour of extending the scope of the Charter would have been that the case law of the ECJ has previously been consistent in holding that situations cannot exist which are covered in that way by European Union law without the Charter of Fundamental Rights being applicable.²⁷ On the other hand, though, although the ECJ has established

²⁰ C-64/16 *Associação Sindical dos Juizes Portugueses* (ECLI:EU:C:2018:117).

²¹ Opinion of Advocate General Saugmandsgaard Øe in case C-64/16 *Associação Sindical dos Juizes Portugueses* (ECLI:EU:C:2017:395).

²² C-64/16 *Associação Sindical dos Juizes Portugueses* (ECLI:EU:C:2018:117) para. 29.

²³ C-64/16 *Associação Sindical dos Juizes Portugueses* (ECLI:EU:C:2018:117) para. 37.

²⁴ C-896/19 *Repubblica* (ECLI:EU:C:2021:311).

²⁵ C-896/19 *Repubblica* (ECLI:EU:C:2021:311) para. 45.

²⁶ C-617/10 *Åkerberg Fransson* (EU:C:2013:105), C-34/09 *Ruiz Zambrano* (EU:C:2011:124). See TORRES PEREZ 2020a.

²⁷ Case C-617/10 *Åkerberg Fransson* (ECLI:EU:C:2013:105) para. 21; see also C-198/13 *Julian Hernández and Others* (ECLI:EU:C:2014:2055) para. 35, C-206/13 *Siragusa* (ECLI:EU:C:2014:126) para. 26–27.



the different scope of Article 47 of the Charter and Article 19 TEU, it has nevertheless held that Article 47 of the Charter must be taken into account for the interpretation of the principle of judicial independence deriving from Article 19 TEU.²⁸ Furthermore, the case law does not appear to have distinguished between the material scope of Article 47 of the Charter and Article 19 TEU. Although suggestions have been made by Advocate Generals²⁹ and the legal literature³⁰ as to the content of Article 19 TEU as opposed to Article 47 of the Charter, the ECJ did not follow these suggestions. This is important because if the two provisions apply the same substantive standards to the procedural law of the Member States, the narrower scope of application of Article 47 of the Charter compared to Article 19 TEU is essentially rendered meaningless.³¹ Yet, the ECJ's practice does not lead to the conclusion that Article 19 TEU is only applied in case of general systemic failures which are serious violations of the rule of law, as opposed to the more stringent requirements of Article 47 of the Charter. In fact, the ECJ has not imposed any proportionality limits on its intervention in the autonomy of the Member States. A recent example of this is the ECJ's judgment in the joint cases of *YP and others and MM*.³² The questions concerned whether the referring court could continue to hear the case pending before it notwithstanding the court decision suspending that judge and whether the court to which the case had been transferred was obliged to suspend its own proceedings in view of the fact that the court decision as a result of which the case was transferred had been given by a court the independence of which both courts referring preliminary reference to the ECJ doubted. The main proceedings were governed solely by national criminal law rules and there was no question of the application of EU law (other than the principle of judicial independence). The ECJ established its jurisdiction and examined the merits of the case, setting out the specific measures to be taken by the courts hearing the case. This case indicates that the ECJ accepts questions on judicial independence in cases where the effective implementation of EU substantive law is not at risk, regardless of whether the questions raised in such cases concern a specific or general threat to judicial independence.

The ECJ has also not incorporated any distinction whereby the ECJ treats the scope of application of judicial independence separately from the requirements of remedies and procedural rules, despite the suggestion by legal scholars that the latter should only apply in cases where the national court implements EU law.³³ Although the ECJ has not so far been called to assess the compatibility of national rules on remedies with the principle of effective judicial protection in cases falling outside the scope of EU law, the *ASJP* judgement could allow for such assessments also, and the ECJ has not ruled out since then the possibility to establish its jurisdiction in those matters.³⁴

²⁸ C-896/19 *Repubblika* (ECLI:EU:C:2021:311) para. 45.

²⁹ Opinion of Advocate General Tanchev in joined Cases C-558/18 and C-563/18, *Miasto Łowicz* (EU:C:2019:775) para. 125.

³⁰ TORRES PEREZ 2020a; PRECHAL 2022.

³¹ TORRES PEREZ 2020b: 105–119; VAN ELSUWEGE – GREMMELPREZ 2020.

³² C-615/20, C-671/20 *YP and others and suspension d'un juge* (ECLI:EU:C:2023:562).

³³ PRECHAL 2022.

³⁴ C-53/23 *Asociația "Forumul Judecătorilor din România"* (ECLI:EU:C:2024:388).



There is also a special aspect of the principle of judicial independence, namely that the court may raise questions concerning this principle also when they are unrelated to the subject matter of the main proceedings. In the *Miasto Łowicz*³⁵ case, the court expressed concern that if it found the judges guilty of a criminal offence, disciplinary proceedings would be brought against them, and requested the ECJ to assess whether the disciplinary liability regime violated Article 19 (1) TEU. The ECJ, however, established that there must be a connecting factor between the dispute and the provisions of EU law whose interpretation is sought, and in this case, the ECJ found that “the disputes in the main proceedings were not substantively connected to EU law, in particular to the second subparagraph of Article 19 (1) TEU to which the questions referred relate, and that the referring courts are not therefore required to apply that law, or that provision, in order to determine the substantive solution to be given to those disputes”.³⁶

The ECJ here underlined that Article 19 (1) could not apply to the question the court raised, since the dispute before the national court did not concern any EU law provision, including Article 19 (1) TEU, contrary to the *ASJP* case.³⁷ The ECJ on this basis found the question inadmissible. In contrast, in later cases the ECJ departed from this practice, and found that a question of judicial independence may arise in cases where the dispute itself is not related to EU law in any way, not even through the principle of judicial independence. In this context, in the case of *Prokuratura Rejonowa w Mińsku Mazowieckim*,³⁸ the criminal proceedings pending before the referring court had only a tangential connection with EU law, namely the national court referred to the principle of the presumption of innocence enshrined in Article 6 of Directive 2016/343/EU in addition to the principle of judicial independence. However, the ECJ found the reference to judicial independence sufficient to establish jurisdiction.³⁹ In subsequent cases, it became clear that the ECJ’s jurisdiction could also be established when question of judicial independence does not concern the underlying case, and the subject matter of the case does not have any relevance to EU law including the question of judicial independence.⁴⁰ Based on the more recent practice of the ECJ, it seems that the ECJ does not distinguish between questions raised in the main proceedings and questions raised as so-called preliminary questions, independent from the main proceedings.

Independence of the referring court

In cases concerning the principle of judicial independence, the interpretation of ‘court or tribunal’ in Article 267 TFEU is also of importance in assessing the jurisdiction of the ECJ. Pursuant to Article 267 TFEU, the jurisdiction of the ECJ to give a preliminary

³⁵ C-558/18 and C-563/18 *Miasto Łowicz* (ECLI:EU:C:2020:234).

³⁶ ECLI:EU:C:2020:234, para. 49.

³⁷ ECLI:EU:C:2020:234, para. 49.

³⁸ C-748/19, C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim* (ECLI:EU:C:2021:931).

³⁹ ECLI:EU:C:2021:931, para. 36–38.

⁴⁰ C-748/19, C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim* (ECLI:EU:C:2021:931), C-615/20 *YP and others and suspension d’un juge* (ECLI:EU:C:2023:562), C-181/21, C-269/21 *G. v MS (Nomination des juges de droit commun en Pologne)* (ECLI:EU:C:2024:1).



ruling is subject to the condition that the question is referred by a court or tribunal. The concept of court or tribunal in Article 267 TFEU has been in a centre of debate, the question being whether the conceptual criteria for a court or tribunal under Article 267 TFEU are equivalent to an independent, impartial tribunal established by law, as provided for by Article 47 of the Charter and by Article 19 (1) TEU. Some Advocate Generals have suggested a less rigid interpretation of the status of independence of the court or tribunal under Article 267 TFEU⁴¹ for the sake of the protection of the dialogue and for fostering the uniform and consistent interpretation and effective protection of the rights of individuals. However, the ECJ did not follow these suggestions, and has not distinguished the concept of court or tribunal under Article 267 TFEU from that of Article 19 (1) TEU and Article 47 Charter.⁴² In the *Getin Noble Bank* judgement⁴³ the ECJ held that, although there is a presumption that courts or tribunals under national law satisfy the concept of a court or tribunal within the meaning of Article 267 TFEU, that presumption may be rebutted, first, where a final decision is taken that the body concerned does not constitute a court or tribunal and, second, “a different assessment [...] could be made in circumstances in which, beyond the personal situation of the judge or judges formally submitting a request pursuant to Article 267 TFEU, other factors were to have repercussions on the functioning of the referring court to which those judges belong and thus contribute to undermining the independence and impartiality of that court”.⁴⁴

In the *Krajowa Rada Sądownictwa* case,⁴⁵ the question was referred by the Extraordinary Control and Public Affairs Chamber of the Polish Supreme Court. The ECJ found that it lacked jurisdiction because of the lack of independence of the referring court. The ECJ ruled that if a court does not meet the requirements arising from the EU principle of judicial independence, it cannot refer a question to the ECJ. In this case, the ECJ placed the constitutional test of the independence of the judiciary above other aspects of the effective application of EU substantive law and the uniform interpretation of EU law.

Necessity of the question

For a question to be admissible before the ECJ, the national court must have before it a question on the interpretation of EU law. According to Article 267 TFEU, a request for

⁴¹ Opinion of Advocate General Bobek in *Getin Noble Bank*, C-132/20, EU:C:2021:557, point 36, Opinion of Advocate General Wahl in Joined Cases *Torresi*, C-58/13 and C-59/13, EU:C:2014:265, points 48 to 51, Opinion of Advocate General Rantos in Case C-718/21, *L.G. v Krajowa Rada Sądownictwa* (ECLI:EU:C:2023:150) point 22.

⁴² C-272/19 *Land Hessen* (ECLI:EU:C:2020:535), C-274/14 *Banco de Santander* (ECLI:EU:C:2020:17) para. 56 C-203/14 *Consorti Sanitari del Maresme* (ECLI:EU:C:2015:664) referring to C-506/04 *Wilson* (ECLI:EU:C:2006:587).

⁴³ C-132/20 *Getin Noble Bank* (ECLI:EU:C:2022:235).

⁴⁴ ECLI:EU:C:2022:235, para. 75.

⁴⁵ C-718/21 *Krajowa Rada Sądownictwa* (*Maintien en fonctions d'un juge*), (ECLI:EU:C:2023:1015).



a preliminary ruling must be ‘necessary’ for the referring court for a ‘judgment to be delivered’ in the case pending before it.⁴⁶

Member States often argue that the question has already been decided by national practice,⁴⁷ or that the answer to the question is clear and therefore does not need to be answered, or that the question is not relevant.⁴⁸ These objections have been consistently rejected by the ECJ, since they do not call into question the objective relevance of the question, but its subjective importance and significance. On the same basis, questions cannot be regarded as hypothetical on the ground that the national court has ‘incorrectly’ interpreted the provision of national law or ‘incorrectly’ established the facts,⁴⁹ and that the questions relating to the provisions of EU law would not have arisen if the interpretation and establishment of the facts had been correct.⁵⁰

Out of the arguments referring to the irrelevance of the question to the decision of the case, the ECJ takes into account only those where there is no connection between the provision sought to be interpreted and the facts and purpose of the main proceedings, even on the basis of the facts and the interpretation of the law presented by the referring court. The question may be regarded as hypothetical if the ECJ can conclude, on the basis of the national legal background and the circumstances of the case as presented to it, that the national court has no jurisdiction to rule on the question which it has referred or that the answer to the question cannot help to resolve the case pending before it or the questions raised. Although the ECJ cannot interpret national law, the national legal background presented and the question raised and to be decided in the case must, in such circumstances, lead the ECJ to hold that the national court has no jurisdiction under national law to decide a particular question. Where the referring court considers that it has jurisdiction to decide the question, the ECJ does not call it into question. The ECJ only declares a question to be hypothetical if it does not follow either from the national court’s statements or from practice that the referring court has actual jurisdiction to decide the question.

A clear example to a hypothetical issue is where the question relied on the assumption of the national court that there would be an appeal against its decision.⁵¹ Admissibility is less evident, however, in cases where the national court relying on EU law wishes to rule on questions which are not otherwise authorised by national law.

In cases relating to the principle of judicial independence, the question may arise not only in the context of a dispute pending before the court, but also as a so-called preliminary question independent of the dispute. In such cases, the court has no jurisdiction under national law to decide the question, it is not required to make any ruling on the question, nor can it be argued that a specific provision of a Member State

⁴⁶ C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny* (EU:C:2020:234) para. 45, C-472/17 *Di Girolamo* (ECLI:EU:C:2018:684) para. 31.

⁴⁷ C-215/21 *Servicios prescriptor y medios de pagos E.F.C. S.A.U.* (ECLI:EU:C:2022:723) para. 25, C-618/10 *Banco Español de Crédito* (EU:C:2012:349) para. 76, C-35/22 *CAJASUR Banco* (ECLI:EU:C:2023:569) para. 14

⁴⁸ C-64/20 *An tAire Talmhaíochta Bia agus Mara, Éire agus an tArd-Aighne* (ECLI:EU:C:2021:207).

⁴⁹ C-363/21 *Ferrovienord* (ECLI:EU:C:2023:563).

⁵⁰ C-756/21 *International Protection Appeals Tribunal and Others (Attentatau Pakistan)* (ECLI:EU:C:2023:523).

⁵¹ C-748/19 *Prokuratura Rejonowa w Mińsku Mazowieckim* (ECLI:EU:C:2021:931) para. 93.



constitutes an obstacle to the application of EU law which could be remedied by setting aside national law – in particular where the subject matter of the main action does not concern EU substantive law. In such cases, the question for the national court is whether, under the provision of EU law sought to be interpreted, the national court may have jurisdiction to examine the question at issue. Such questions arise for example when the court is examining whether it meets the requirement of independence or whether another court meets that requirement. The case law of the ECJ has so far decided on a case by case basis whether it considers the question to be hypothetical or admissible in cases where national law does not allow for any decision on the question concerned, meaning that from the perspective of national law, the question raised by the national court do not arise. The criteria applied by the ECJ for admissibility does not appear to be clear in these cases.

The ECJ uses two lines of reasoning in parallel. According to the first, such questions can only be decided on the merits, since an interpretation of the EU legal provision is necessary to answer the question. The other line of argument is that the hypothetical nature of the question is a question of fact which the ECJ must assess in the light of the national legal background put forward by the referring court and the background and circumstances of the case. That is to say, if the national law does not allow the national court to rule on the question, the ECJ considers that the question is hypothetical, and therefore rejects it as inadmissible. The two arguments are logically incompatible. Depending on which approach the Court has chosen, it has either accepted the question or not.

In the following two cases, the ECJ ruled inadmissibility. In the case *Prokurator Generalny*,⁵² the disciplinary proceedings against the applicant were brought before a court appointed by a judge whose independence – according to the referring court – could not be established. The ECJ held that, under national law, the court hearing the case did not have the jurisdiction to rule on the lawfulness of the act appointing the person concerned as a judge. The ECJ therefore held that the question was hypothetical, since its answer was not necessary for the resolution of the dispute. The ECJ also held that the possible disregard of the right to have the dispute heard by an independent and impartial tribunal established by law should have been challenged in an earlier court proceeding.

In joined cases *G. v MS*,⁵³ the ECJ also based its reasoning on the fact that the referring court did not have jurisdiction under national law to decide on the question concerned. Indeed, the referring judge did not have the power to exclude his fellow judge sitting in the same chamber and could not decide on the independence of another court whose final decision was binding on the referring court.⁵⁴ Here, the ECJ interpreted the terms ‘actually and objectively necessary’ as meaning that the national court must have jurisdiction based on national law to rule on the question raised.⁵⁵ The ECJ held that the necessity of the interpretation sought, within the meaning of Article 267 TFEU, means

⁵² C-508/19 *Prokurator Generalny (Chambre disciplinaire de la Cour suprême – Nomination)* (ECLI:EU:C:2022:201), see also C-558/18 and C-563/18, *Miasto Łowicz* (EU:C:2019:775).

⁵³ C-181/21, C-269/21 *G.* (ECLI:EU:C:2024:1).

⁵⁴ ECLI:EU:C:2024:1, para. 74.

⁵⁵ C-508/19 *Prokurator Generalny (Chambre disciplinaire de la Cour suprême – Nomination)* (ECLI:EU:C:2022:201).



that the national court – the referring judge alone – must be able to draw the necessary conclusions from that interpretation by assessing, in the light of that interpretation, the lawfulness of the appointment of another judge of the same formation of the ECJ and, where appropriate, by deciding whether to disqualify that judge.⁵⁶ The ECJ established that “it does not appear that the referring court [...] has jurisdiction, under the rules of national law, to assess the legality, in the light, in particular, of EU law, of the panel of three judges which made the order definitively ruling on the application for protective measures and, in particular, the conditions for the appointment of Judge A.T., and to call into question, where appropriate, that order”.⁵⁷

The ECJ concluded that since, under the rules of national law, the judge which made the reference for a preliminary ruling in that case could not, alone, act in that way, it cannot therefore take account of the answer to the question. On that basis, the question was considered hypothetical.⁵⁸

On the other hand, though, the ECJ has found the question admissible in a number of cases where the national courts had no jurisdiction to decide the question under national law.⁵⁹ In the case of *A.K. and others*,⁶⁰ the dispute pending before a Polish court had to be transferred to a new judicial body, the Disciplinary Chamber, due to a change in national rules. However, the referring court, not being convinced as to the independence of the Disciplinary Chamber, referred the matter to the ECJ for a preliminary ruling. Although the national court clearly had no jurisdiction to rule on the matter under national law, the ECJ admitted the question, on the ground, first, that to set aside national law in the case would have the effect of conferring jurisdiction on the national court to rule on the matter under the national legislation *previously in force*.⁶¹ The ECJ in this case laid down a broad and new understanding of the disapplication of EU law, according to which the national court does not only disregard national law contrary to EU law, or set aside national law to apply EU law instead. In this case the court sets aside national law and applies national law that is not in force anymore.

This broad meaning of setting aside national law was applied when deciding on the admissibility of the case *A.B. and others*,⁶² where judges whose appointment was rejected by the National Judicial Council (NJC) did not have any opportunity for appeal due to a change in legislation. The referring court asked whether, setting aside national law, it could disregard the decision of the NJC declaring the appeal proceedings of judges who had been subject to an appeal to be devoid of purpose? The referring court questioned whether it can disregard legislative changes, and disapply the national rules at issue, by

⁵⁶ C-181/21, C-269/21 G. (ECLI:EU:C:2024:1) para. 69.

⁵⁷ ECLI:EU:C:2024:1, para. 76.

⁵⁸ ECLI:EU:C:2024:1, para. 70–72.

⁵⁹ C-564/21 *Bundesrepublik Deutschland* (ECLI:EU:C:2022:951), C-585/18 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* (ECLI:EU:C:2019:982), C-824/18 *A.B. and others (Nomination des juges à la Cour suprême – Recours)* (ECLI:EU:C:2021:153), C-487/19 *W. Ż. and des affaires publiques de la Cour suprême – nomination* (ECLI:EU:C:2021:798), C-748/19 and C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim* (ECLI:EU:C:2021:931).

⁶⁰ C-585/18 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* (ECLI:EU:C:2019:982).

⁶¹ ECLI:EU:C:2019:982, para. 112.

⁶² C-824/18 *A.B. and others (Nomination des juges à la Cour suprême – Recours)* (ECLI:EU:C:2021:153).



continuing to assume the jurisdiction previously vested in it.⁶³ Although national law excluded the jurisdiction of the court to rule on the question at issue, the ECJ's reasoning did not preclude the admissibility of the question.

In the case of *W. Ż.*,⁶⁴ in the main proceedings, the referring court was called upon to rule on the exclusion of judges who were called to decide on the appeal of *W. Ż.* In the meantime, the case of appeal was referred to a new judge, who closed the case without hearing *W. Ż.* The referring court asked if it had jurisdiction to assess the appointment of the judge deciding on the appeal case of *W. Ż.* and disregard the binding decision of the court on that basis. The referring court did not have the power under national law to make such assessment even by setting aside national law on jurisdiction and applying the national rules previously in force. The ECJ here has formulated an even broader admissibility criterion, by establishing that, if the question is raised on the scope of Article 19 TEU, it can, in principle, be answered only by an assessment on the merits regardless of what sort of requirement the national court seeks to derive from EU law. The ECJ therefore merely relied here on the fact that, since the questions relate to the substance of the question referred, cannot, by their very nature, lead to the inadmissibility of the question concerned the interpretation of EU law.⁶⁵ The ECJ did not consider whether the national court had any jurisdiction under national law to decide on the lawfulness of the appointment of another judge,⁶⁶ and accordingly find its order to be null and void and then rule on the application before it.

In the *Prokuratura* judgment,⁶⁷ the ECJ chose a similar interpretation as in *W. Ż.* The ECJ argued that the “question referred concerns the interpretation of provisions of EU law and their effects, in view, in particular, of the primacy of that law, on the regularity of the composition of the adjudicating panels hearing the cases in the main proceedings”.⁶⁸ As to the objection that the answer to the questions could not, under national law, affect the course of the main proceedings, the ECJ reinforced the argument relied on in *W. Ż.*, that is, that the questions which relate to the scope of the provisions of EU law, and to the likely effects of those provisions, cannot by their very nature, entail the inadmissibility of that question.⁶⁹

In the case *YP and others*⁷⁰ already outlined in this article, the question referred by the national courts challenged the binding effect of a judicial decision based on doubts as to the independence of the decision-making body. Although the national law did not allow the referring courts to challenge the contested decision and, even if the decision were disregarded, there was no procedural basis enabling them to reallocate the cases to the judge who originally heard them, the ECJ did not find the questions to be hypothetical.

⁶³ ECLI:EU:C:2021:153, para. 81.

⁶⁴ C-487/19 *W. Ż. and des affaires publiques de la Cour suprême – nomination* (ECLI:EU:C:2021:798).

⁶⁵ ECLI:EU:C:2021:798, para. 90.

⁶⁶ ECLI:EU:C:2021:798, para. 153.

⁶⁷ C-748/19 and C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim* (ECLI:EU:C:2021:931).

⁶⁸ ECLI:EU:C:2021:931, para. 49.

⁶⁹ ECLI:EU:C:2021:931, para. 49.

⁷⁰ C-615/20 *YP and others and suspension d'un juge* (ECLI:EU:C:2023:562).



Analysis and conclusion

The future of the principle of effective judicial protection

The principle of effective judicial protection in preliminary rulings goes beyond ensuring the enforcement of EU substantive law, and has evolved into a fundamental right and at the same time a directly applicable requirement of EU law. Essentially, the ECJ does not examine the EU law relevance of the underlying case as an independent question, in order to establish its jurisdiction, instead the ECJ only examines the EU law relevance of the questions, irrespective of whether the question is connected with the dispute to be decided in the case before the national court. Besides, in cases where the case has a connection with Union law only through the principle of judicial independence, the ECJ does not examine whether the problem the question raises is specific to the concrete case or whether it is general enough so that the interpretation given by the ECJ would contribute to the safeguarding of the principle of judicial independence in other cases, where EU substantive law is actually implemented. The lack of such assessment supports the view that the aim of Article 19 (1) TEU shifted from the effective enforcement of EU law to the general protection of judicial independence as a constitutional principle. In some cases, the principle of effective judicial protection as an expression of the rule of law, can even risk resulting in a lowered level of protection of the parties' rights under EU law, since national courts cannot refer a preliminary question to the ECJ if they do not pass for an independent and impartial court established by law, which may put parties before such a judicial body in an even more vulnerable position. In addition, in such cases, the uniform and consistent interpretation of EU law may also be jeopardised.

The scope of application of this principle, however, remains unclear as it has not been clarified in which cases the extended scope of Article 19 TEU, which is not governed by the provisions of the Charter, can be invoked. The general protection of the principle of judicial independence derived from the principle of effective judicial protection also raises the question of what other constitutional principles may be given general protection by the ECJ on the ground that their infringement jeopardises or undermines the effective application of EU law? The principle of effective judicial protection in Article 19 TEU may open the door to the general protection of other fundamental rights in the EU, beyond the principle of judicial independence. The ECJ has not, on the basis of its case law, ruled out the possibility of further extending the material scope of the principle of effective judicial protection. The ECJ may argue that the principle of effective judicial protection is inseparable from the adequate protection of certain fundamental rights and extend its jurisdiction to interpret and define in preliminary reference procedure for instance, the principle of legal certainty, communication rights, the protection of human dignity, or other personality rights, based on the argument that the adequacy of the protection of certain fundamental rights is a necessary guarantee of effective judicial protection.



Can the rule of law be protected in preliminary ruling procedure?

Starting with the *ASJP* judgement, and in particular in the context of systemic rule of law problems related to the Polish judicial system, the preliminary ruling procedure has become a key instrument for addressing the rule of law backsliding in Member States. In its preliminary ruling procedures, the ECJ has taken on an active role, and seems to have attempted to take over as much as possible the function of the infringement procedure and the procedure laid down in Article 7 TEU in protecting and ensuring the values enshrined in Article 2 TEU. However, the limitations of the preliminary ruling procedure have also become apparent. In some cases, the ECJ itself recognised, by rendering the questions inapplicable, that the means of preliminary ruling procedure to protect the rule of law is limited, even if the ECJ could find the national legislation in contrary to the principle of effective judicial protection, interpretative answers of the ECJ is not sufficient, national judges cannot remedy on a case by case basis situations where systemic legislative reform is needed.⁷¹ There can be situations contrary to EU law which cannot be remedied in preliminary ruling procedure. However, there is still no consistently applied admissibility test in the ECJ's practice, the question of where to draw the line is decided on a case by case basis.

Another hidden cause of inconsistency: The direct effect of judicial independence

The uncertainty in the Court's case law as to the admissibility of questions also highlights the challenges that the direct effect of the principle of effective judicial protection raises. In *Torubarov*,⁷² the ECJ established that the principle of effective judicial protection is directly applicable, i.e. that national provisions contrary to this provision must be set aside by the national court. The principle of judicial independence is, however, a principle of constitutional law nature, guaranteed by the rules governing the organisation and functioning of the judiciary and the status of judges. Therefore, it is possible, that setting aside national provisions contrary to the EU principle of judicial independence leaves the national court without applicable law in certain cases. Matteo Bonelli has called the direct effect of the principle of effective judicial protection a "fiction" and warned that it "might lead to important disruptions of national judicial systems".⁷³ The practice of the ECJ on the admissibility of questions over the last few years has demonstrated this. In some cases, the ECJ itself has assisted the court by determining how the judge should act in cases where national law had to be set aside. Whereas, in other cases the ECJ has ruled that the question is inadmissible on the ground that the referring judge, acting in his own jurisdiction, could not alone draw the consequence from the answer to the question. The problem arises when the setting aside of national law leaves the

⁷¹ C-181/21, C-269/21 G. (ECLI:EU:C:2024:1).

⁷² C-556/17, *Torubarov*, (ECLI:EU:C:2019:626) para. 74, C-924/19 PPU and C-925/19 PPU *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, (ECLI:EU:C:2020:367) para. 146.

⁷³ BONELLI 2022: 94.



national court without applicable law, which can only be remedied by the legislature, not by the courts. In my opinion, in the context of the admissibility of the question, the ECJ's practice could be rendered predictable by a consistent application of the principle, already laid down by the ECJ in case G, that the question is hypothetical if the court cannot independently draw any conclusion from the answer to the question, including cases where national legislation should be set aside.⁷⁴

To conclude, there is great potential for the principle of effective judicial protection for further development, and it is likely that the ECJ will not back down from using this principle in preliminary ruling procedures to fight against Member States for the protection of the common values of the EU. However, it is crucial for the ECJ to recognise in this battle the limits of preliminary ruling procedure, and most importantly, strive for consistency, the elimination of parallel standards and contradictions in its practice. The latter would not only be essential to promoting the coherence of the EU legal order and the legitimacy of the EU judiciary, but also to ensuring the principle of the rule of law in the very procedures in which the ECJ seeks its protection from national autocratic aspirations.

References

- ARNULL, Anthony (2011): The Principle of Effective Judicial Protection in EU Law: An Unruly Horse? *European Law Review*, 36(1), 51–70.
- BLUTMAN László (2003): *EU-jog a tárgyalóteremben. Az előzetes döntéshozatal*. Budapest: KJK-Kerszöv.
- BONELLI, Matteo (2022): Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States. In BONELLI, Matteo – ELIANTONIO, Mariolina – GENTILE, Giulia (eds): *Article 47 of the EU Charter and Effective Judicial Protection: Volume 1: The Court of Justice's Perspective*. Oxford: Hart Publishing, 81–98. Online: <https://doi.org/10.5040/9781509947973.ch-005>
- BONELLI, Matteo (2023): Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States. *REALaw.blog*, 8 February 2023. Online: <https://realaw.blog/?p=2151>
- GENTILE, Giulia (2022): Autonomous but Interdependent: Constitutional Traditions on Judicial Protection and the General Principle of Effective Judicial Protection. *Maastricht Journal of European and Comparative Law*, 29(6), 685–707. Online: <https://doi.org/10.1177/1023263X231158489>
- GENTILE, Giulia (2023): Effective Judicial Protection: Enforcement, Judicial Federalism and the Politics of EU Law. *European Law Open*, 2(1), 128–143. Online: <https://doi.org/10.1017/elo.2022.48>
- LENAERTS, Koen (2011): Federalism and the Rule of Law: Perspectives from the European Court of Justice. *Fordham International Law Journal*, 33(5), 1338–1387.

⁷⁴ C-181/21, C-269/21 G. (*Nomination des juges de droit commun en Pologne*) (ECLI:EU:C:2024:1) para. 69.



- LENAERTS, Koen (2022): Judicial Dialogue in a Changing World: Preserving Judicial Independence. In CAPETA, Tamara – GOLDNER LANG, Iris – PERIŠIN, Tamara (eds.): *The Changing European Union. A Critical View on the Role of Law and the Courts*. Oxford: Hart Publishing, 9–34. Online: <https://doi.org/10.5040/9781509937363.ch-002>
- LENAERTS, Koen (2023): On Checks and Balances: The Rule of Law within the EU. *Columbia Journal of European Law*, 29(2), 25–63.
- MUZZALYI Róbert (2020): *Az EU-jog hatása a polgári eljárásjogra*. Budapest: Akadémiai Kiadó. Online: <https://doi.org/10.1556/9789634546108>
- O'NEILL, Ruairi (2021): Effet Utile and the (Re)organisation of National Judiciaries: A Not so Unique Institutional Response to a Uniquely Important Challenge? *European Law Journal*, 27(1–3), 240–261. Online: <https://doi.org/10.1111/eulj.12437>
- PRECHAL, Sacha (2022): Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection? In BONELLI, Matteo – ELIANTONIO, Mariolina – GENTILE, Giulia (eds): *Article 47 of the EU Charter and Effective Judicial Protection: Volume 1: The Court of Justice's Perspective*. Oxford: Hart Publishing, 11–26. Online: <https://doi.org/10.5040/9781509947973.ch-001>
- ROEBEN, Volker (2020): Judicial Protection as the Meta-Norm in the EU Judicial Architecture. *Hague Journal on the Rule of Law*, 12(1), 29–62. Online: <https://doi.org/10.1007/s40803-019-00085-3>
- TORRES PEREZ, Aida (2020a): Rights and Powers in the European Union: Towards a Charter That Is Fully Applicable to the Member States? *Cambridge Yearbook of European Legal Studies*, 22(3), 279–300. Online: <https://doi.org/10.1017/cel.2020.8>
- TORRES PEREZ, Aida (2020b): From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence. *Maastricht Journal of European and Comparative Law*, 27(1), 105–119. Online: <https://doi.org/10.1177/1023263X19892185>
- VAN ELSUWEGE, Peter – GREMMELPREZ, Femke (2020): Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice. *European Constitutional Law Review*, 16(1), 8–32. Online: <https://doi.org/10.1017/s1574019620000085>
- VARGA Zsófia (2017): *Az EU-jog alkalmazása. Kézikönyv gyakorló jogászoknak*. Budapest: Wolters Kluwer.

