An Uncertain First Step in the Field of Judicial Self-government

ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, *A.K.*, *CP* and *DO*

Mathieu Leloup*

Introduction

The last decade has seen a surge in interest in questions of judicial self-government – and in judicial councils in particular – by international organisations,[1] judicial associations[2] and legal scholars.[3] Increasingly, questions on these topics have also been brought before international courts, with two cases making it to the Grand Chamber of the European Court of Human Rights in 2018 alone.[4] The judgment in the joined cases of *A.K.*, *CP* and *DO* was the first opportunity for

*PhD Assistant at the University of Antwerp, Belgium; email: Mathieu.Leloup@uantwerpen.be.
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[1]For example Report of 2 May 2018 of the Special Rapporteur on the independence of judges and lawyers on Judicial Councils, A/HRC/38/38.

[2]For example Consultative Council of European Judges (CCJE), Opinion No. 19 (2016) on the Role of Court Presidents; CCJE, Opinion No. 10 (2007) on the Council for the Judiciary at the service of society.

[3]For example J. Sillen, 'The concept of "internal judicial independence" in the case law of the European Court of Human Rights', 15 *EuConst* (2019) p. 104; Guest Editor D. Kosař, 'Judicial Self-Government in Europe', 19 *German Law Journal* (2018).

[4]ECtHR 25 September 2018, No. 76639/11, *Denisov* v *Ukraine* (on the independence of the Ukrainian High Council of Justice during proceedings concerning the applicant's removal from the position of court president); ECtHR 21 June 2016, Nos. 55391/13 57728/13 and 74041/13, *Ramos Nunes De Carvalho E Sá* v *Portugal* (on procedural guarantees before the Portuguese High Council of the Judiciary during disciplinary proceedings and the relationship between this body and the Supreme Court).

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the Court of Justice of the European Union to substantively deal with questions concerning a national judicial council, more particularly its composition, competences and independence from the political branches.[5] The preliminary questions stemmed from the highly contentious reforms that the Polish government has carried out in its judicial system, which have already been the subject of several other judgments of the Luxembourg Court.[6] Among other things, these reforms introduced a new Disciplinary Chamber in the Polish Supreme Court, altered the composition of the National Council of the Judiciary and lowered the retirement age throughout the judiciary.

In essence, the Court was asked two questions by the Polish Supreme Court in this case.[7] First, whether the new Disciplinary Chamber could be seen as independent, in particular considering that its judges had been appointed by the newly composed National Council of the Judiciary. Second, if the first question was answered in the negative, the referring court wanted to know whether it was required under EU law to assume jurisdiction over the case, despite clear national legislation giving jurisdiction to the Disciplinary Chamber.

The Court's response to the question on the independence of the Disciplinary Chamber was rather meek, ruling that it was ultimately for the Supreme Court to decide on this. By contrast, the Court, rather easily and much more straightforwardly, came to the conclusion that, if that Chamber were not independent, the referring court should assume jurisdiction despite the clear wording of national competence rules.

This case note will first outline the Polish legislative framework and the facts that led to the three joined cases. Then, it will set forth the opinion of Advocate General Tanchev and the judgment of the Court. It will comment on three distinct aspects of the judgment. First, the Court's response to the first question and the standards it has set out for national judicial councils. Second, its answer to the second question and the obligation for domestic courts to disapply national legislation on the basis of the primacy of EU law. Third, the Court's view on the

[5]Respectively case numbers C-585/18, 624/18 and 625/18. ECJ 19 November 2019, joined Cases C-585/18, C-624/18 and C-625/18, *A.K.*, *CP* and *DO*.

[6]On the question whether national judges could refuse to execute a European Arrest Warrant due to doubts that persisted around the independence of Polish judges after the judicial reform: ECJ 25 July 2018, Case C-216/18, *Minister for Justice and Equality (Deficiencies in the system of justice)*. On the infringement proceedings initiated due to the lowering of the retirement age for judges of the Polish Supreme Court: ECJ 24 June 2019, Case C-619/18, *Commission* v *Poland (Independence of the Supreme Court)*. On the infringement proceedings initiated due to the lowering of the retirement age for judges of the Polish ordinary courts: ECJ 5 November 2019, Case C-192/18, *Commission* v *Poland (Independence of the ordinary courts)*.

[7]There were other questions that were declared inadmissible on procedural grounds and which will not be addressed in this case note.

relationship between the notion of judicial independence as enshrined in Article 47 of the Charter, the second subparagraph of Article 19(1) TEU and Article 267 TFEU.

Legislative framework and facts of the case

The reforms to the judicial system that were introduced by the Polish government between 2016 and 2018 have been widely commented on and severely criticised by a wide range of actors, like the Venice Commission,[8] the UN Special Rapporteur on the independence of judges and lawyers,[9] the Parliamentary Assembly of the Council of Europe,[10] and legal scholars.[11] Although the judicial reforms were wide-ranging and had an impact throughout the whole of the Polish judiciary, this case note will focus on two particular institutions: the Supreme Court and the National Council of the Judiciary.

On 3 April 2018 the New Law on the Supreme Court entered into force. This law lowered the retirement age of the Supreme Court judges from 70 to 65. Judges who wished to keep exercising their mandate past this age could submit a request to the Polish President.[12] Besides lowering the retirement age, the law also created two new chambers within the Supreme Court. The first of these is the Extraordinary Control and Public Affairs Chamber. This chamber will examine extraordinary appeals, with the power to revise legally binding judgments within five years after the contested judgment,[13] and to hear electoral and other public law disputes.[14] The second is the Disciplinary Chamber. This chamber has

[8]Venice Commission, Opinion 904/2017 of 11 December 2017, on the draft act amending the act on the national council of the judiciary, on the draft act amending the act on the supreme court, proposed by the president of Poland, and on the act on the organisation of ordinary courts, CDL-AD(2017)031.

[9]Report of 2 April 2018 of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, A/HRC/38/38/Add.1.

[10]PACE, Resolution 2188 of 11 October 2017, New threats to the rule of law in Council of Europe member States: selected examples, ⟨assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24214&lang=en⟩, visited 2 December 2019.

[11]Most notably W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

[12]This lowering of the retirement age, combined with the competence of the President to rule on the extension of the mandate, was found to infringe the principle of judicial independence and the irremovability of judges as enshrined in the second subparagraph of Art. 19(1) TEU. *See Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 6.

[13]Although this case note will not go into detail about this chamber, it should be noted that the European Court of Human Rights has previously found a violation of the right to a fair trial on account of such special appeal procedures that could set aside final judgments: *see*, for example ECtHR 27 July 2003, No. 52854/99, *Ryabykh* v *Russia*.

[14]Venice Commission, *supra* n. 8, para. 53.

jurisdiction over the disciplinary proceedings involving Supreme Court judges and proceedings concerning their compulsory retirement. Both chambers enjoy considerable autonomy within the framework of the Supreme Court and consist exclusively of newly appointed members. These new judges are appointed by the President of the Republic on a proposal of the National Council of the Judiciary.

This brings us to the second institution that has undergone considerable reforms: the National Council of the Judiciary. According to the Polish Constitution this council is tasked with safeguarding the independence of courts and judges.[15] Its competences include the selection of candidates for judicial positions, issuing individual decisions on the reassignment of judges to other posts or their retirement, and presenting opinions on the appointment and the dismissal of presidents and vice-presidents of ordinary and military courts.[16] This body thus plays a vital role in judicial governance in Poland.

The judicial reforms in Poland had a significant impact on the composition of the National Council of the Judiciary. According to the Constitution, it is composed of the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court, an individual appointed by the President of the Republic, 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts, four members chosen by the Sejm (Polish parliament) from amongst its Deputies, and two members chosen by the Senate from amongst its Senators.[17] The body thus has a hybrid composition, including representatives from all three branches of power, but with a majority for the members representing the judiciary. However, the Constitution does not specify how these judicial members are to be chosen. Whereas these members were originally chosen by the judiciary, a new law of December 2017 has given this competence to the Polish parliament. Since this reform, a total of 23 out of 25 members are appointed by or are a member of the executive or legislative branch. Furthermore, the new legislation also terminated the mandates of the then members of the Council.[18] The Polish government defended these reforms as enhancing the democratic accountability of the judiciary and combatting the corporatism which affected the justice system and hampered its efficiency.[19]

[15]Art. 186(1) Polish Constitution.

[16]A. Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition', 19 *German Law Journal* (2018) p. 1839 at p. 1848.

[17]Art. 187(1) Polish Constitution.

[18]Venice Commission, *supra* n. 8, paras. 19-27.

[19]Report of 2 April 2018 of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, A/HRC/38/38/Add.1., para. 13.

In a judgment of March 2019, the Constitutional Court ruled that this way of appointing the judicial members of the Council was in conformity with the Constitution.[20]

It is against this legislative backdrop that the three cases that led to the Court of Justice's judgment should be understood. The three cases concerned judges of the Supreme Court and the Supreme Administrative Court, who had reached the new lowered retirement age of 65. One of them had, in conformity with the new legislation, submitted a request to the President, asking to be allowed to continue in his post. However, the National Council of the Judiciary issued a negative opinion. The two other judges had not submitted requests to continue in their posts, and had consequently been informed by the President that they were deemed retired.

The three judges brought a complaint against these decisions before the Chamber of Labour Law and Social Security of the Supreme Court; this is the chamber that was competent to rule on these issues before the Disciplinary Chamber was created. They claimed to have been discriminated against on the basis of age, contrary to Article 9(1) of Council Directive 2000/78/EC.[21] Furthermore, they expressed doubts concerning the independence of the Disciplinary Chamber, given that the judges for that chamber were appointed by the President on a proposal of the National Council of the Judiciary, and the concerns about the independence of this latter body. The Chamber of Labour Law and Social Security decided to stay the proceedings and ask the Court of Justice whether the Disciplinary Chamber, on a proper construction of Article 267(3) TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the Charter, could be seen as an independent court or tribunal within the meaning of EU law. If the answer to that question were negative, the referring court also inquired whether these same provisions should be interpreted as meaning that it should disregard the national legislation which precludes it from having jurisdiction in these proceedings.[22]

[20]Polish Constitutional Court 25 March 2019, K 12/18. English press release available at: ⟨trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/10522-wybor-czlonkow-krs-przez-sejm-sposrod-sedziow-odwolanie-od-uchwaly-krs-dotyczacej-powola/⟩, visited 17 February 2020. One could see this judgment as evidence that the Polish Constitutional Court is acting more like a government enabler than as a legitimate check on the functioning of government. *See* P. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe', 15 *EuConst* (2019) p. 48.

[21]Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, p. 16.

[22]For the full questions, *see A.K.*, *CP* and *DO*, *supra* n. 5, paras. 51 and 52.

Opinion of the advocate general and judgment of the Court

The independence of the Disciplinary Chamber

With regard to the question concerning the independence of the Disciplinary Chamber and the National Council of the Judiciary, Advocate General Tanchev and the Court followed different approaches. The Advocate General started off by stating that the main proceedings were a situation in which a member state was implementing EU law within the meaning of Article 51(1) of the Charter, as the three judges were seeking protection against discrimination on the grounds of age, which is prohibited by Directive 2000/78. Because of this, the main proceedings fell within the scope of application of Article 47 of the Charter.[23] In his Opinion, the Advocate General unambiguously came to the conclusion that the Disciplinary Chamber did not meet the requirement of judicial independence set out in that Charter provision.[24]

The Advocate General stated that under the Court's case law, guarantees of independence and impartiality require rules, particularly with regard to the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members.[25] Furthermore, the Court has held that the disciplinary regime governing judges must display the necessary guarantees to prevent it from being used as a system of control over the content of judicial decisions. In this regard disciplinary sanctions must be imposed by an independent body in a procedure which fully complies with the safeguards enshrined in Articles 47 and 48 of the Charter.[26] Based on this, the measures relating to the appointment and disciplinary regime for judges are important aspects of the guarantees of judicial independence under EU law. Therefore, it is important that the National Council of the Judiciary, as the body tasked with selecting judges for the Disciplinary Chamber, can fulfil its functions in accordance with the guarantee of independence under Article 47 of the Charter, even if it does not itself carry out the role of a court.[27] Thus, whereas member states are free to decide whether to establish a judicial council

[23]Opinion of AG Tanchev of 27 June 2019 in joined cases C-585/18, C-624/18 and C-625/18, *A.K., CP* and *DO*, paras. 82-89.

[24]Opinion of AG Tanchev in *A.K., CP* and *DO*, *supra* n. 23, para. 130.

[25]Opinion of AG Tanchev in *A.K., CP* and *DO*, *supra* n. 23, para. 116. This is settled case law: *Commission* v *Poland (Independence of the ordinary courts)*, *supra* n. 6, para. 116; *Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 6, paras. 71-73; *Minister for Justice and Equality (Deficiencies in the system of justice)*, *supra* n. 6, para. 66.

[26]*Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 6, para. 77; *Minister for Justice and Equality (Deficiencies in the system of justice)*, *supra* n. 6, para. 67.

[27]Opinion of AG Tanchev in *A.K., CP* and *DO*, *supra* n. 23, para. 118.

or similar body, the independence of this body must be sufficiently guaranteed when they choose to do so.[28]

To assess the independence of the Polish National Council of the Judiciary, the Advocate General drew inspiration from the case law of the European Court of Human Rights and from a list of international and European soft law standards. He referred to the Grand Chamber judgment in *Denisov*, where a violation of Article 6 of the European Convention on Human Rights was found because the Ukrainian judicial council consisted for a majority of non-judicial members, appointed directly by the legislative and executive authorities.[29] Similar minimum standards regarding the composition of a judicial council can be found in international soft law.[30] Furthermore, to guarantee the continuity of a judicial council, the mandates of the members of the judicial council should not be terminated at the same time or renewed following parliamentary elections.[31]

In light of these principles, the Advocate General came to the conclusion that the Polish National Council of the Judiciary is not an independent body. Not only were the mandates of the members of the Council prematurely terminated,[32] but the new manner of appointment implies that 23 out of 25 members come from legislative or executive authorities and thus discloses deficiencies which appear likely to impair the body's independence.[33] Because of the role that the National Council of the Judiciary plays in the selection of judges at the Disciplinary Chamber, the Advocate General concluded that there are legitimate reasons to objectively doubt the independence of the latter and that the chamber did not offer sufficient guarantees of independence under Article 47 of the Charter.[34]

This syllogistic reasoning of the Advocate General was not followed by the Luxembourg Court. The Court began by stating that, on account of Article 52(3) of the Charter, it should interpret Article 47 of the Charter in such a way that it safeguards a level of protection which does not fall below the level of

[28]Ibid., para. 129.

[29]*Denisov*, *supra* n. 4, paras. 69-70; ECtHR 9 January 2013, No. 21722/11, *Oleksandr Volkov* v *Ukraine*, paras. 109-117.

[30]CCJE, Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, points 17-19; CCJE, Magna Carta of Judges (Fundamental Principles), CCJE(2010)3 Final, point 13; Council of Europe, European Charter on the Statute of Judges, DAJ/DOC(98)23, point 1.3.

[31]Opinion of AG Tanchev in *A.K., CP* and *DO*, *supra* n. 23, para. 127. With reference to: CCJE, Opinion No 10 (2007) on the Council for the Judiciary at the service of society, point 35; United Nations Human Rights Council, Report of the Special Rapporteur on de independence of judges and lawyers, point 83; Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality, CM(2016)36 final, Explanatory Note, Action 1.1., p. 20.

[32]On this *see also* Venice Commission, *supra* n. 8, paras. 28-31.

[33]Opinion of AG Tanchev in *A.K., CP* and *DO*, *supra* n. 23, para. 135.

[34]Opinion of AG Tanchev in *A.K., CP* and *DO*, *supra* n. 23, para. 137.

protection established in Article 6 of the European Convention as interpreted by the European Court of Human Rights.[35] Then, it repeated its – by now standard – formula, that the requirement that courts are independent has two aspects to it, an external and an internal one, which require rules in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors.[36] Unlike its previous judgments concerning the Polish judicial reforms, it expressly invoked the principle of separation of powers to support the independence of the judiciary and elaborately referred to the principles concerning judicial independence in the case law of the European Court of Human Rights.[37]

However, in contrast to the Advocate General, the Court ruled that it is ultimately up to the referring court to decide whether the Disciplinary Chamber is independent. Nonetheless, it can provide the national court with an interpretation of EU law as guidance.[38] In this sense, the Court notes that the mere fact that the judges of the Disciplinary Chamber are appointed by the President is insufficient to doubt their impartiality.[39] Yet, the rest of the procedural rules that govern the adoption of such a decision should still be such that they exclude any reasonable doubt about the judges' independence. The participation of a judicial council, like the Polish National Council of the Judiciary, is such a procedure and may in principle contribute to making the appointment process more objective. However, that will only be the case if that body itself is sufficiently independent of the political branches of power.[40]

According to the Court, it is, again, up to the national court to conduct this verification concerning the National Council of the Judiciary. To do this, it should take stock of all factors taken together, instead of individually. In that regard, it could, among others, look at the way the judicial council is composed, how it was formed, what its competences are and how it has exercised those competences in the past.[41] Furthermore, the national court may take into consideration other factors that characterise the Disciplinary Chamber, like the fact that it is composed completely of newly appointed judges and the high degree of autonomy it has within the framework of the Supreme Court.[42] If all of these

[35] *A.K.*, *CP* and *DO*, *supra* n. 5, para. 118.

[36] *A.K.*, *CP* and *DO*, *supra* n. 5, paras. 120-123, and the case law cited there.

[37] *A.K.*, *CP* and *DO*, *supra* n. 5, paras. 124-131. It is worth pointing out that this is the first judgment concerning the rule of law crisis in Poland in which the Court of Justice refers to the principle of separation of powers so explicitly.

[38] *A.K.*, *CP* and *DO*, *supra* n. 5, para. 132.

[39] *A.K.*, *CP* and *DO*, *supra* n. 5, para. 133.

[40] *A.K.*, *CP* and *DO*, *supra* n. 5, paras. 134-138.

[41] *A.K.*, *CP* and *DO*, *supra* n. 5, paras. 142-145.

[42] *A.K.*, *CP* and *DO*, *supra* n. 5, paras. 146-151.

factors, when taken together, in particular the doubts surrounding the independence of the National Council of the Judiciary, lead the referring court to conclude that there are legitimate doubts as to the imperviousness of the Disciplinary Chamber to be influenced by the legislative or executive branch, it would follow that the court does not meet the requirements of Article 47 of the Charter.[43]

The duty of disapplication on the referring court

The second question from the referring court was whether, in such a scenario, it should disapply the national provisions which confer jurisdiction to the Disciplinary Chamber and assume jurisdiction itself. For this question, the approaches of the Advocate General and the Court are much more similar. Advocate General Tanchev answered this question in only four paragraphs. He stated that under established case law, the primacy of EU law requires national courts to disapply of their own motion any national provision, including procedural provisions, conflicting with Union law. On the basis of this case law, the referring court was held to assume jurisdiction over the cases at hand if it were to conclude that the Disciplinary Chamber was not an independent court.[44]

The Court responded to this question with reference to the Grand Chamber judgment in *Popławski*,[45] which came out only days before the conclusion of the Advocate General. It recalled that EU law is characterised by its primacy over the laws of the member states and by the direct effect of a whole series of provisions. The principle of primacy establishes the pre-eminence of EU law over the law of the member states and requires all member state bodies to give full effect to the various EU provisions.[46] This implies that national bodies must interpret national law to the greatest extent possible in conformity with EU law which has direct effect and, where this is impossible, refuse to apply the national provision.[47] As Article 47 of the Charter has direct effect,[48] any national court is required to give full effectiveness to this provision, if need be by disapplying any contrary provision of national law.[49] A national provision which grants exclusive jurisdiction to rule on a case raising issues of EU law to a court which does not meet the requirements of independence and impartiality arising from Article 47 of the Charter, would fail to comply with the essential content of the right to an

[43]*A.K.*, *CP* and *DO*, *supra* n. 5, paras. 152-153.
[44]Opinion of AG Tanchev in *A.K.*, *CP* and *DO*, *supra* n. 23, paras. 153-156.
[45]ECJ 24 June 2019, Case C-573/17, *Popławski*.
[46]Ibid., paras. 53-54.
[47]Ibid., paras. 55-58.
[48]ECJ 26 July 2019, Case C-556/17, *Torubarov*, para. 56.
[49]ECJ 17 April 2018, Case C-414/16, *Egenberger*, para. 79.

effective remedy enshrined in that Charter provision.[50] According to the Court, it followed from this that if a national provision gives exclusive competence to a court which does not meet the requirements of independence and impartiality under EU law, another court before which such a case is brought has the obligation to disapply that provision of national law. That way, the case may be determined by a court which does meet those requirements and which, were it not for that provision, would have jurisdiction in the relevant field. In general, this is the court which had jurisdiction in accordance with the law then in force, before the entry into force of the amending legislation which conferred jurisdiction on the court which does not meet those requirements.[51]

Finally, the Court ruled that it is unnecessary to conduct a distinct analysis under the second subparagraph of Article 19(1) TEU because it can only come to the same conclusions under Article 47 of the Charter. Similarly, it is also not necessary to interpret Article 267 TFEU, since the referring court provided no reasons why such an interpretation should be relevant to resolving the questions in the main proceedings.[52]

Commentary

The Court's judgment in this case was highly anticipated and was immediately picked up by several national and international news sources.[53] This is understandable given its great political importance. At first glance one could question whether the Court's ruling is equally significant from a legal point of view, since virtually the entire judgment consists of references to previous case law. The innovative aspects of this judgment thus seem rather limited. Yet, when the judgment is scrutinised in more depth, there are certain aspects that are worth examining further. I will address three, which roughly correspond to the three substantive parts in the Court's judgment. First, I shall discuss the Court's answer to the first question and its reasoning concerning judicial councils. Second, I will explore the referring court's duty of disapplying the national legislation and the Court's reasoning in the second question. The third part will examine the relationship between Article 47 of the Charter, the second subparagraph of Article 19(1) TEU and Article 267 TFEU, as touched upon in the final paragraphs of the Court's judgment.

[50] *A.K.*, *CP* and *DO*, *supra* n. 5, para. 165.

[51] *A.K.*, *CP* and *DO*, *supra* n. 5, para. 166.

[52] *A.K.*, *CP* and *DO*, *supra* n. 5, paras. 169-170.

[53] *See*, for example, J. Shotter and A. Majos, 'EU court raises concerns over Polish judicial overhaul', *Financial Times*, 19 November 2019, ⟨www.ft.com/content/e94dab9a-0ab9-11ea-b2d6-9bf4d1957a67⟩, visited 17 February 2020.

Judicial councils in the case law of the European Court of Justice

This judgment was the first opportunity for the Court of Justice to address judicial councils and to elaborate on any standards to which they should adhere. As was noted above, the Court has opted for a different approach to that of the Advocate General. Instead of the latter's syllogistic approach, based on minimum standards concerning the composition of such bodies, the Court grounded its reasoning on the concept of the appearance of independence. This approach has been defended because it was said to preserve constitutional pluralism, avoided a tyranny of values, and allowed for flexibility.[54] These arguments are not completely convincing. The main reason for this is that the case law of the European Court of Human Rights does impose certain minimum standards for the composition of judicial councils. It requires half of these councils to be composed of members of the judiciary and elected by their peers.[55] Yet, in the end, the violation of Article 6 of the Convention in these cases is found because there are objective reasons to doubt the judges' independence and impartiality.[56] The Strasbourg Court thus combines the two approaches and appears to use the composition of the judicial council as an aspect of the appearance-test, as opposed to the Luxembourg Court, which relies solely on the appearance-test.

It could appear then, that, by refraining from imposing any obligations concerning the composition of judicial councils, the Luxembourg Court offers a protection that is lower than the one found in the case law of the Strasbourg Court,[57] despite the explicit reference to Article 52(3) of the Charter.[58] It is, however, also possible that the Luxembourg Court wanted to distinguish this case from the principles that are found in the case law of the Strasbourg Court. The judgments in which the European Court of Human Rights imposed minimum standards on the composition of judicial councils were cases in which these bodies had to decide on disciplinary sanctions for national judges.[59] According to the Strasbourg Court,

[54]M. Krajewski and M. Ziółkowski, 'The power of "Appearances"', *Verfassungsblog*, 26 November 2019, ⟨verfassungsblog.de/the-power-of-appearances/⟩, visited 17 February 2020.

[55]*Denisov*, *supra* n. 4, paras. 69-70: *Ramos Nunes De Carvalho E Sá*, *supra* n. 4, paras. 78-79; *Oleksandr Volkov*, *supra* n. 29, paras. 109-117.

[56]*Denisov*, *supra* n. 4, para. 72; *Ramos Nunes De Carvalho E Sá*, *supra* n. 4, para. 80; *Oleksandr Volkov*, *supra* n. 29, para. 117.

[57]It should be pointed out here that certain scholarship indicates that supremacy of judicial members can lead to its own problems: D. Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press 2016); M. Bobek and D. Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe', 15 *German Law Journal* (2014) p. 1257.

[58]*A.K.*, *CP* and *DO*, *supra* n. 5, paras. 116-118.

[59]*Denisov*, *supra* n. 4, para. 18; *Ramos Nunes De Carvalho E Sá*, *supra* n. 4, para. 6; *Oleksandr Volkov*, *supra* n. 29, para. 3.

such disciplinary disputes fall within the scope of the right to a fair trial.[60] Consequently, in such cases judicial councils should either comply with the standards found in that Convention provision, or their decision should be amenable for review by a body that does so comply.[61]

In this case, however, the Polish National Council of the Judiciary did not act as a disciplinary body, but rather played an advisory role, helping the President to appoint the judges to the Disciplinary Chamber. The argument could be made that lower standards are acceptable for judicial councils in cases where they only play an appointing role.[62] This understanding of the Luxembourg Court's reasoning could help explain its repeated references to the *Thiam* judgment of the Strasbourg Court,[63] instead of to the case law that the Advocate General used in his opinion, such as *Denisov* or *Volkov*.[64] In contrast to those latter judgments, in *Thiam* questions were raised about the composition of the French judicial council as a national body tasked with appointing judges and not as a disciplinary body.[65] Interestingly, in *Thiam* the Strasbourg Court did not mention that the French judicial council should be composed for a majority of judicial members, nor did it refer to any of its previous case law imposing such standards. All of this could point to the fact that the European Court of Human Rights and the European Court of Justice both distinguish between judicial councils on account of the function they fulfil, an adjudicatory or advisory one. To the best of my knowledge, such distinction between these two functions of judicial councils and its consequences on the standards these bodies should adhere to is not addressed explicitly in the case law of either Court. If such distinction does actually underpin the reasoning of both Courts, it would be advisable to make this explicit in future jurisprudence.

[60]ECtHR 5 February 2009, No. 22330/05, *Olujić* v *Croatia*, paras. 31-43.

[61]*Denisov*, *supra* n. 4, para. 67.

[62]It should be noted, however, that a recent judgment of the Strasbourg Court has indicated that a breach of national legislation when appointing a national judge, and undue influence from the political branches during this process, can lead to the decision that a tribunal is not established by law. *See* ECtHR 12 March 2019, No. 26374/18, *Guðmundur Andri Ástráðsson* v *Iceland*. This case has been referred to the Grand Chamber of the Strasbourg Court. A similar question is pending before the Luxembourg Court: C-487/19. Furthermore, it is to be noted that international soft law instruments do not appear to make any distinction on the basis of which function a judicial council fulfils. The CCJE mentions that there should be a close connection between the composition and competences of a judicial council, without, however, derogating from the rule, which is a majority of judicial members. *See* CCJE, Opinion No 10 (2007) on the Council for the Judiciary at the service of society, point 45.

[63]ECtHR 18 October 2018, No. 80018/12, *Thiam* v *France*.

[64]*Denisov*, *supra* n. 4; *Oleksandr Volkov*, *supra* n. 29.

[65]ECtHR 18 October 2018, No. 80018/12, *Thiam* v *France*, para. 81.

This possibility of distinguishing notwithstanding, the threshold that the Court ultimately imposes in this judgment is that of legitimate doubts as to the independence of the Disciplinary Chamber.[66] The referring court will thus need to assess whether that chamber still has the appearance of independence, based on all surrounding factors, including the composition and functioning of the Polish National Council of the Judiciary. To assess the independence of the National Council of the Judiciary, the Court requires the referring court to take account of all relevant factors taken together. Whereas these factors, on their own, may escape criticism and could be seen as a legitimate assertion of the member state's procedural and institutional autonomy, when taken together, they may raise doubts about the independence of that body.[67] This holistic view of judicial independence can be commended. Judicial independence is a complex, multi-layered concept, which requires more than just structural safeguards, but is also fostered in the political and social culture.[68] It is therefore important that the national judge views the contested measure within the broader context. Especially in a country like Poland, which has seen an orchestrated assault on the independence of various actors at all levels in the legal order, it is important to take stock of the combined effects of the implemented measures to assess their genuine impact.

It should, however, be noted that the Court of Justice has only given limited guidance to the referring court in its judgment on how to conduct this appearance-test. Most of the Court's reasoning refers to previous case law concerning judicial independence and does not contain any new principles. The only new step in the Court's reasoning is the express statement that the independence of the national body which appoints judges to a court is relevant to assess the independence of that court.[69] This lack of clear criteria makes the appearance-test difficult to operationalise.[70] With this judgment, the Court of Justice has left the difficult decision to the national body, without providing much guidance to it.[71]

[66]*A.K.*, *CP* and *DO*, *supra* n. 5, para. 153.

[67]*A.K.*, *CP* and *DO*, *supra* n. 5, para. 142.

[68]V. Jackson, 'Judicial Independence: Structure, Context, Attitude', in A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012) p. 19 at p. 25.

[69]*A.K.*, *CP* and *DO*, *supra* n. 5, paras. 137-138, with reference, by analogy, to *Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 6, paras. 115-116.

[70]*See*, more elaborately on this issue, F. Sudre, 'Le mystère des «apparences» dans la jurisprudence de la cour européenne des droits de l'homme', 20 *Revue Trimestrielle des Droits de l'Homme* (2009) p. 633.

[71]The Court followed a similar approach in the *L.M.* judgment, *see Minister for Justice and Equality (Deficiencies in the system of justice)*, *supra* n. 6. For criticism on this approach, *see* M. Krajewski, 'Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges', 14 *EuConst* (2018) p. 792 at p. 797-798; M. Leloup, 'Het Hof van Justitie als Hoeder van de Rechtsstaat' [The Court of Justice as Guardian of the Rule of Law], 73 *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (2018) p. 571 at p. 578.

This is regrettable, especially considering the sanctions which the judges of the Polish Supreme Court can expect if they rule against the Disciplinary Chamber and given the fact that the Court did give a concrete response to earlier, similar questions.[72] A more extensive reasoning by the Court would have provided more guidance for the referring court and might have helped insulate it from retaliatory rhetoric, as well as further clarify the notion of judicial independence. In October 2019 the Commission initiated another infringement procedure against Poland, this time regarding the disciplinary regime for national judges.[73] It can be hoped that the Court uses that case to clarify some of the questions left open by the instant judgment.

Interestingly, the Chamber of Labour Law and Social Security of the Supreme Court has already come to a decision after the judgment by the Court of Justice. In a ruling of 5 December 2019, it decided that the current National Council of the Judiciary is not an impartial body independent from the legislative and executive authorities. Therefore, it bypassed the Disciplinary Chamber and examined one of the three cases in which it asked for a preliminary ruling in substance, thereby adhering to the Court's response to the second question.[74] Members of the political majority have already denounced this decision.[75] One week after the decision of the Supreme Court, in what can be understood as a direct reaction to the judgment of the European Court and the following decision by the Supreme Court, the ruling party has introduced draft legislation which would open national judges up to disciplinary sanctions if they question the legitimacy of certain aspects of the judicial reforms in Poland.[76]

The principle of primacy, the duty of disapplication and the domestic separation of powers

In its answer to the second question, the Court of Justice explained that Article 47 of the Charter obliges the domestic judge to disapply national legislation that

[72]ECJ 7 February 2019, Case C-49/18, *Escribano Vindel*; ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*.

[73]European Commission, 'Rule of Law: European Commission refers Poland to the Court of Justice to protect judges from political control', *European Commission*, 10 October 2019, ⟨ec.europa.eu/commission/presscorner/detail/en/IP_19_6033⟩, visited 17 February 2020. This procedure is lodged under case number C-791/19.

[74]*See* ⟨www.sn.pl/en/currenttopics/SitePages/Current%20calendar.aspx?ItemSID=331-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty_o_sprawach⟩, visited 17 February 2020.

[75]J. Shotter, 'Poland's top court attacks ruling party over legal reform', *Financial Times*, 5 December 2019, ⟨www.ft.com/content/50660394-1763-11ea-9ee4-11f260415385⟩, visited 17 February 2020.

[76]*See* on this Venice Commission, Opinion 977/2019 of 16 January 2020, Urgent Opinion on Amendments to the Law of the Common Courts, the Law on the Supreme Court and Some Other Laws, CDL-PI(2020)002.

grants jurisdiction on a case which pertains to EU law to a court which does not meet the requirements of impartiality and independence. This response is a logical consequence of the existing primacy case law of the Court.[77] The guarantees found in Article 47 of the Charter have direct effect and national provisions which cannot be read in conformity with those guarantees must be disapplied in order to safeguard the primacy of EU law. Furthermore, this response was the only way to guarantee the right to an effective remedy. If the referring court were to come to the conclusion – as it turned out that it did – that the Disciplinary Chamber cannot operate in an independent manner, it would be unacceptable if the referring court would then allow this chamber to rule on the cases in question, especially when these cases concern topics as contentious as the lowered retirement age of the Polish Supreme Court judges.

Many EU scholars will hardly bat an eyelid at this part of the judgment. Yet, the Court's reply to this question – and the primacy case law in general – may lead to unexpected problems, as they can put strain on the domestic balance of powers. The friction between the doctrine of primacy and the domestic separation of powers is an under-researched topic.[78] Probably the most commonly known example of this tension is the *Costanzo*-obligation, which requires administrative authorities to set aside national legislation they believe to conflict with EU law.[79] Similar concerns regarding the domestic separation of powers could also stem from the judgment under discussion, depending on how broadly the scope of the duty of disapplication is understood.

To explain this more clearly, a closer look should be taken at the reasoning of the Court for this question, which can be construed as a simple syllogism. The principle of primacy of EU law dictates that, where it is impossible to interpret national law in compliance with a rule of EU law which has direct effect, the national court should refuse to apply the national law (major premise).[80] According to the case law of the Court, the various aspects of the right to a fair trial, including the right to an impartial and independent judge, have direct effect (minor premise).[81] Therefore, national legislation which grants jurisdiction to a court that cannot be seen as independent would fail to comply with the right

[77]Attested by the fact that the Advocate General responded to this question in only four paragraphs.

[78]*See*, for an exception, L. Besselink, 'Separation of powers versus EC Law? Supreme Court of the Netherlands 21 March 2003, Stichting Waterpakt', 41 *Common Market Law Review* (2004) p. 1429.

[79]*See* on this Opinion of AG Jääskinen of 14 March 2013 in Case C-509/11, *ÖBB-Personenverkehr*, n. 22, and sources cited there.

[80]*A.K.*, *CP* and *DO*, *supra* n. 5, para. 160.

[81]*A.K.*, *CP* and *DO*, *supra* n. 5, para. 162.

to an effective remedy, and must be disapplied by any court who hears the case (conclusion).[82]

One could question how broadly the scope of this duty of disapplication can be understood. Granted, at the very end of its reasoning the Court appears to limit the scope of the judgment to the rather exceptional situation in which new legislation transfers competence over certain disputes to a court which does not meet the requirements of Article 47 of the Charter.[83] Could EU law, however, be interpreted as requiring a similar duty of disapplication in cases where no such new and specific legislation is present, but where competence is derived from general, perhaps longstanding, competence legislation? In such situations, there would be no previous legislation to fall back on after disapplying the new jurisdictional rule. For example, could an applicant bring his or her case before a second court of appeal, asking it to verify the independence of the court of appeal that would ordinarily have competence over a given dispute and to assume jurisdiction if this verification turns out to be negative? Or, even more radically, could a similar request be made with regard to a case that would normally be for the Polish Constitutional Court to decide, given the strong doubts concerning its independence?[84] The general wording in the rest of the Court's reasoning in this judgment and,[85] indeed, the very way in which the principle of primacy and the duty of disapplication operate,[86] would suggest that the scope of this duty could be understood in such a way. It is clear, however, that such an understanding of EU law would seriously confuse the national system of jurisdictional competence and would raise questions on various procedural aspects of this verification exercise. By linking – for the first time – the principle of primacy to the requirement of judicial independence, the court has opened the door for future questions in this regard.

[82]*A.K.*, *CP* and *DO*, *supra* n. 5, para. 165.

[83]*A.K.*, *CP* and *DO*, *supra* n. 5, para. 166. Here it said 'so that the case may be determined by a court which, *were it not for that provision*, would have jurisdiction in the relevant field, namely, in general, *the court which had jurisdiction before the entry into force of the amending legislation*' (emphasis added and parts omitted).

[84]W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) p. 58–95. In fact, there is a case pending before the Strasbourg Court questioning the independence of the Polish Constitutional Court and the fact that it is a tribunal established by law: ECtHR (communicated) 2 September 2019, No. 4907/18, *Xero Flor w Polsce Sp.z o.o.* v *Poland*.

[85]*See* in particular *A.K.*, *CP* and *DO*, *supra* n. 5, paras. 164 and 165.

[86]Interesting in this regard is the statement of AG Tanchev that 'national courts are obliged to supply an effective remedy to enforce EU law when it is otherwise unavailable under national law' (para. 156 in his Opinion). In his Opinion he does not stress, like the Court did in its judgment, that the court that had been competent prior to the transfer of competence to a new court by new legislation must hear the complaint. Rather, he emphasises the obligation resting on all national courts to provide an effective remedy.

In general, this issue can be seen as a problem of vacuums.[87] By having to disapply the domestic legislation which distributes jurisdictional competence, a legal vacuum is created. The primary responsibility to fill this vacuum lies with the national parliament, but in the meantime the national courts will have to provide an interim solution.[88] However, depending on the kind of rule that is disapplied, such interim solution might prove difficult to reconcile with the traditional understanding of the separation of powers. To understand this, a distinction should be made between two types of legal rules: those that concern binary choices and those that concern non-binary choices.

In some cases, the national judge is faced with rules that offer a binary choice, which only allows for two possible outcomes. If EU law is then found to be incompatible with the choice that is made in the national legislation, this automatically implies that the other option should be followed. An example of this can be found in the judgment in *Koppensteiner*.[89] That case concerned questions on the possibility of appealing a decision which withdrew an invitation to tender after its opening. According to EU law,[90] such a decision should be amenable to review. On the basis of the Austrian jurisdictional rules, the *Bundesvergabeamt* would normally be the competent court to hear such appeals. However, the Austrian legislation explicitly excluded this kind of decision from any form of appeal. The domestic legislation thus precluded a court, which would normally be competent to hear appeals against specific decisions, to hear these appeals, even though Union legislation allows for an effective judicial remedy in those instances.[91] This is a clear example of a binary choice. Here, the competent national judge can rely on the primacy of EU law to disapply the national provision which precludes its jurisdiction. This disapplication then automatically implies the jurisdiction of that court. In such circumstances, the national judge can fill the legal vacuum without any difficulty.[92]

The situation is completely different, however, in cases where the judge is faced with a non-binary option. Here, the fact that the national rule is disapplied on account of Union law, does not directly point to one other outcome, but leaves

[87] *See* on this M. Dougan, 'Primacy and the Remedy of Disapplication', 56 *Common Market Law Review* (2019) p. 1459.

[88] Ibid., at p. 1480.

[89] ECJ 2 June 2005, Case C-15/04, *Koppensteiner*.

[90] *See* Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30 December 1989, p. 33–35.

[91] *See* for a similar case ECJ 22 May 2003, Case C-462/99, *Connect Austria*.

[92] Another example of such a binary choice can be found in cases where national legislation precludes a specific remedy that is expressly provided by EU law; for example ECJ 19 July 2012, Case C-591/10, *Littlewood Retail*.

the judge with several options to choose from. In such a situation, when filling the legal vacuum, the domestic judge is asked to step into the shoes of the domestic legislator, a situation which sits uncomfortably with the principle of separation of powers.[93]

When we apply this dichotomy to the abovementioned issue of disapplication of national competence rules, we get the following image. A case like the judgment discussed here, where there is previous legislation, comes closest to a binary option. After disapplying the new jurisdictional rule, the resulting vacuum gets filled by the previous legislation, avoiding the need for the national judge to fill it him- or herself. The situation would be different, however, if the case concerned a situation where there is no previous legislation. In such a situation, the fact that a national court comes to the conclusion that another domestic court cannot be seen as independent, does not automatically grant the former competence to decide over the latter's cases. It is up to the legislative power to develop a conclusive system of jurisdiction within its legal order, and this should not be left to any kind of discretion by members of the judiciary.[94] In such an understanding, the decision of a judge to disapply the domestic jurisdictional rules and to assume jurisdiction over the case would be difficult to reconcile with the principle of the separation of powers.

It is important to reiterate that there appear to be few legal arguments that object to applying the link between the principle of primacy and the requirement of judicial independence to a situation outside the scope of this judgment, in which there is no new, specific piece of legislation which transfers jurisdiction over certain cases. I argue here that by introducing that link, this judgment may have established a principle in the case law of the Court with far-reaching effects. More generally, this judgment can be situated in the broader debate on whether certain limitations should be accepted to the principle of primacy.[95] Furthermore, it raises the question whether domestic constitutional aspects, like the system of separation of powers, might constitute such a limitation. New questions on this will almost certainly reach the Court in the coming years. It is to be hoped that

[93]Dougan, *supra* n. 87, at p. 1486.

[94]This is well-established case law by the European Court of Human Rights: ECtHR 12 March 2019, No. 26374/18, *Guðmundur Andri Ástráðsson* v *Iceland*, para. 99, with further references.

[95]In this regard, it is interesting to look at a recent opinion of AG Saugmandsgaard Øe, in which he stated that the duty to disapply national legislation on account of the primacy of EU law is subject to an absolute limit, where this would collide with the fundamental right to liberty as guaranteed in Art. 6 of the Charter. *See* Opinion of 14 November 2019 in C-752/18, *Deutsche Umwelthilfe*, paras. 68-89. Recently, the Court has accepted this view: ECJ 19 December 2019, C-752/18, *Deutsche Umwelthilfe*, para. 43.

the Court will use these cases to clarify the various points of uncertainty regarding this strand of case law.[96]

Relationship between the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 267 TFEU

Throughout the judgment, the Court's reasoning for both questions is grounded completely on Article 47 of the Charter. Yet, the questions referred to the Court made mention not only of this provision, but also of the second subparagraph of Article 19(1) TEU and Article 267 TFEU. Recently, questions have been raised about how these three provisions relate to each other.[97] All three involve the independence of national courts, either within their text, or via the case law of the Luxembourg Court, but differ strongly in their scope and function in the EU constitutional order. Recent judgments of the Court and opinions of the Advocates General have touched upon this issue. This part of the case note will analyse these instruments and see what conclusions can be drawn about the relationship between those three provisions.

Both Article 47 of the Charter and the second subparagraph of Article 19(1) TEU, as understood since the *ASJP* judgment,[98] enshrine a right to an independent tribunal. Yet, these two provisions differ in their nature. Whereas the latter imposes a general duty on member states to provide remedies sufficient to ensure effective legal protection, the former is drafted as an individual, fundamental right. Questions then arose on whether the application of the second subparagraph of Article 19(1) TEU was limited to situations where a member state implemented EU law, just like Article 47 of the Charter, or whether it provided an autonomous ground to assess judicial independence; whether the second subparagraph of Article 19(1) TEU could be invoked in all situations; and whether the concept of judicial independence was identical in the two provisions.

[96]In this regard one could, for example, question what the Court meant by 'granted *exclusive jurisdiction* to hear and rule on a case'. It refers to this exclusive jurisdiction in para. 165 of the judgment, but never mentions it again. Does this, for example, mean that the principles that the Court sets out in this judgment only apply to national courts of which there only exists one in a legal order, like a constitutional court or a supreme court? Or must this be interpreted in the way that in any legal order, the combination of jurisdictional rules *ratione materiae* and *ratione loci* must point to one court who has exclusive jurisdiction in any given case?

[97]L. Pech and S. Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the *ASJP* case', 55 *Common Market Law Review* (2018) p. 1827; M. Bonelli and M. Claes, 'Judicial Serendipity: how Portuguese judges came to the rescue of the Polish judiciary', 14 *EuConst* (2018) p. 622.

[98]ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*.

In several of his opinions, Advocate General Tanchev explained how he believed the relationship between the two provisions should be understood. He claims that there exists a constitutional passerelle between the two provisions.[99] This implies that the case law concerning them inevitably intersects and that the interpretation of one provision might prove relevant in understanding the other. Yet, despite this substantive concordance, the two provisions have a distinct material scope. The second subparagraph of Article 19(1) TEU offers an autonomous ground for judicial independence, but is confined to correcting structural problems in a member state. This means that the contested measure should impact an entire tier of the judiciary.[100] Article 47 of the Charter, by contrast, is applicable to individual or particularised incidences concerning judicial independence, but, in accordance with Article 51(1) of the Charter, only in situations where the member state is implementing EU law.[101] A structural issue that also entails the implementation of EU law can be dealt with under both provisions.[102]

When we take a look at the case law of the Court, it seems to agree with Advocate General Tanchev that both provisions are substantively similar. A clear indication of this is that the Court refers to case law under Article 47 of the Charter when it deals with a case under the second subparagraph of Article 19(1) TEU,[103] and vice versa.[104] Furthermore, in the instant judgment, the Court, after expounding its reasoning under Article 47 of the Charter, stated that it did not appear necessary to conduct a distinct analysis of the second subparagraph of Article 19(1) TEU, since this could only reinforce the conclusion already set out above.[105] This would indicate that the Court believes that the content of both provisions is similar, or even identical, and that only their material scope is different.[106]

[99]Opinion of AG Tanchev in *A.K., CP* and *DO*, *supra* n. 23, para. 85; Opinion of AG Tanchev of 20 June 2019 in C-192/18, *Commission* v *Poland (Independence of the ordinary courts)*, para. 97.

[100]Opinion of AG Tanchev of 24 September 2019 in C-558/18, *Łowicz*, para. 125; Opinion of AG Tanchev in *A.K., CP* and *DO*, *supra* n. 23, para. 145; Opinion of AG Tanchev in *Commission* v *Poland (Independence of the ordinary courts)*, *supra* n. 99, para. 115.

[101]Opinion of AG Tanchev in *Commission* v *Poland (Independence of the ordinary courts)*, *supra* n. 99, para. 116.

[102]Ibid., para. 116.

[103]*Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 6.

[104]*Minister for Justice and Equality (Deficiencies in the system of justice)*, *supra* n. 6.

[105]*A.K.*, *CP* and *DO*, *supra* n. 5, para. 169.

[106]This raises the interesting follow-up issue of whether the Court is, similarly to Art. 47 of the Charter read in conjunction with Art. 52(3) of the Charter, required to interpret the second subparagraph of Art. 19(1) TEU in such a way as to offer a protection equal to or greater than Arts. 6 and 13 of the European Convention on Human Rights. Based on the current case law, I would argue that it is.

When it comes to the scope of application of both provisions, however, the view of the Court seems to deviate from that of Advocate General Tanchev. It does not appear to follow the Advocate General's distinction between structural and individual problems regarding judicial independence.[107] Rather, the pertinent question seems to be whether the member state is implementing EU law. If this is the case, then Article 47 of the Charter will be applicable. If this is not the case, then the second subparagraph of Article 19(1) TEU can still apply, provided that the domestic court in question may be required to rule on questions which concern the application or interpretation of EU law and thus fall within the fields covered by EU law.[108] As was noted,[109] there do not appear to be many, if any, courts that do not fit this description. It would therefore seem that the Court of Justice has a much broader understanding of the material scope of the second subparagraph of Article 19(1) TEU than the Advocate General.[110]

Based on this case law, the relationship between Article 47 of the Charter and the second subparagraph of Article 19(1) TEU can be described as follows. Both provisions safeguard the right to effective judicial protection, which includes the right to an independent judge. In accordance with Article 51(1) of the Charter, Article 47 of the Charter can only be invoked in situations where the member state is implementing EU law. By contrast, the second subparagraph of Article 19(1) TEU is an autonomous provision and does not need such a nexus with substantive EU law, but can be applied whenever the case concerns a national court that may be required to rule on questions concerning the application or interpretation of EU law. Irrespective of which of the provisions applies, the Court can, due to the close connection between them, refer to case law concerning the other for their interpretation.

Besides the relationship between Article 47 of the Charter and the second subparagraph of Article 19(1) TEU, questions have also been raised about how these provisions relate to Article 267 TFEU. This final provision either allows or requires a national court to ask for a preliminary ruling by the Court of Justice. According to longstanding case law such guidance can only be sought by courts that are independent.[111] This led scholars to question whether courts that could no longer be seen as independent were precluded from reaching the Court via the

[107] *See also* Opinion of AG Tanchev in *A.K., CP* and *DO*, *supra* n. 23, para. 147.

[108] *See A.K., CP* and *DO*, *supra* n. 5, paras. 78-86; *Commission* v *Poland (Independence of the Supreme Court)*, *supra* n. 6, paras. 50-54.

[109] Pech and Platon, *supra* n. 97, at p. 1840.

[110] This case law might be refined in future cases, like the pending case *Miasto Łowicz* (C-558/18). This case concerns the Polish system of disciplinary proceedings for judges after the reforms to the judicial system.

[111] Among others ECJ 17 September 1997, Case C-54/96, *Dorsch Consult*, para. 23; ECJ 30 June 1966, Case C-34/65, *Vaassen-Göbbels*, paras. 29-30.

preliminary ruling mechanism.[112] This point of view would, indeed, not seem completely without merit. A degree of consistency exists between the notion of independence as used in Article 267 TFEU, Article 47 of the Charter and the second subparagraph of Article 19(1) TEU.[113] Moreover, the Court refers to its case law under Article 267 TFEU in cases where it interprets Article 47 of the Charter[114] or the second subparagraph of Article 19(1) TEU.[115] This would indicate that, where a national court is no longer seen as independent, it is precluded from turning to the court for a preliminary ruling.

Such understanding would, however, be a harsh verdict, especially in situations where the doubts concerning a court's independence result from structural measures implemented throughout the entire legal order. As was noted, this would mean that the Court would abandon the national courts to their fate.[116] Several Advocates General seem to share this point of view. They have claimed in their opinions that the assessment of judicial independence under Article 267 TFEU is a qualitatively different exercise than under Article 47 of the Charter or the second subparagraph of Article 19(1) TEU, and that a lower threshold can be applied here.[117] They ground their reasoning on the different aims of the provisions.

The system of preliminary references under Article 267 TFEU allows for cooperation between the national courts and the Court of Justice and aims at preserving the uniform application of EU law.[118] It therefore functions as the cornerstone of the judicial system in the Union. A more flexible understanding of the notion of independence means that more national institutions can take part in this dialogue, facilitating the uniformity of EU law and maintaining the line of communication between the national and EU judiciary. With this aim of dialogue in mind, a less stringent understanding of the notion of independence can be understood.[119]

[112]Bonelli and Claes, *supra* n. 97, p. 637; Pech and Platon, *supra* n. 97, p. 1842.

[113]K. Lenaerts 'On Judicial Independence and the Quest for National, Supranational and Transnational Justice', in G. Selvik et al. (eds.), *The Art of Judicial Reasoning* (Springer 2019) p. 155 at p. 169.

[114]ECJ 13 December 2017, Case C-403/16, *El Hassani*, para. 40.

[115]ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, para. 44.

[116]Pech and Platon, *supra* n. 97, p. 1842.

[117]*See* Opinion of AG Tanchev in *A.K., CP* and *DO*, *supra* n. 23, para. 111; Opinion of AG Bobek of 26 October 2015 in C-551/15, *Pula Parking*, paras. 81-107; Opinion of AG Wahl of 10 April 2014 in C-58/13 and C-59/13, *Torresi*, paras. 45-54.

[118]ECJ 6 May 2018, Case C-284/16, *Achmea*, para. 37.

[119]See, in this sense, Opinion of AG Bobek, *supra* n. 117, para. 104. AG Kokott has referred to a rebuttable presumption of independence: Opinion of 23 January 2020 in C-658/18, *UX (Statut des juges de paix italiens)*, paras. 46-47.

This predominately procedural independence-test under Article 267 TFEU can be contrasted with the substantive assessment of the notion of independence under Article 47 of the Charter and the second subparagraph of Article 19(1) TEU. What is at stake here is not the question whether a certain body can refer a question to the Court, but rather the fundamental right to be tried by an independent body. With this aim in mind the Court should apply a rigorous understanding of independence in order to strengthen the judicial protection of individuals.[120]

In a recent judgment, the Court made a connection between these two independence-tests. In *Banco de Santander* it decided that the Spanish Central Tax Tribunal is not sufficiently independent and therefore does not qualify as a court or tribunal in the sense of Article 267 TFEU,[121] thereby reversing its earlier approach in *Gabalfrisa*.[122] In its judgment, the Court relied on its recent case law concerning the second subparagraph of Article 19(1) TEU when assessing the notion of independence under Article 267. It would therefore appear that the Court tries to reconcile the two independence-tests. Whether the notion of independence will be interpreted more or less intensely, depending on the applicable test, will most likely be clarified in future jurisprudence.

It is interesting to note that in the *Banco de Santander* judgment the Court clarifies, at the end, that, even if the Spanish tax tribunal is not a tribunal for the purposes of Article 267 TFEU, it is still required to ensure the effectiveness of EU law, if need be by disapplying any contrary provision of national law. Moreover, it points out that the decision of the tax tribunal is amenable to judicial review and that the courts entrusted with that review can or must request a preliminary ruling from the Court.[123] With these two final considerations, the Court appears to make clear that, even when a court or tribunal is excluded from the preliminary reference procedure, this should in principle not impair the effectiveness of EU law, nor disconnect the judicial dialogue between the Court and the national jurisdictions in the case at hand.

With the developments in several of the EU member states threatening the independence of (often highest) national courts, this possible friction between the two independence-tests will very probably become increasingly apparent in the near future. Though the Court's recent jurisprudence has thus clarified some aspects on the relationship between the second subparagraph of Article 19(1)

[120]See, in this sense, Opinion of AG Wahl, *supra* n. 117, para. 49.

[121]ECJ 21 January 2020, Case C-274/14, *Banco de Santander*.

[122]ECJ 21 March 2000, Case C-110-98 to 147/98, *Gabalfrisa a.o*. Here, the Court ruled that a similar Spanish tax tribunal was sufficiently independent.

[123]*Banco de Santander, supra* n. 121, paras. 78-79.

TEU, Article 47 of the Charter and Article 267 TFEU, it has certainly not dispelled all uncertainties.

Conclusion

The 2018 *ASJP* judgment was a ground-breaking development in the Court's jurisprudence. The Court's new interpretation of the second subparagraph of Article 19(1) TEU has allowed for an autonomous ground to verify the independence of national courts. In doing so, the Court of Justice has placed the internal judicial architecture of member states within its purview, not unlike the situation under the European Convention on Human Rights.

One of the consequences of this development is that more intricate questions concerning judicial independence and the institutional architecture of member states will reach the Court, as is already apparent from recently pending cases.[124] This will require the Luxembourg Court to refine the often general principles on judicial independence that can now be found in its case law. Moreover, it can stimulate the Court to more openly engage with the judgments of the European Court of Human Rights. When it does this, it can be hoped that the Court not only makes reference to the basic principles found in the case law of the Strasbourg Court, but also takes into account its more nuanced aspects.

The *A.K.*, *CP* and *DO* case was the first of these novel questions to reach the Court and its first opportunity to substantively deal with judicial councils. The Court's reasoning can be divided into three parts: the independence of the Disciplinary Chamber and the National Council of the Judiciary in the light of Article 47 of the Charter, the duty of disapplication of national legislation on the ground of the requirement to an independent court, and the question whether a different outcome would be reached under Article 267 TFEU or the second subparagraph of Article 19(1) TEU.

From the commentary it became clear that the Court's reasoning on all three of these issues left questions unanswered or even created new uncertainties. In this sense, it is unclear whether the Court offered a lower protection than can be found under the European Convention on Human Rights or deliberately distinguished this case from the case law of the Strasbourg Court. Furthermore, questions arose as to how far-reaching the Court's interpretation of the duty of disapplication was and whether it possibly created friction with the domestic separation of powers.

[124]Among others Case C-564/19 (on the Hungarian system of appointment of court presidents by the president of the National Office of the Judiciary); C-487/19 (on the question whether a Court is still established by law if the judge has been appointed in flagrant breach of national legislation); C-291/19 (on the establishment in Romania of a section for the investigation of offences committed within the judiciary, within the prosecutor's office).

Finally, while offering some clarity on the relationship between Article 47 of the Charter and the second subparagraph of Article 19(1) TEU, the relationship between those two provision and Article 267 TFEU remains highly unclear.

In general, this judgment thus raises more questions than it answers and provides an uncertain first step by the Court in the field of judicial self-government. It is to be hoped that the steps that will undoubtedly follow are taken with more conviction.

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