SUPREME ADMINISTRATIVE COURT OF THE REPUBLIC OF POLAND

19 March 2018

THE COURT OF JUSTICE AND NATIONAL COURTS: A DIALOGUE BASED ON MUTUAL TRUST AND JUDICIAL INDEPENDENCE

KOEN LENAERTS*

President Zirk-Sadowski,

Honourable Judges,

Excellencies,

Ladies and gentlemen,

It is a great honour for me to be here today at this conference organised by the Supreme Administrative Court of the Republic of Poland.

President Zirk-Sadowski has kindly asked me to deliver an introductory lecture that highlights the core topics of this conference devoted to the application of European Union law. As the title of my lecture reveals, I would like to explore the relationship between judicial dialogue, mutual trust and independence within the EU legal order.

That relationship is governed by mutually-reinforcing dynamics, as there can only be an effective judicial dialogue between the European Court of Justice (the 'ECJ') and national courts, as well as between courts of different Member States, where those courts trust each other, and in order for those courts to trust each other, they must be independent.

The fact that courts must be independent is nothing new, as it follows directly from the constitutional traditions common to the Member States. In accordance with those traditions, disputes must be resolved by an impartial and independent umpire whose role is to guarantee that the law is observed and whose decisions are to be respected and enforced by the political branches of government. Judicial independence is thus not only a defining feature of the judicial function, but is also an essential component of the rule of law, one of the key values on which the EU is founded.

* President of the Court of Justice of the European Union. All opinions expressed herein are personal to the author.

In both the Member States and the EU, respect for the rule of law means no more and no less than respect for judicial decisions, especially in cases where a court does not rule in favour of the incumbent political majority of the moment. For example, it was the need to ensure the effectiveness of final judicial decisions and thus, the need to uphold the rule of law within the EU, that led the ECJ to hold in *Commission v Poland* that the adoption of interim measures may be accompanied by the imposition of a periodic penalty payment in the event that those measures would not be complied with.[1] Such imposition is not to be seen as a sanction, but as a means of ensuring the effective application of EU law in cases where there are grounds for doubting that the Member State concerned has complied with a previous interim relief order or that it is prepared to comply with a new order.[2]

As Chief Justice Marshall famously wrote in the legendary *Marbury v Madison* case more than two centuries ago, '[it] is emphatically the province and duty of the judicial department to say what the law is.'[3] If we, the peoples of Europe want governments of laws and not men, we must, first and foremost, honour what judges say about the law. This is, in my view, how real European democracies work and must continue to work in the future. That is the reason why judicial independence is of pivotal importance, since it ensures that judges remain faithful to the law and only to the law. Judicial independence is the bedrock of our democracies, be it at national or European level. I would go as far as to say that judicial independence is part of both our common heritage and of our very identity as Europeans.

My lecture will be divided into three parts. In Part I, I would like to describe the role that judicial independence plays in the context of the preliminary reference procedure, the keystone of the EU judicial system. In so doing, I shall highlight the importance of the recent judgment of the ECJ in *Associação Sindical dos Juízes Portugueses*, where that court held that EU law protects the independence of national courts, since it is an essential prerequisite for the judicial dialogue between the ECJ and the national courts. [4] The second Part of my lecture is devoted to another recent judgment of the ECJ in *Achmea*, which reflects the objective of protecting the integrity of that dialogue. This case concerned an arbitration clause

[1] ECJ, order of 20 November 2017, *Commission v Poland*, C-441/17 R, EU:C:2017:877.
[2] *Ibid*., paras 102, 103, and 109.
[3] US Supreme Court, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
[4] ECJ, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117.

contained in a Bilateral Investment Treaty (a 'BIT').[5] Finally, in the last Part of my lecture, I shall look at judicial dialogue but from a transnational perspective. In that regard, I shall stress the fact that in the Area of Freedom, Security and Justice (the 'AFSJ'), such a transnational dialogue can only take place between judicial authorities that are independent – in particular, from the executive –, as only those authorities guarantee the successful operation of the principle of mutual trust.

I. Judicial independence and the preliminary reference procedure

As you all know, from a European perspective, national courts play a vital role in securing effective protection of the rights that EU law confers on individuals. Those courts are, in cooperation with the ECJ, to enforce the law of the EU so as to provide effective remedies against defaulting Member States and against EU institutions that have acted in breach of the Treaties and/or the Charter of Fundamental Rights of the European Union (the 'Charter').[6]

To that end, the ECJ has held that, by virtue of EU law, national courts are, for example, empowered to set aside a provision of national law that is incompatible with EU law, even if that provision enjoys constitutional status under the laws of the Member State concerned.[7] National courts may also grant interim relief so as to ensure that EU rights are preserved before it is too late.[8] In the same way, a person may also claim compensation before a national court for the harm that a defaulting Member State has caused to his or her EU rights.[9]

Given that each and every EU citizen is entitled to the same rights, it is of paramount importance that national courts apply EU law in a uniform fashion. With a view to ensuring that uniformity, and when experiencing doubts as to the interpretation of a provision of EU

[5] ECJ, judgment of 6 March 2018, *Achmea*, C‑284/16, EU:C:2018:158.

[6] See generally De Witte B, and Others (eds) (2016), National courts and EU law: new issues, theories and methods. Edward Elgar Publishing, Cheltenham.

[7] See, e.g., ECJ, judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, and of 8 September 2010, *Winner Wetten*, C‑409/06, EU:C:2010:503.

[8] Regarding interim relief against national measures, see, e.g., ECJ, judgment of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257. As to EU measures, see ECJ, judgment of 21 February 1991, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, C‑143/88 and C‑92/89, EU:C:1991:65.

[9] See, e.g., ECJ, judgments of 19 November 1991, *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428; of 5 March 1996, *Brasserie du pêcheur and Factortame*, C‑46/93 and C‑48/93, EU:C:1996:79; of 20 September 2001, *Courage and Crehan*, C‑453/99, EU:C:2001:465; of 30 September 2003, *Köbler*, C‑224/01, EU:C:2003:513.

law, national courts are to engage in a dialogue with the ECJ by having recourse to the preliminary reference procedure. To put it in the ECJ's own words, 'the [EU] judicial system […] has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the [ECJ] and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law'.[10]

That same imperative of uniformity applies where a national court has serious doubts as to the legality of an act adopted by the institutions, bodies, offices or agencies of the Union. That is why national courts are precluded from exercising jurisdiction in respect of the legality of such an act. Instead, they are required to make a reference to the ECJ which has the power to review the legality of EU acts. In that regard, that Court has held that 'requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, a means for reviewing the legality of European Union acts'.[11]

It follows that national courts or tribunals, within the meaning of Article 267 TFEU, are, first and foremost, called upon to protect effectively the rights that EU law confers on individuals, thereby providing them with 'supranational justice' and upholding the rule of law within the EU.

A. The notion of 'judicial independence' in the context of the preliminary reference procedure

In order to have access to the preliminary reference procedure, national courts must be independent because only those courts can be trusted with applying loyally the law of the EU as interpreted by the ECJ. The effective protection of EU rights indeed requires that the competent national court is insulated from any political pressure, notably on the part of the public authorities that brought about the breach of these rights.

The fact that the preliminary reference procedure is open only to independent courts stems from the fact that Article 267 TFEU refers explicitly to 'any court or tribunal of a

[10] ECJ, Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para. 176.
[11] ECJ, judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, para. 68.

Member State'.[12] As understood by the ECJ, the notion of 'court or tribunal' is an autonomous concept of EU law.[13] This means that national law is not decisive in order to determine whether the body making a preliminary reference qualifies as a 'court or tribunal' under that Treaty provision. It is, however, relevant in verifying whether the factors to which EU law subjects the notion of 'court or tribunal' are present.

It follows from settled case law that the ECJ 'will take account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent'.[14]

The concept of judicial independence requires, in the administrative law context, that judicial power should be exercised by a body that acts as a third party in relation to the authority which adopted the contested decision.

In addition, the concept of judicial independence, as developed in the seminal *Wilson* judgment,[15] has both an internal and an external dimension. Internally, judicial independence is intended to ensure a level playing field for the parties to proceedings and for their competing interests. In other words, independence requires courts to be impartial.

Externally, judicial independence establishes the dividing line between the political process and the courts. Courts must be shielded from any external influence or pressure that might jeopardise the independent judgement of their members as regards proceedings before them.[16] That protection must apply to the members of the judiciary, by, for example, laying down guarantees against removal from office.[17]

Furthermore, the external aspect of judicial independence also requires the absence of any 'hierarchical constraint or subordination to any other body that could give […] orders or instructions' to the body making the reference.

[12] See, generally, Broberg M, Fenger N (2014), Preliminary references to the European Court of Justice. Oxford University Press, Oxford.
[13] See, e.g., ECJ, judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, para. 23.
[14] See, for example, ECJ, judgments of 30 June 1966, *Vaassen-Göbbels*, 61/65, EU:C:1966:39; of 10 December 2009, *Umweltanwalt von Kärnten*, C-205/08, EU:C:2009:767, para. 35; of 6 October 2015, *Consorci Sanitari del Maresme* C-203/14, EU:C:2015:664, para. 17, and of 24 May 2016, *MT Højgaard and Züblin*, C‑396/14, EU:C:2016:347, para. 23.
[15] ECJ, judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paras 49-52.
[16] *Ibid*., para. 51.
[17] See ECJ, judgments of 22 October 1998, *Jokela and Pitkäranta*, C-9/97 and C-118/97, EU:C:1998:497, para. 20, and judgment of 4 February 1999, *Köllensperger and Atzwanger*, C-103/97, EU:C:1999:52, para. 21.

B. The protection of national judges as the arm of EU law

Next, the question that arises is whether EU law protects national judges in their role as the arm of EU law (or, put more simply, as 'European judges'). Put differently, where a national court is independent for the purposes of EU law and a legislative or regulatory measure adopted at national level threatens its independence, does EU law protect that court? In the seminal *Associação Sindical dos Juízes Portugueses* judgment, the ECJ held that the second subparagraph of Article 19(1) TEU may be relied upon in order to set aside national measures that call into question the independence of the national judiciary.[18]

Before moving on to the findings of the ECJ, I would like to describe very briefly the facts of that case. In response to the EU programme of financial assistance and with a view to curtailing its excessive budget deficit, Portugal passed a law in 2014 that sought to cut public spending by reducing the salaries of various public office holders and employees, including members of the legislature, the executive and the judiciary. Such salary-reduction measures also applied to the members of the Portuguese Court of Auditors ('Tribunal de Contas'). Unlike the Courts of Auditors in some other Member States, the Tribunal de Contas may, in some cases, indeed operate as a court of law. The Union of Portuguese Judges, acting on behalf of the members of the Tribunal de Contas, brought legal proceedings against the administrative acts implementing that law, arguing that those salary-reduction measures threatened the judicial independence of the said members, as guaranteed by Article 19 TEU and Article 47 of the Charter.

At the outset, the ECJ stressed the fact that the second subparagraph of Article 19(1) TEU applies *ratione materiae* to '*the fields covered by EU law*', irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter.[19]

Next, the ECJ went on to explain the relationship between the rule of law, Article 19 TEU, the principle of effective judicial protection and national courts. The Member States are under the obligation 'to establish a system of legal remedies and procedures ensuring effective

[18] ECJ, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117.
[19] *Ibid*., para. 29.

judicial protection in [the fields covered by EU law]'.[20] The ECJ found that there is an unbreakable link between compliance with the rule of law and the principle of effective judicial protection: one cannot exist without the other. The bodies entrusted with responsibility for upholding the rule of law within the EU – i.e. 'courts or tribunals' within the meaning of Article 267 TFEU and Article 47 of the Charter –, must meet the requirements of effective judicial protection, which means that they must be independent.[21] In turn, Article 19 TEU protects the independence of national judiciaries. According to the ECJ, 'the receipt by [the] members [of the judiciary] of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence'.[22]

However, as to the salary-reduction measures at hand, the ECJ found, first, that those measures were adopted as a response to mandatory requirements linked to eliminating the Portuguese State's excessive budget deficit and in the context of an EU programme of financial assistance to Portugal.[23] Second, the reduction of the amount of remuneration was limited to a percentage varying in accordance with the level of salary.[24] Third, they were temporary in nature since by 2016, the full reinstatement of the rights to remuneration at issue in the main proceedings had already taken place.[25] Most importantly, the salary-reduction measures did not target the members of the Tribunal de Contas specifically, but applied to various public office holders as part of a comprehensive effort to cut down spending in the public sector at a time of economic crisis.[26] As a result, the ECJ ruled that those measures could not be considered to impair the independence of the members of the Tribunal de Contas.

In my view, three direct implications flow from the judgment of the ECJ in *Associação Sindical dos Juízes Portugueses*. First, it shows that the scope of application of the second subparagraph Article 19(1) TEU is not the same as that of Article 47 of the Charter. The

[20] *Ibid*., para. 34.
[21] *Ibid*., paras 42, 43 and 44. Regarding Article 47 of the Charter – which contains the notion of 'independent and impartial tribunal', the ECJ referred to ECJ, judgments of 14 June 2017, *Online Games and Others*, C 685/15, EU:C:2017:452, para. 60; and of 13 December 2017, *El Hassani*, C-403/16, EU:C:2017:960, para. 40. As to the notion of 'court or tribunal' set out in Article 267 TFEU, it refered to ECJ, judgments of 19 September 2006, *Wilson*, C-506/04, U:C:2006:587, para. 49, and of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, para. 37
[22] ECJ, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117. para. 46.
[23] *Ibid*., para. 46.
[24] *Ibid*., para. 47.
[25] *Ibid*., para. 50.
[26] *Ibid*., para. 49.

former applies to '*the fields covered by EU law*', whilst the latter applies to national measures *implementing EU law* within the meaning of Article 51(1) of the Charter. Second, where a national court qualifies as a 'court or tribunal' as defined by EU law and such a court enjoys jurisdiction to rule on questions of EU law, that court acts as a European court and accordingly, Article 19(1) TEU protects its independence. Last but not least, that judgment is a positive development in the law on judicial remedies. It shows that national courts are called upon to play a pivotal role in European integration, and that the ECJ is committed to upholding the rule of law within the EU.

II. The integrity of the judicial dialogue between the ECJ and national courts

In order for the judicial dialogue between the ECJ and national courts to be effective, no field of EU law may be removed from the scope *ratione materiae* of the preliminary reference procedure. Where national courts apply the relevant provisions of EU law, they must have the possibility and, where appropriate, the obligation to engage in a dialogue with the ECJ. Otherwise, if either the EU political institutions or the Member States were able to remove a given field of EU law from the jurisdiction of national courts – and thereby from the scope of the preliminary reference procedure –, the entire EU system of judicial protection, which is a defining feature of the EU and one of the principal guarantees of its autonomy, would be called into question.

As that system ensures the equal and uniform protection of rights across the EU, its integrity must be protected. This means, for example, that neither the EU political institutions nor the Member States may enter into an international agreement the effects of which would be to prevent the ECJ and national courts from engaging in dialogue in a given field of EU law.

For example, in Opinion 1/09,[27] the ECJ held that the draft agreement creating a Unified Patent Litigation System was not compatible with EU law, given that it conferred on an international court –which was outside the institutional and judicial framework of the EU – exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field.

[27] ECJ, Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011, EU:C:2011:123.

That exclusive jurisdiction meant that all national courts would be deprived of their powers in relation to the interpretation and application of the relevant provisions of EU law and the ECJ of its powers to reply, by preliminary ruling, to questions referred by those courts.

Accordingly, the ECJ ruled that the EU could not ratify the agreement as drafted, since that agreement would alter the essential character of the powers which the Treaties confer on the institutions of the EU and on the Member States. More generally, it stressed the fact that all international agreements to which the EU becomes a party must ensure compliance with, and I quote, 'the system set up by Article 267 TFEU [which] establishes between the [ECJ] and the national courts direct cooperation as part of which the latter are closely involved in the correct application and uniform interpretation of [EU] law and also in the protection of individual rights conferred by that legal order'.[28] Indeed, 'the tasks attributed to the national courts and to the [ECJ] respectively are indispensable to the preservation of the very nature of the law established by the Treaties'.[29]

More recently, in *Achmea*,[30] the ECJ reached the same conclusion, this time, however, in respect of a BIT concluded between two Member States, i.e. the Netherlands and the Slovak Republic (as a successor State to the Czech and Slovak Federative Republic). The BIT contained an arbitration clause entitling an investor from one of those two Member States, in the event of a dispute concerning investments in the other Member State, to bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

In the case at hand, following the Slovak Republic's decision to liberalise the private sickness insurance sector in 2004, *Achmea*, a company belonging to a Dutch insurance group, decided to invest in that Member State. However, in 2006, the Slovak Republic reversed the liberalisation of that sector, in particular by prohibiting the distribution of profits generated by private sickness insurance activities. That action caused financial harm to Achmea which decided to bring arbitration proceedings against the Slovak Republic. The parties chose Germany as the place of arbitration, meaning that the law of that Member State applied to those proceedings. The arbitral tribunal ordered the Slovak Republic to pay Achmea damages in the principal amount of EUR 22.1 million. The Slovak Republic challenged that award

[28] *Ibid*., para. 84.
[29] *Ibid*., para. 85.
[30] ECJ, judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158

before the German courts which made a reference to the ECJ, asking, in essence, whether the arbitration clause set out in the BIT was compatible with EU law.

In order to provide an answer to the referring court, the ECJ decided to examine the three following questions: 1) whether the arbitral tribunal mentioned in the BIT was called upon to apply and interpret EU law; 2) whether that tribunal formed part of the EU judicial system, and 3) whether its own case law on commercial arbitration could be applied by analogy to the arbitration proceedings mentioned in the BIT.

First, although the arbitral tribunal was only called upon to rule on possible infringements of the BIT, the ECJ found that, in order for that tribunal to do so, it had to take account of the law applicable in the Contracting Party where the investment was made, including national, EU and international law. This meant that the arbitral tribunal could be called upon to interpret and apply rules and principles of EU law, in particular the freedom of establishment and the free movement of capital.

Second, the ECJ noted that the arbitral tribunal did not form part of the EU judicial system, since the very *raison d'être* of the arbitration clause contained in the BIT was precisely to prevent investor-related disputes from being submitted to the courts of the Contracting Parties. As a result, that tribunal could not be classified as a court or tribunal '*of a Member State*' within the meaning of Article 267 TFEU.

Thirdly, the ECJ observed that the arbitral award was final and the question whether that award was subject to review by a court of a Member State — thereby ensuring the potential application of the preliminary reference mechanism— had to be examined in the light of the law of the country chosen as the place of arbitration. For the case at hand, that country was Germany whose law only provided for limited review of arbitral awards.

At this point, the ECJ drew an important distinction between commercial arbitration proceedings and arbitration proceedings such as those mentioned in the BIT. In relation to commercial arbitration proceedings, which are the result of the express wishes of the parties, the ECJ has held that the efficiency of those proceedings may justify a limited review, 'provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the [ECJ] for a preliminary ruling'. By contrast, such considerations could not be applied to the arbitration proceedings mentioned

in the BIT. This is because, and I quote, '[those proceedings] derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the [EU] system of judicial remedies […] disputes which may concern the application or interpretation of EU law'. In view of the ECJ, such removal 'could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law'.[31] Accordingly, the ECJ ruled that the arbitration clause set out in the BIT had an adverse effect on the autonomy of EU law.

The ruling of the ECJ in *Achmea* is an important development in the case law of the ECJ, both in terms of international investment law and in terms of the law of the EU on remedies. It highlights the distinction between commercial arbitration proceedings and arbitration proceedings provided for in BITs. Most importantly, just as the ECJ ruled in its Opinion 1/09, the autonomy of EU law precludes an international agreement entered into by the Member States the effect of which would be to remove from the jurisdiction of national courts – and thus from the scope of the preliminary reference procedure – disputes that may involve the application and interpretation of EU law. *Achmea* makes absolutely clear that the application of EU law at national level and judicial dialogue must *always* go hand-in-hand.

III. Judicial independence and mutual trust

So far, I have focused on judicial independence as a pre-condition in order for national courts to engage in a dialogue with the ECJ. It is also a pre-condition for courts of different Member States to trust each other so as to engage in a transnational dialogue within the framework of the AFSJ.

In the establishment of an AFSJ, the principle of mutual trust is 'of fundamental importance'[32] since it guarantees that the exercise of free movement does not undermine the effectiveness of the decisions adopted by the competent Member State (whose public power is often exercised on a territorial basis). As internal borders disappear, the principle of mutual trust enables the arm of the law to become longer by acquiring a transnational reach.

[31] *Ibid*., para. 55.
[32] ECJ, Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para 191.

In setting up the AFSJ, the authors of the Treaties took the view that national courts were best placed to protect the (fundamental) rights of individuals since they are insulated from political considerations and are, in cooperation with the ECJ, entrusted with the task of upholding the rule of law within the EU. That is why the establishment of the AFSJ is, first and foremost, to be achieved through the mutual recognition of national judicial decisions. Mutual recognition of those decisions implies that the court where recognition and enforcement is sought should trust that the court that adopted the decision in question provided effective judicial protection to the persons concerned by that decision, including, in particular, protection of their fundamental rights.

Accordingly, for the purposes of the free movement of judicial decisions, the notion of 'court' (or 'tribunal') is of paramount importance, as it is that notion that determines the bodies whose decisions qualify for mutual recognition. In that regard, I believe that the notion of 'court' must be construed in the light of the principle of mutual trust. Just like in the context of the preliminary reference procedure, this means, in essence, that the notion of 'court' within the AFSJ requires the body in question to be impartial and independent.

For example, in *Pula Parking*,[33] the ECJ was asked to interpret the notion of 'court' within the meaning of the new Brussels I Regulation.[34] More specifically, the question that arose was whether, in respect of enforcement proceedings based on an 'authentic act', a Croatian notary could be considered as 'a court' within the meaning of that Regulation. The ECJ replied in the negative. It held that '[c]ompliance with the principle of mutual trust in the administration of justice in the Member States of the European Union which underlies that regulation requires, in particular, that judgments the enforcement of which is sought in another Member State have been delivered in court proceedings offering guarantees of independence and impartiality and in compliance with the principle of *audi alteram partem*'.[35] Put differently, only courts of the Member State of origin that fulfil those guarantees and

[33] ECJ, judgment of 9 March 2017, *Pula Parking*, C-551/15, EU:C:2017:193.
[34] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351/1.
[35] *Ibid*., para. 54.

comply with that principle are worthy of the trust of the courts of the Member State of enforcement.

However, this was not the case as regards Croatian notaries who, apart from the fact that they do not form part of the Croatian judicial system, may issue 'a writ of execution based on an "authentic document" [that] is served on the debtor only after the writ has been adopted, without the application by which the matter is raised with the notary having been communicated to the debtor'.[36] Since the adoption of such a writ fails to comply with the principle of *audi alteram partem*, Croatian notaries could not be seen in this context as 'courts' within the meaning of the new Brussels I Regulation.

It follows from that judgment that the proper operation of the principle of mutual trust may require the application of a criterion that is not absolute under Article 267 TFEU.[37] This is the case of the principle of *audi alteram partem*, compliance with which is not mandatory under that Treaty provision, but is considered to be absolute in order for courts to trust each other in the context of the new Brussels I Regulation.

Furthermore, it is possible for the EU legislator to apply the principle of mutual recognition not only to decisions adopted by courts but also by authorities that participate in the administration of criminal justice, provided that such application complies with the principle of mutual trust. That principle requires those authorities to be independent from the executive.

This is the case of the European Arrest Warrant Framework Decision,[38] which provides that in order for an EAW to be enforced and recognised in the executing Member State, such an arrest warrant must be issued by a 'judicial authority', understood as an authority that is independent from the executive.[39] This is because the mutual recognition of EAWs is predicated on a high level of trust that is not justified unless the issuing of an arrest

[36] *Ibid*., para. 57.
[37] See, e.g., ECJ judgment of 25 June 2009, *Roda Golf & Beach Resort*, C‑14/08, EU:C:2009:395, paras 33-34.
[38] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L 190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, [2009] OJ L 81/ 24.
[39] See ECJ, judgments of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858; *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, and *Özçelik*, C-453/16 PPU, EU:C:2016:860.

warrant is subject to judicial approval. This was made clear by the ECJ in a series of cases dealt with under the urgent preliminary procedure that were decided on the same day, i.e. *Poltorak*, *Kovalkovas*, and *Özçelik.*

Those three cases involved, respectively, the execution of an EAW issued by the Swedish police board for the purposes of executing a custodial sentence, that of an EAW issued by the Lithuanian Ministry of Justice for the purposes of executing a custodial sentence, and that of an EAW issued in the context of criminal proceedings by the Hungarian police and confirmed by the Hungarian public prosecutor's office ('PPO').

In *Poltorak*, the case concerning the EAW issued by the Swedish police board, the ECJ examined the term 'judicial authority' as set out in Article 6(1) of the EAW Framework Decision, a provision that states that '[t]he issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue [an EAW] by virtue of the law of that State'.

Textually, the ECJ observed that the words 'judicial authority', contained in that provision, are not limited to designating only the judges or courts of a Member State, but may extend, more broadly, to the authorities required to participate in administering criminal justice in the legal system concerned.[40] The judiciary must be distinguished, in accordance with the principle of the separation of powers, from the executive. Thus, judicial authorities are traditionally those authorities that administer justice, unlike, *inter alia*, administrative authorities or police authorities, which fall within the sphere of the executive.[41]

Contextually, when the EAW Framework Decision was adopted, the Treaties themselves drew a distinction between police cooperation and judicial cooperation in criminal matters, as each type of cooperation was defined in a separate Treaty provision, namely ex Articles 30 and 31 EU.[42]

[40] *Ibid*., para. 33.
[41] *Ibid*., paras 34 and 35.
[42] *Ibid*., para. 37. .Currently, each type of cooperation is defined in a separate Chapter of the Title relating to the AFSJ (i.e. Title V of Part Three of the TFEU), namely Chapter 4 (Articles 82 to 86 TFEU) for judicial cooperation and Chapter 5 (Articles 87 and 88 TFEU) for police cooperation.

Teleologically, the principle of mutual recognition – as given concrete expression in the context of the EAW – operates on the premise that a judicial authority has intervened prior to the execution of the EAW. This is because it is such judicial intervention that justifies the high level of trust between the Member States that is required for the successful operation of that principle.[43]

As a result, the ECJ ruled that the term 'judicial authority', within the meaning of the EAW Framework Decision, must be interpreted as meaning that police services are not covered by that term. Nor can an EAW issued by such services be regarded as a 'judicial decision' within the meaning of that Framework Decision.

Similarly, in *Kovalkovas,* the case concerning the EAW issued by the Lithuanian Ministry of Justice, the ECJ found that such an EAW was not issued by a 'judicial authority'.

By contrast, in *Özçelik***,** the case concerning the EAW issued by the Hungarian police and confirmed by the Hungarian PPO, the questions referred focused on the term 'judicial decision' rather than on the term 'judicial authority'. However, that made no difference. In order to ensure consistency between the various provisions of the EAW Framework Decision, the ECJ held that the same rationale applied. This meant that the term 'judicial decision' covered decisions of the Member State authorities that administer criminal justice, but not police services.

In the *Özçelik* case, the intervention of the PPO proved, however, to be decisive. Under Hungarian law, the PPO verifies and validates the arrest warrant issued by the police, so that it is that office that is to be assimilated with the issuer of that arrest warrant. Recalling its previous case law, the ECJ found that the PPO constitutes a Member State authority for the purposes of administering criminal justice.[44]Thus, unlike the EAWs issued in *Poltorak* and *Kovalkovas*, the ECJ found that the EAW issued by the Hungarian police and confirmed by the PPO constituted a 'judicial decision' within the meaning of the EAW Framework Decision.

[43] *Ibid*., paras 44 and 45.
[44] ECJ, judgment of 10 November 2016, *Özçelik*, C-453/16 PPU, EU:C:2016:860, para. 34 (referring to ECJ, judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, para. 39).

As pointed out by AG Campos Sánchez-Bordona in *Özçelik*, it seems that the notion of 'judicial authority' is broader than that of 'court or tribunal' within the meaning of Article 267 TFEU. Indeed, the PPO may not make a reference to the ECJ[, since it is not called upon 'to rule on an issue in complete independence but, acting as prosecutor in the proceedings, to submit that issue, if appropriate, for consideration by the competent judicial body'].[45] The fact that the EU legislator opted for the concept of 'judicial authority' instead of that of 'court' may be explained by the fact that EU law allows room for diversity in the criminal procedural law of the Member States when it comes to choosing between the inquisitorial and adversarial criminal systems, the latter giving a more prominent role to an authority such as the PPO than the former. However, extending the application of the principle of mutual recognition beyond the notion of 'courts' requires compliance with the principle of mutual trust. This meant, in *Özçelik*, that the EAWs confirmed by the PPO could only benefit from free movement because that office was independent from the executive and participated in the administration of justice.

IV. Concluding remarks

In the EU legal order, a 'court' is *always* to be understood as meaning an 'independent court'. This is so despite of the fact that the notion of 'court or tribunal' may, as *Pula Parking* shows, be subject to some degree of variation depending on the normative context in which that notion is applied.

That said, judicial independence is, in any event, a prerequisite for any 'court' that wishes to engage in a dialogue with the ECJ and with sister courts in other Member States. From a supranational perspective, independent courts guarantee the effective and loyal application of EU law, as interpreted by the ECJ. From a transnational perspective, mutual trust between national courts can only take place where those courts are independent, as only then will those courts see each other as equals.

[45] ECJ, Opinion of Advocate General Campos Sánchez-Bordona in Özçelik, C-453/16 PPU, EU:C:2016:783, point 62 (referring to ECJ, judgment of 12 December 1996, *X*, C-74/95 and C-129/95, EU:C:1996:491, para. 19)

Since the enforcement of EU law is decentralised, the entire EU system of judicial protection is thus predicated on the premise that the Member States enjoy and cherish an independent judiciary that is capable of providing effective judicial protection of EU rights. However, where that premise no longer holds true, i.e. where judicial independence is lacking, the preliminary reference procedure becomes devoid of purpose, and the principle of mutual trust no more than an empty promise. Should that happen, then a link in the chain of European justice would be broken and the rule of law within Europe as a whole would inevitably be weakened as a result.

That is the reason why, in the fields covered by EU law, the second subparagraph of Article 19(1) TEU imposes on the Member States the obligation to refrain from adopting any measures that may threaten the independence of their own judiciaries. Any such measures are repugnant to the values on which the EU is founded and must be set aside. Thus, as the ruling in *Associação Sindical dos Juízes Portugueses* shows, the ECJ, as the ultimate guarantor of the rule of law within the EU, is genuinely committed to preserving the independence of the Member State judiciaries. The reason is simple: without it, justice will not prevail, be it from a national, a supranational, or a transnational perspective.

Thank you very much.

,