FIDE 2021 Congress - Topic 1: National Courts and the Enforcement of EU Law

Brief overview most relevant updates

Table of Contents

Supplementary Contribution on the EFTA Court 1

Introduction 1

Case law 1

Procedural innovations 3

General update: Ireland 5

CJEU caselaw on "balancing" primacy with other concerns, e.g. concerns about legal certainty; limits to mutual trust / mutual recognition 5

Recent national challenges to the authority of Union law within the domestic legal systems 6

Preliminary References 6

General update: Poland 7

Recent national challenges to the authority of Union law within the domestic legal systems 7

Rule of Law / independence of the judiciary 8

General update: Portugal 10

Recent national challenges to the authority of Union law within the domestic legal systems 10

Preliminary References 11

Supplementary Contribution on the EFTA Court

Written by: Michael-James Clifton

Introduction

Since submitting the Supplementary Contribution on the EFTA Court in February 2020, there have been substantial developments in the EFTA Court's operation in advisory opinion cases. These will be addressed in two parts: concerning or involving case law, and significant procedural changes and innovations.

Case law

Geographical scope of the EEA Agreement

In two cases, the EFTA Court has considered for the first time the geographic scope of the EEA Agreement: Case E-8/19 Scanteam AS v The Norwegian Government, judgment of 16 July 2020, and Case E-11/20 Eyjólfur Orri Sverrisson v The Icelandic State, not yet reported, judgment of 15 July 2021.

Case E-8/19 Scanteam AS v The Norwegian Government, cited above, concerned a public procurement tender issued in the Norwegian national procurement register 'Doffin' by the Royal Norwegian Embassy

in Luanda, Republic of Angola for the procurement of consulting services in connection with the planning, management and implementation of a human rights project in Angola.

The Court relying on inter alia the ECJ's judgments in Boukhalfa, C-214/94, EU:C:1996:174, and Parliament v Council, C-132/14 to 136/14, EU:C:2015:813 held that "Legal acts incorporated into the EEA Agreement apply, in principle, to the same area as the EEA Agreement" "[h]owever, the geographical scope of the EEA Agreement does not preclude EEA law from having effects outside the territory of the EEA" (Case E-8/19 Scanteam AS v The Norwegian Government, cited above, paragraphs 65 and 66).

The Court held in paragraph 69 that, "procurement is subject to EEA law where it is sufficiently closely linked to the EEA, such as when it is liable to have a direct impact on the functioning of the internal market within the EEA." This necessarily included "[a]cquisition by an EFTA State's foreign mission located in a third country by means of a public contract of supplies or services from an economic operator established in the EEA" (Case E-8/19 Scanteam AS v The Norwegian Government, cited above, paragraph 68).

Article 126(1) EEA provides that the Agreement "shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway." In paragraph 73, the Court held that "there is no reason to examine Article 126 EEA". The Norwegian Government had argued "that the territorial scope of the EEA Agreement differs between EFTA States and EU Member States due to the wording of Article 126 EEA".

In Case E-11/20 Eyjólfur Orri Sverrisson v The Icelandic State, cited above, the Court relied upon its findings in Scanteam in a case concerning the Working Time Directive. It held "that in making a journey to a location other than the worker's fixed or habitual place of attendance, it is immaterial whether that journey is made entirely within the EEA or to or from third countries if the employment agreement is established under and governed by the national law of an EEA State" (Case E-11/20 Eyjólfur Orri Sverrisson v The Icelandic State, cited above, paragraph 65).

Presumption of compatibility with the ECHR? Norwegian Confederation of Trade Unions and Norwegian Transport Workers' Union v. Norway

The Fifth Section of the European Court of Rights rendered its judgment in LO and NTF v Norway on 10 June 2021 (ECtHR Fifth Section, Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway, App. No. 45487/17 ECLI:CE:ECHR:2021:0610JUD004548717). It goes far beyond the scope of this supplement to address fully the contents of the judgment (see generally, C Baudenbacher, ECtHR Holship – The End of Dockers' Monopolies in Europe?, in Clifton/Rab/Scorey (Eds.) Building Bridges in European and Human Rights Law, Hart Publishing (forthcoming 2022)). The case is significant. It is the third case to engage directly with the role of the EFTA Court. The first was ECtHR, Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia, App. No. 60642/08, ECLI:CE:ECHR:2014:0716JUD006064208.The second case, ECtHR, Konkurrenten.no AS v Norway, 2019, App. No. 47341/15, ECLI:CE:ECHR:2019:1105DEC004734115, was addressed at length in the Supplementary Contribution on the EFTA Court.

Very briefly, the EFTA Court rendered its judgment in Case E-14/15 Holship Norge AS v Norsk Transportarbeiderforbund [2016] EFTA Ct. Rep. 240 in April 2016. The Supreme Court of Norway in its judgment of 16 December 2016 followed the EFTA Court's ruling. LO and NTF lodged their case against

Norway on 15 June 2017, complaining that the decision to declare the notified boycott unlawful had violated their right to freedom of association as provided for in Article 11 ECHR.

It is notable that the Norwegian Government argued before the Strasbourg Court that "while EU law and EEA law differ in certain respects, and even if it were decided that this difference means that EEA law, as such, does not benefit from the so-called Bosphorus presumption of equivalent protection, the present case concerns the application of the main part of the EEA Agreement, which corresponds with EU law, and to which the presumption should therefore apply" (LO and NTF v Norway, § 105).

The Fifth Section was clearly uncomfortable with the ECtHR Second Section's position in Konkurrenten.no. While it 'reiterated' that the ECtHR has "has held that if an organisation to which a Contracting State has transferred jurisdiction is considered to protect fundamental rights in a manner which can be considered at least "equivalent" to that for which the Convention provides, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation (see Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], no. 45036/98, §§ 152-153, ECHR 2005 VI, §§ 155-56 and Konkurrenten.no AS v. Norway (dec.), no. 47341/15, § 42, 5 November 2019)" (LO and NTF v Norway, § 104)", it proceeded "on the basis that for the purposes of this case the Bosphorus presumption does not apply to EEA law" (LO and NTF v Norway, § 108).

The Fifth Section stated that "the Court observes, however, as clearly stated by the EFTA court in the Holship case, that fundamental rights form part of the unwritten principles of EEA law… [s]ince this reflects the position which previously pertained under EU law, prior to successive EU Treaty amendments, according to which fundamental rights were first recognised as general principles of EU law, the Court considers that the fact that the EEA agreement does not include the EU Charter is not determinative of the question whether the Bosphorus presumption could apply when it comes to the implementation of EEA law, or certain parts thereof." (LO and NTF v Norway, § 107).

The Fifth Section continued "[h]owever, given one of the other features of EEA law identified by the Court in the Konkurrenten.no decision – the absence of supremacy and direct effect, added to which is the absence of the binding legal effect of advisory opinions from the EFTA Court – and given that the existence of procedural mechanisms for ensuring the protection of substantive fundamental rights guarantees is one of the two conditions for the application of the Bosphorus presumption, the Court leaves it to another case, where questions in relation to the procedural mechanisms under EEA law may arise, to review this issue." (LO and NTF v Norway, § 108).

As the Fifth Section stated that it left "it to another case, where questions in relation to the procedural mechanisms under EEA law may arise, to review this issue" this remains an open matter. It would appear clear that there is room for increased judicial dialogue.

Procedural innovations

New Rules of Procedure

The EFTA Court has issued new Rules of Procedure, to accommodate certain changes and update the existing provisions, as pertinent, pursuant to Article 43(2) SCA. These amendments are substantial that are completely restructured when compared to the previous Rules of Procedure. Consultations on the draft rules of procedure were held from 5 July 2018 until 1 October 2018. On 21 May 2021 the final version of Rules of Procedure 2021 were published and they entered into force on 1 August 2021. The purpose of the new Rules of Procedure is to update the Court's procedural rules in light of its own experience, as well as the experiences of the Court of Justice and of the General Court, insofar as those provisions are relevant for the structure and jurisdiction of the EFTA Court.

Changes to the Report for the Hearing

A Report for the Hearing is produced in advance of all hearings at the EFTA Court. The content of the Report for the Hearing has been reduced in advisory opinion cases so as to no longer include the arguments of the parties. Since autumn 2020, reports for the hearing now contain only the relevant law, facts, procedural history, and the parties' respective prayers. As part of the Court's January 2021 consultation document, the Court noted that it had "…decided to shorten the Report for the Hearing. Currently, the report does, in principle, no longer contain any record of the arguments set out in the written observations, only the proposed answers by each participant" (see EFTA Court, 'Consultation on the possible publication of Written Observations in Advisory Opinion Cases', 13 January 2021, available at https://eftacourt.int/wp-content/uploads/2021/01/Consultation-publication-of-WO-final-13.1.21.pdf, accessed 10 June 2021).

Remote hearings

In the wake of the pandemic-induced closure of the Court's premises, a process requiring supplementary written submissions was instituted in Cases E-10/19 Bergbahn Aktiengesellscha Kitzbühel v Meleda Anstalt and E-13/19 Hraðbraut. However, it swiftly became apparent that this method was not as efficient or effective as anticipated, and could not sufficiently substitute the attributes of hearings. As a direct consequence, the EFTA Court has been conducting remote hearings since June 2020. The first remote hearing was held on 16 June 2020 in Joined Cases E-11/19 and E-12/19 Adpublisher AG v J and K, and it has conducted a total of 18 by June 2021.

The Court's remote hearings are conducted via Zoom, with the judges and registrar robed, seated in a socially-distanced fashion on the bench. 'Guidelines for Participants' have been issued, which note that the conduct of remote hearings is subject to the same rules as generally applicable to the Court's 'physical' oral hearings (see generally, Clifton/Şchiopu Justice must also be seen to be done: digitalisation at the EFTA Court, EU Law Live Weekend Edition, No. 63, 19 June 2021, 2-15 at pp.3 and 4).

Streaming of proceedings

Both the remote hearings, and now the delivery of judgments – should this be conducted at a specific separate public sitting of the Court – are streamed on the Court's website (www.eftacourt.int). As President Páll Hreinsson has written, live-streaming was implemented in order to ensure both the "accessibility and transparency of the hearings" (see, P. Hreinsson, in 'EFTA Court 2020 Report', p.5). The stream is 'not quite live', as there is a delay of a few moments. The event is not available to view after the closure of the public sitting. The content of the stream broadcast is the same feed as is visible to all participants (see generally, Clifton/Şchiopu Justice must also be seen to be done: digitalisation at the EFTA Court, EU Law Live Weekend Edition, No. 63, 19 June 2021, 2-15 at pp.4 and 5).

Publication of national courts' requests for advisory opinions

In all advisory opinion cases lodged after 1 January 2021, the national court's request is published in full (subject to any redactions) on the Court's website in both English and the language of the request (see, for example in Case E-1/21 ISTM International Shipping & Trucking Management GmbH v AHV-IV-FAK available here: https://eftacourt.int/cases/e-1-21/).

Publication of submissions in advisory opinion cases

The EFTA Court is currently examining the possibility of publishing parties' written submissions in advisory opinion cases only on its website in cases lodged from 1 January 2021. To this end, the Court

decided "to consult stakeholders in order to help facilitate a well-informed decision on the issue" on 13 January 2021 (see, EFTA Court, 'Consultation on the possible publication of Written Observations in Advisory Opinion Cases', 13 January 2021, available at https://eftacourt.int/wp-content/uploads/2021/01/Consultation-publication-of-WO-final-13.1.21.pdf, accessed 10 June 2021). The submissions would be published after the rendering of the Court's judgment, and may be redacted.

General update: Ireland

Written by: Ciarán Toland SC, Dr Sarah Fennell BL and Dr Aoife Beirne BL[1]

CJEU caselaw on "balancing" primacy with other concerns, e.g. concerns about legal certainty; limits to mutual trust / mutual recognition

When and how have the Irish courts balanced the principle of supremacy with other competing principles of Union law?

In the Court of Appeal decision in Brady v Revenue Commissioners [2021] IECA 8. the Court addressed the question of supremacy of EU law noting:

"There does appear to have been an ostensible conflation in the minds of both the Circuit Court judge, and the High Court judge, of the concept, on the one hand, of disapplying a provision of a domestic statute because its application in the circumstances of the case would contravene EU law; and on the other hand, the concept of granting a declaration that a provision of a domestic statute is incompatible with EU law. Every domestic court at every level, whether it enjoys local and limited jurisdiction, full original jurisdiction or appellate jurisdiction, is bound to have regard to the doctrine of supremacy of EU law where it applies and has jurisdiction to disapply a provision of a domestic statute where its application would clearly contravene EU law. That was what counsel for the defendant (i.e. the present appellant) was asking the Circuit Court to do." (para [55])

When and how have the Irish courts dealt with conflicts between national constitutional principles and EU law?

In the High Court decision of Right To Know CLG v Commissioner For Environmental Information [2021] IEHC 273. an appeal was allowed from a decision of the Commissioner for Environmental Information. The High Court found that documentation concerning speeches of the President of Ireland relating to environmental information and certain documentation that was before the Council of State, when it advised the President in relation to two particular Bills on which he had consulted them, for the purpose of Art. 26 of the Constitution, should be produced on request under the European Communities (Access to Information on the Environment) Regulations 2007 (para [1]-[2]). The Court reasoned that although the President had immunity under the Constitution of Ireland, EU legislation requires that a Member State actively exclude any public body from the obligations contained therein.

The Commissioner for Environmental Information had refused to order the production of such documentation on the basis that the President was entitled to immunity under Article 13.8.1 of the Constitution (para [2]). That decision was subsequently appealed to the High Court under Article 13 of the 2007 Regulations. The central issue in the appeal was whether the Commissioner was correct in holding that the President was excluded from the definition of a public authority provided for in

[1] We are grateful to Dr Róisín Costello BL for her research assistance.

Directive 2003/4/EC pursuant to Art. 2.2 of the Directive, which provided that if the constitutional provisions of Member States:

" … at the date of adoption of this Directive makes no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition." (para [4])

While that particular provision was not transposed into the 2007 Regulations (implementing the 2003 Directive), the respondents argued that such transposition was not necessary as, once a person or body enjoyed immunity from review of its decisions under the constitution at the date of entry into force of the Directive, they were automatically excluded from the definition of public authority contained therein (para [5]).

The appellant submitted that the true interpretation of that sentence in Art. 2.2. of the Directive, meant that Member States were obliged to take steps when transposing the Directive into domestic law to avail of the option that was given to them to exclude such persons or bodies from the definition of public authority. As the Irish Government had not done so, they submitted that the President was therefore within the definition of public authority in the Directive and in the 2007 Regulations and was obliged to furnish the documentation requested by the appellant (para [6]). The Court ultimately considered the position of the appellants to be correct.

Recent national challenges to the authority of Union law within the domestic legal systems

How have the Irish courts balanced the obligation of mutual recognition and the presumption of mutual trust against other competing principles of EU law?

In Minister for Justice v Lyszkiewicz [2021] IEHC 108 the High Court ordered the surrender of the respondent to Poland in the context of European Arrest Warrant proceedings. Arguments had been advanced relating to the independence of the judiciary and fair trial rights in that jurisdiction which, it was argued, should ground a refusal to surrender the respondent. The Court noted, however, that the CJEU had found, on two occasions that "that such generalised and systemic deficiencies in the rule of law of a requesting Member State are not in and of themselves a sufficient basis upon which to refuse an application for surrender" (para [38]). Rather, the Court noted that, in order to justify a refusal of surrender, such general and systemic deficiencies must be linked to the personal situation of the requested person such that there are substantial grounds for believing the requested person will not receive a fair trial. Noting that no argument was advanced to that effect in this case, and that no information was provided to the Court that could support such an argument the Court was obliged to dismiss the application to refuse the respondent's surrender (para [52]).

Preliminary References

The circumstances in which a preliminary reference will be made

This issue of surrender of an individual to Poland was considered once more in the decision of Minister for Justice v Szamota [2021] IECA 209, Collins J was presented with an appeal from the High Court which raised several important questions regarding the scope and effect of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (para [1]). In light of a number of significant decisions of the CJEU, and in particular the decision in Case C-571/17 PPU, Samet Ardic EU:C:2017:1026 the Court referred three questions to the CJEU as a result of the "significant issues" the case raised concerning Article 6 of the ECHR, Articles 47 and 48 of the Charter of the Charter and their interaction with section 37 of the 2003 Act (para [52]).

In the case of Minister for Justice v Siklosi [2021] IECA 210 which was decided on the same day as Szamota the Court of Appeal noted that they were exercising their power to make a preliminary reference under Article 267 as a result of the "importance and complexity of the questions raised by the points of law certified by the High Court" (para [2]).

The central criteria for making a preliminary reference in the case of Hellfire Massy Residents Association v An Bord Pleanala[2021] IEHC 424 (para [112]) include whether the questions raised a point of interpretation, rather than application, of EU law; that the point is not acte clair or acte éclairé; that the answer to the question must be necessary for the decision at hand and, finally, that the Court has chosen to exercise its discretion in favour of making a reference. The novelty of questions requiring resolution were subsequently demonstrated in the decision of the High Court in Board of Management of Salesian Secondary School v. Facebook Ireland 2021] IEHC 287 where a preliminary reference was made in the context of an application to identify those individuals behind an anonymous Instagram account in the context of disciplinary proceedings within a secondary school (para [1]). The Court concluded that it was necessary to make a reference to the CJEU given the "significant legal issues in respect of privacy, data protection and freedom of expression' raised by the case" (para [2]). Specifically, the Court noted that it was concerned with the existence of a right to anonymous speech under the GDPR, or Articles 7, 8 or 11 of the Charter (para [83]) and whether there was a requirement to put affected parties on notice of any application to identify operators of an anonymous account (para [83]). The reference was subsequently withdrawn following the decision by the applicants not to pursue the case.

A similar emphasis on novelty, and the importance of the questions posed to the regulatory schema in place in numerous member states grounded the decision to make a preliminary reference in respect of five questions concerning Regulation 11 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 in the decision of Eircom Limited v. Commission for Communications Regulation 2021] IEHC 328. A similar emphasis was discernible again in the decision of Stan v Chief Appeals Officer [2020] IEHC 548 in respect of Article 81 of Regulation 883/2004 (para [28]).

In Eco Advocacy CLG v An Bord Pleanala [2021] IEHC 265 the High Court discussed specific features of the Article 267 procedure and noted that a wider set of interested parties may sometimes require to be put on notice where they are not joined as parties due to the limitations of the procedure (para [93]-[94]). The Court went on to note that while the Court can call in amici curiae of its own motion, as a general proposition and subject to further argument it would be a matter for the parties as to whether or not they want to ask for any other national, European or international body to participate as amici curiae (para [95], [98]).

General update: Poland

Written by: Agnieszka Sołtys

Recent national challenges to the authority of Union law within the domestic legal systems

The latest developments of the case law of the Polish Constitutional Court have brought a serious threat to the authority of Union law within the domestic legal systems.

* On 20 April 2020, the Constitutional Court ruled on the application of the Prime Minister questioning the resolution of the combined chambers: Civil, Criminal and Labour and Social Security Law of the

Supreme Court of 23 January 2020 (BSA I 4110 1/20). The Resolution of 3 Chambers of the Supreme Court was issued following the judgment of the CJEU in case A.K. (judgment of 19 November 2019, Case C-585/18, C-624/18 and C-625/18, A.K. et al. v Sąd Najwyższy) in which the CJEU indicated the requirements to be fulfilled by courts in democratic states so that – in view of Article 6 European Convention on Human Rights, and Article 47 Charter – they could be considered impartial and independent. In its judgment the Constitutional Court ruled that the Resolution of 3 Chambers of the Supreme Court was inconsistent with the Constitution, with the TEU, and the European Convention on Human Rights (case U 2/20).

* The Resolution of 3 Chambers of the Supreme Court – implementing the CJEU judgment in case A.K. – was also questioned in case Kpt 1/20 initiated by the Marshal of the Sejm (the lower chamber of the Polish parliament). In a decision dated 21 April 2020, the Constitutional Court ruled that the Supreme Court – also in connection with the ruling of an international court – does not have the competence to provide a law-making interpretation of legal provisions, leading to a change in the normative status in the sphere of the system and organization of the judiciary.

* On 14 July 2021 the Constitutional Court ruled (case P 7/20) that Article 4(3), second sentence, of the TEU, in conjunction with Article 279 of the TFEU – insofar as the CJEU ultra vires imposes obligations on the Republic of Poland as an EU Member State, by prescribing interim measures pertaining to the organisational structure and functioning of Polish courts and to the mode of proceedings before those courts – is inconsistent with the provisions of the Constitution. The judgment was issued in response to the question of the Supreme Court (Disciplinary Chamber) issued as a result of the ruling of the Court of Justice in case Case C 791/19 R European Commission v Republic of Poland in which it ordered Poland to immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges.

* Three other cases – initiated at the Constitutional Tribunal by the Prosecutor General (K 7/18), the Prime Minister (K 3/21) and the group of deputies of the governing party (K 5/21) – concerning the application of EU standards to the organization and functioning of the national judiciary – seek an assessment of the compatibility with the Constitution of EU Treaty provisions.

Rule of Law / independence of the judiciary

The situation in Poland concerning the rule of law / independence of the judiciary has been extremely dynamic. Since 15 February 2021 (the date of the 2021 FIDE Report on Poland) the CJEU, as well as the European Court of Human Rights, have issued a number of rulings concerning the reported issues. New cases have also been filed with the CJEU.

It is worth noting several in particular:

* On 2 March 2021, the CJEU issued a judgment in a preliminary ruling procedure, clarifying the requirements of EU law with respect to judicial appointments to the Supreme Court that took place in 2018 (CJEU judgement in case AB, C-824/18). The CJEU found that successive amendments to the Polish Law on the National Council of the Judiciary which had the effect of removing effective judicial review of that council's decisions, when proposing candidates for the office of judge at the Supreme Court to the President of the Republic, are liable to infringe EU law. Where an infringement has been proved, the principle of the primacy of EU law requires the national court to disapply such amendments.

On 6 May 2021, the Supreme Administrative Court implemented the above judgment of the Court of Justice (SAC judgement in case II GOK 2/18), ruling that the current National Council for the Judiciary, in the procedure for appointing judges, does not provide sufficient guarantees of independence from the executive and the legislature. At the same time the Supreme Administrative Court indicated that it had

not ruled on the systemic validity and the effectiveness of the acts of judicial appointments made by the President of the Republic, since they are not subject to judicial control.

* In April 2021, the European Commission initiated infringement procedures before the CJEU against Poland – the EC challenged the law on the judiciary of 20 December 2019 (see Commission press release of 31 March 2021 IP/21/1524; case registered as C-204/21). The Commission considers that the contested Polish legislation undermines the independence of Polish judges, in breach of Article 19(1) TEU and the primacy of EU law. In particular, the contested provisions prevent Polish courts from directly applying EU law protecting judicial independence, via threats of disciplinary proceedings, as well as from referring questions to the Court of Justice for preliminary rulings.

On 14 July 2021, the Vice-President of the Court issued an Order for interim measures (case C-204/21 R) obliging Poland to immediately suspend the application of the provisions introduced in the law on the judiciary of 20 December 2019 concerning the competences of the Disciplinary Chamber of the Supreme Court towards judges.

* On 15 July 2021, in the context of an infringement procedure launched by the European Commission, the CJEU found that the disciplinary regime for judges in Poland is not compatible with EU law (case C-791/19). In particular, the CJEU found that the Disciplinary Chamber of the Supreme Court does not provide all the guarantees of impartiality and independence required, and is not protected from the direct or indirect influence of the Polish legislature and executive.

* A number of additional requests for preliminary rulings filed by Polish courts concerning the justice reforms of 2017 and 2018 are still pending before the Court of Justice (see cases C-491/20 – C-496/20, C-506/20, C-509/20 and C-511/20 Supreme Court et al.; case C-615/20 Y.P. et al.; case C-671/20 M.M. et al.; C-181/21, G.; C-269/21, BC and DC).

* The National Council for the Judiciary – a decisive body in the process of the appointment of judges – continues to operate despite serious concerns as to its independence. Those concerns have been expressed in the case law of Polish courts as well as in the jurisprudence of the CJEU (see recently case C-791/19).

* In May 2021, the European Court of Human Rights found irregularities in the appointment procedure to the Constitutional Tribunal. In its judgment in case Xero Flor w Polsce sp. z o.o. v Poland (Case No. 4907/18) the European Court of Human Rights ruled that Poland had violated Article 6(1) of the European Convention on Human Rights by denying the applicant the right to a 'tribunal established by law' on account of the participation of a judge whose election was vitiated by grave irregularities that impaired the very essence of that right, in the proceedings before the Constitutional Court.

On 16 June 2021, the Constitutional Tribunal ruled that the judgment of the European Court of Human Rights had been issued by the European Court of Human Rights without a legal basis, and in violation of its competences, thereby constituting unlawful interference with the national legal order in matters which remain outside the competence of that Court (the decision in case P 7/20). Therefore, the judgment of the European Court of Human Rights is 'non-existent'.

* On 29 June 2021, the European Court of Human Rights issued a ruling (Cases No. 26691/18 and 27367/18) concerning the premature removal by the Minister of Justice of judges from their post as vice-presidents of ordinary courts. As the premature termination of the applicants' term of office as court vice-presidents had not been examined either by an ordinary court or by another body exercising judicial duties, the European Court of Human Rights found that Poland had infringed the very essence of the applicants' right of access to a court.

* On 22 July 2021, the European Court of Human Rights issued a judgment (Case No. 43447/19) following a complaint from an attorney punished with a disciplinary penalty by the Disciplinary Chamber of the Supreme Court. The Court found a violation by Poland of Article 6(1) of the European Convention on Human Rights. It considered that the Disciplinary Chamber of the Supreme Court was not a 'tribunal established by law'. This was due to the defective procedure for appointing judges to this Chamber, in particular on the basis of the opinion of the National Council of the Judiciary, i.e. a body which, under the Amending Act on the NCJ of 8 December 2017, does not provide sufficient guarantees of independence from the legislative or executive power;

Following that judgment of the European Court of Human Rights, on 28 July 2021, the Prosecutor General filed a request with the Constitutional Tribunal (case K 6/21) for a declaration of non-compliance with the Constitution of Article 6(1) sentence 1 of the ECHR.

* As to the current situation in Poland concerning threats to the rule of law – see in addition the European Commission Report issued on 20 July 2021: 2021 Rule of Law Report. The rule of law situation in the European Union accompanied by COMMISSION STAFF WORKING DOCUMENT 2021 Rule of Law Report Country Chapter on the rule of law situation in Poland, Brussels, 20.7.202, SWD(2021) 722 final.

The Report concludes that the reforms of the Polish justice system, including the new developments, continue to be a source of serious concerns. In particular, reforms carried out since 2015 have increased the influence of the executive and legislative powers over the justice system, to the detriment of judicial independence.

General update: Portugal

Written by: Inês Quadros

Recent national challenges to the authority of Union law within the domestic legal systems

On the 15th of July 2020 the Portuguese Constitutional Court delivered a landmark decision (Judgment 422/2020) in which for the first time directly addressed the question of primacy of EU law, in light of both the ECJ caselaw and the Portuguese Constitution. The case concerned a concrete review of constitutionality of a provision of Regulation 2220/85, on grounds of infringement of the principle of equality set out in article 13 of the Constitution.

The Constitutional Court recalled extensively the ECJ's caselaw regarding the primacy principle, recognised the particular nature of EU Law and rejected the federal model of primacy as a way of understanding the relation between it and domestic law. Accordingly, it highlighted the preference for dialogue and cooperation as the strategy for dealing with the, inevitable, "daily conflicts", by means of the preliminary references' procedure.

However, having in consideration the limits imposed to EU law primacy by article 8 (4) of the Constitution (already described in the Report) the CC draw attention to the need of preserving national competences and fundamental principles. The Constitutional Court recognises that the fundamental principles embedded in the Portuguese Constitution are shared by the European acquis due to the "deep historical, cultural and judicial affinity" between Member States and their common legal order, and that the final claim of sovereignty enshrined in the last part of Article 8 (4) should therefore have a very limited scope. Hence, the formula developed by the Constitutional Court on the relation between EU and domestic law reads as follows: "Pursuant to Article 8 (4) of the CPR, the Constitutional Court may only appreciate and refuse to apply a rule of EU law if the latter is incompatible with a fundamental

principle of the democratic state based on the rule of law which, within the scope of EU Law itself – including, therefore, the case law of the CJEU -, does not benefit from a parametric value that is materially equivalent to that recognised for it in the CPR (…) Conversely, whenever the matter at issue is appreciation of a rule of EU law in the light of a (fundamental) principle of the democratic state based on the rule of law which, within the scope of EU law, benefits from a parametric value that is materially equivalent to that which is recognised for it in the Portuguese Constitution, functionally guaranteed by the CJEU (in line with the judicial means provided for in EU Law), the Constitutional Court refrains from assessing the compatibility of that rule with the CPR".

Preliminary References

Following decision 422/2020 (supra, 3), the Constitutional Court has made its first preliminary reference to the ECJ (Judgment 711/2020 of 9.12.2020), on a case concerning an appeal from a tax arbitration court who had refused to apply a national provision on motor vehicle tax on the ground that it was incompatible with article 110 and 191 TFEU. The law on the functioning of the Constitutional Court prescribes that it can decide on appeals from decisions of courts that refuse to apply a given domestic norm on the ground of its incompatibility with international law, which was the case. Having considered that the decision required a correct interpretation of the above mentioned provisions of EU law, the Constitutional Court decided to refer a question to the ECJ. A note should be made regarding the fact that the Constitutional Court was careful in ticking every condition of admissibility of the question: it paid regard to the fact that it was a last instance Court; described the factual and legal background of the case; and made references to previous case law of the ECJ on the matter.