Orbeliani Law Review ▸ 2022
Vol. 1, No. 1, 87-104
Received: Aug 08, 2022 | **Accepted:** Nov 4, 2022 | **Published:** Dec 22, 2022

Edyta Anna Krzysztofik*
ORCID: 0000-0001-6160-9600

The Principle of Effectiveness of Eu Law from the Perspective of the Obligations of National Courts

RESUME

The principle of effectiveness of EU law, despite the lack of an explicit basis in EU primary law, is the source of principles regulating the nature of EU law and the manner of its application. It particularly affects the performance of duties by domestic courts, which, according to the wording of Art. 19 para. 1 item 2 TEU, is one of the elements of the EU judicial system. It is based on a systemic dualism that includes the CJEU and national courts. When analyzing the implementation of the principle of effectiveness, it should be noted that it covers two areas. The first is of general nature and concerns the obligation to ensure the effectiveness of EU law, and the second – the subjective one – is related to the obligation to ensure the effectiveness of EU law in a specific case by granting adequate protection to the rights of an individual that derive from EU law. In this aspect, the courts are of key importance, as they implement it through the systemic principle of effective judicial protection. It is a guide that indicates how to proceed and what principles should be followed in the process of application of EU law. This process consists of several stages, the implementation of which is subordinated to one goal – to guarantee effective judicial protection and thus the effectiveness of EU law. First, the court examines whether a given claim is based on a norm that has a direct effect, which will determine the next stage of action. Then, by referring to the principle of direct effect, it subsumes and, if necessary, applies the principle of primacy of EU law or a pro-EU interpretation. The last element that indirectly implements the principle of effectiveness of EU law is the referral for a preliminary ruling.

Keywords: The principle of effectiveness, the principle of effective judicial protection, the question referred for a preliminary ruling, the direct effect of EU law, the principle of primacy.

* PhD., Associate Professor, The John Paul II Catholic University of Lublin, Al. Racławickie 14, 20-950 Lublin, Poland, email: ekrzyszt@kul.pl

I. Introduction

The process of integration of European states that started in 1951 is a new, special form of cooperation that breaks the existing mechanisms known to public international law. The distinguishing feature is the ability of the EU to create its own, autonomous legal system that is directly applicable to the legal systems of the Member States. It binds both the entities of international law, i.e. the European Union and the Member States, and individual entities: natural persons and legal persons[1]. The specificity of the EU law forced the creation of a control system for the implementation of this law, which is able to guarantee the effectiveness of this system both at the supranational and national levels. Already at the very beginning of the functioning of the EU, it was assumed that the courts of the Member States need to be included, and they have the obligation to guarantee the effectiveness of EU law in the national legal order. The Treaties currently in force, namely the TEU in Art. 19 section 1 states that "The Court of Justice of the European Union shall include the Court of Justice, the General Court, and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." When interpreting the above-mentioned provisions, the Court of Justice clearly emphasized that "judicial review of compliance with the European Union legal order is ensured […] by the Court of Justice and the courts and tribunals of the Member States."[2] In its Opinion 1/09, it indicated that "it is for the national courts and tribunals and for the Court of Justice to ensure the full application of the European Union law in all Member States and to ensure judicial protection of an individual's right under that law."[3] The consequence of including national courts in the EU judicial system is, in a way, the culmination of the principle of effective judicial protection of claims arising from EU law, already emphasized in the case law and the literature on the subject, which primarily imposes specific obligations on national courts, as the so-called "Courts of first contact".

This article attempts to show how the principle of effectiveness of EU law affects the process of application of this law by national courts. Several issues will be raised. Firstly, the terminological issues will be explained, namely the understanding of the principle of effectiveness of EU law and effective legal protection. Their position in the political system, their impact on the obligations, and the powers of domestic courts will also be addressed. Secondly, the process of application of EU law at the level of

[1] Judgment of the CJEU of 15 July 1964, case 6/64 Costa v. E.N.E.L., ECLI: ECLI: EU: C: 1964: 66.

[2] Judgment of the CJEU of 3 October 2013, case C 583/11 P Inuit Tapiriit Kanatami, ECLI: EU: C: 2013:625.

[3] Opinion of the CJEU of 8 March 2011 1/09, OJ EU 2009 C 220/04.

national courts will be described, together with the rules that apply therein, which at the same time implement the principle of effectiveness of EU law. The last element discussed in this study is the meaning of the questions referred to for a preliminary ruling from the perspective of ensuring the effectiveness of EU law.

II. The Principle of Effectiveness

When discussing the position of the national court in the EU legal system, it should be noted that it is directly related to its nature and rules of jurisdiction. The European Union was established to implement the Treaty goals that could not be achieved individually by the Member States. As repeatedly emphasized by the CJEU, the specific nature of EU law is based on the assumption that the Member States have transferred strictly defined competencies to the supranational level and committed to joint action to achieve the identified goals. Consequently, the legal order that was created within the framework of the delegated powers must be effective, which means that it must not only apply directly in the Member States but must also be uniformly applied. In the doctrine, the principle of effectiveness is defined as a systemic principle, functional for the entire legal system, which affects not only the protection of the rights of individuals but also the integrity, proper functioning, and uniform implementation of EU law[4]. It is also referred to as a meta-principle, which is the source of many general principles of EU law[5]. However, it does not have the status of a general principle of EU law and is not regulated by primary law. Nevertheless, its elements should be interpreted first of all from the provisions of Art. 4 para. 3 TEU. It regulates the principle of sincere cooperation, which determines mutual relations between the Member States as well as between them and the EU. It contains positive obligations on the part of the Member States to take all necessary measures to fulfill their obligations under EU law and to cooperate in this regard, and a negative obligation to refrain from actions that could prevent the achievement of the Union's objectives[6]. Moreover, it obliges the EU to respect the Member States and to support them in performing the Treaty tasks[7]. The indicated principle refers

[4] Półtorak N., Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych (Protection of Rights under European Union Law in Domestic Proceedings), Warsaw, 2010, 76.

[5] Wróbel A., Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej (Procedural Autonomy of Member States. The Principle of Effectiveness and the Principle of Effective Judicial Protection in European Union Law), Ruch Prawniczy, Ekonomiczny i Socjologiczny rocznik LXVII – z. 1/ 2005, 45.

[6] Łazowski A., Zasada lojalności, in: Zasady ustrojowe Unii Europejskiej (The Principle of Loyalty, in: The Systemic principles of the European Union), edited by J. Barcz, Warsaw, 2010, II - 98–II – 107.

[7] Wyrozumska A., Zasady działania UE, in: Instytucje i prawo Unii Europejskiej (The Principles of Op-

to the obligation to ensure the full effectiveness of EU law also in relation to many entities: not only the Member States and the EU but also EU bodies and entities obliged to effectively implement EU law[8]. Another source that refers to this principle is Art. 197 TFEU and it states that "Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest"[9]. Nowadays, in the literature on the subject, there is a presumption that "the introduction of this phrase (effective implementation of EU law) into primary law may be interpreted as sanctioning the principle of effectiveness in primary law and thus granting it the attribute of a general principle"[10]. The principle of effectiveness of EU law is directly related to the obligation of uniform application of this law, which should be understood as the obligation to give EU law the same meaning in all Member States. It must equally bind all legal entities and be effective from the moment it enters into force for the entire duration of its validity[11]. When analyzing the content scope of the principle of effectiveness, it should be noted that it is also understood in two aspects, objective and subjective. The first, also referred to as general, concerns the obligation to ensure the effectiveness of EU law. The subjective aspect is about ensuring the effectiveness of EU law in a specific case by granting adequate protection to the rights of an individual that are derived from EU law[12].

The consequence of the specific nature of EU law is its direct application and creation of rights and obligations for not only the Member States and the EU but also directly for individual entities. Therefore, the principle of effectiveness also affects the protection of the rights of individuals. The Court of Justice then invokes the principle of effective judicial protection, which is integral to the principle of effectiveness. According to the wording of this principle, it comprises two elements: judicial protection and effective protection. The first concerns access to court, i.e.

eration of the EU, in: Institutions and Law of the European Union), edited by J.Barcz, M. Górka, A. Wyrozumska, Warsaw, 2020, 133–134.

8 Półtorak N., Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych (Protection of Rights under European Union Law in Domestic Proceedings), Warsaw, 2010, 78.

9 Treaty on the Functioning of the European Union (TFEU), OJ EU C 202 of 7.6.2016, Article 197, para. 1.

10 Półtorak N., Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych (Protection of Rights under European Union Law in Domestic Proceedings), Warsaw, 2010, 79.

11 Kornobis-Romanowska D., Kompetencje wspólnotowe sądów krajowych – przegląd zagadnienia, in: Stosowanie prawa wspólnotowego w prawie wewnętrznym z uwzględnieniem prawa polskiego (Community Competences of National Courts - Overview, The Application of Community Law in Domestic Law, Including Polish Law), edited by D. Kornobis-Romanowska, Warsaw, 2003, 17-19.

12 Miąsik D., System prawa Unii Europejskiej (The System of European Union Law), T. 2, Warsaw, 2022, 21.

subjecting a specific request to a judicial review. On the other hand, the second aspect, i.e. effective protection, is understood as the existence of specific legal protection measures and rules of court proceedings[13]. One should pay attention to the systematic position of the indicated principle. It is a general principle of EU law that derives from the constitutional traditions of the Member States, Art. 6 and 13 of the European Convention on Human Rights and Art. 47 of the Charter of Fundamental Rights of the European Union[14]. Currently, however, the Court of Justice emphasizes its importance in conjunction with Art. 19 para. 1 TEU[15]. While interpreting the above-mentioned provisions, it emphasized that "judicial review of compliance with the European Union legal order is ensured […] by the Court of Justice and the courts and tribunals of the Member States"[16]. However, in Opinion 1/09, it specified that "it is for the national courts and tribunals and for the Court of Justice to ensure the full application of the European Union law in all Member States and to ensure judicial protection of an individual's right under that law"[17]. Therefore, the national court, as an element of the EU judicial system, is obliged to ensure effective protection of the rights of individuals under EU law.

III. The Principle of Effectiveness in the Process of Application of EU Law

The literature on the subject emphasizes that the implementation of the principle of effective judicial protection is gradual. The first element is the legal norm itself, which must be directly effective and thus create a specific right on the part of an individual entity. Secondly, the court has an obligation to guarantee the direct application of a given norm. In the very process of application, specific mechanisms are triggered, i.e. the choice of appropriate legal norms in the event of a conflict between the norms of EU law and national law (the principle of primacy of EU law), the possibility of applying a pro-EU interpretation of a norm of the national law, the obligation to guarantee the uniform application of EU law and to adjust procedural rules of the Member States to the "European" cause.

When analyzing the indicated process from the court's perspective, the first key issue is proper subsumption. In line with the principle of direct application, as de-

[13] Ibid, 27.

[14] Judgment of the CJEU of 13 March 2007, case C 432/05 Unibet, ECLI:EU:C:2007:163.

[15] Judgment of the CJEU of 18 May 2021, joined cases C 83/19, C 127/19, C 195/19, C 291/19, C 355/19 and C 397/19 Asociația „Forumul Judecătorilor din România", ECLI:EU:C:2021:393.

[16] Judgment of the CJEU of 3 October 2013, case C 583/11 P Inuit Tapiriit Kanatami, ECLI:EU:C:2013:625.

[17] Opinion of the CJEU of 8 March 2011, 1/09, OJ EU 2009 C 220/04.

fined in the judgment of the CJEU in the Simmenthal case, the Court referred directly to the obligations of national courts and emphasized that "A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effectiveness to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means"[18]. The indicated thesis contains several elements: firstly, the duties of the court include ensuring the full effectiveness of a norm of EU law; secondly, it is the exclusive competence of the court to choose and possibly not apply a contradictory norm of the national law; thirdly, this obligation covers not only the norm already in force but also the one that will be adopted later than the norm of EU law, i.e. it excludes the principle of lex posterior derogat legi priori; fourthly, the indicated competence of the court is sufficient to not apply the norm of the national law without first repealing it in any manner[19]. The cited judgment clarifies, from the perspective of the national court, the previously interpreted principle of primacy of EU law. In the Costa v ENEL judgment, the CJEU emphasized that "The law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however, framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question"[20]. The argumentation of the CJEU is extremely important. It began from the very idea of integration when the Member States partially limited their sovereignty and transferred specific competencies to the Community (now the EU). Within the limits of its competence, through its institutions and procedures established in the Treaties, it makes the law that enables the objectives of the Treaties to be achieved. In this way, it creates its own, independent legal system which is directly applicable in the internal orders of the Member States but does not become the national law. This law is the means to achieve the Treaty objectives that have been established by the Member States. Consequently, it must enjoy precedence over the norms of national law because "The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty […]. The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in ques-

[18] Judgment of the CJEU of 9 March 1978, case C 106/77 Simmenthal, ECLI:EU:C:1978:49.

[19] Cf.: Brzeziński P., Unijny obowiązek odmowy zastosowania przez sąd krajowy ustawy niezgodnej z dyrektywą Unii Europejskiej (EU obligation to refuse to apply by a national court a law that is inconsistent with the European Union directive), Warsaw, 2010, 41.

[20] Judgment of the CJEU of 15 July 1964, case C 4/64 Costa v. ENEL, ECLI:EU:C:1964:66.

tion by subsequent legislative acts of the signatories"[21]. The cited judgment refers to national law but does not specify the scope of the principle of primacy. In another judgment, the CJEU extended the scope of the compliance review of EU law, also with regard to higher-ranking acts. In the judgment in case C 11/70, emphasized that "The validity of measures adopted by the institutions of the Community can only be judged in the light of Community law. The law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however, framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question"[22]. Therefore, the validity of EU regulations or the effects they cause within a Member State cannot be called into question by the allegation of non-compliance with fundamental rights or principles contained in the constitution of a given state. The analyzed problem was re-addressed by the CJEU in the Melloni[23] case, where the referring court adopted an incorrect interpretation of Art. 53 of the Charter, and recognized that a Member State has the right „to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law (56)". The Court of Justice clearly indicated "That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution".

In subsequent judgments, the CJEU expanded the limits of the application of the principle of primacy and emphasized that it applies both to the law in force and to acts not yet adopted in accordance with the relevant procedure[24]. It should be noted that the CJEU connects the principle of primacy with the application of regulations that have a direct effect and defines them as those that are regulated in a precise, unconditional manner and do not require further action on the part of EU institutions or the authorities of the Member States[25]. In its case law, the CJEU recognized direct effect in relation to the Treaties, provisions of international agreements to which the EU is a party, regulations, general principles in a specific scope, and provisions of di-

[21] Ibid.

[22] Judgment of the CJEU of 17 December 1970, case C 11/70 Internationale Handelsgesellschaft, ECLI:EU:C:1970:114.

[23] Judgment of the CJEU of 26 February 2013, case C 399/11 Stefano Melloni v. Ministerio Fiscal, ECLI:EU:C:2013:107.

[24] Judgment of the CJEU of 19 June 1990, case C-213/89 Factortame, ECLI:EU:C:1990:257.

[25] For more see, e.g.: Barcik J., Wentkowska A., Prawo Unii Europejskiej po Traktacie z Lizbony (The European Union Law After Lizbon Treaty), wyd. 2, Warsaw, 2011, 94.

rectives, but in a situation where a Member State has not fully implemented it into the national order or did it improperly[26]. When referring the above considerations to the position of the national judge, it should be emphasized that "in accordance with the principle of the primacy of EU law, the national court called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty, where it is unable to interpret national law in compliance with the requirements of EU law, to give full effect to the requirements of EU law in the dispute brought before it, by disapplying, as required, of its own motion, any national rule or practice, even if adopted subsequently, that is contrary to a provision of EU law with direct effect, without it having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means"[27].

However, a question arises about the position of EU law norms that do not have a direct effect. This issue is interpreted in a particular way in the context of directives, i.e. specific EU binding acts that require implementation into the national order. Yet, a problem with the implementation of the objectives set in the directive occurs if a Member State fails to implement it, or the implementation is incomplete and incorrect. In this context, the concept of a pro-EU interpretation was developed[28]. It was introduced in the case law of the Court of Justice in the 1980s. Initially, it was used mainly in the context of directives and referred to as the so-called indirect effect[29]. The Court of Justice emphasized that "a directive cannot of itself impose obligations on an individual and cannot, therefore, be relied upon as such against an individual […]. […] even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties"[30]. In such a situation, the national court must interpret the national law as far as possible in the light of the wording and purpose of the directive in question, in order to achieve the result envisaged by it.

[26] Sołtys A., Relacja zasady bezpośredniego skutku i zasady pierwszeństwa prawa Unii Europejskiej w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości (The Relationship Between of the Principle of Direct Effect and the Principle of Primacy of European Union Law in the Light of the Latest Jurisprudence of the Court of Justice), EPS, June 2022, 6.

[27] Judgment of the CJEU of 22 February 2022, case C 430/21 RS, ECLI:EU:C:2022:99.

[28] For more on the conforming interpretation see, e.g.: Rowiński W., Nakaz dokonania wykładni prounijnej jako dyrektywa wykładni systemowej (The Order to Provide a Pro-EU Interpretation as a Directive of a Systemic Interpretation), Ruch Prawniczy, Ekonomiczny i Socjologiczny, Rok LXXVIII – zeszyt 1, 2016, 99-111.

[29] Kowolik-Bańczyk K., Wykładnia prowspólnotowa (tzw. pośredni skutek), Stosowanie prawa Unii Europejskiej przez sądy (The Pro-Community Interpretation (The So-Called Indirect Effect), The Application of European Union Law in Courts), edited by A. Wróbel, Warsaw, 2007, 404.

[30] Judgment of the CJEU of 5 December 2005, joined cases of Bernhard Pfeiffer (C 397/01), Wilhelm Roith (C 398/01), Albert Süß (C 399/01), Michael Winter (C 400/01), Klaus Nestvogel (C- 401/01), Roswitha Zeller (C 402/01) and Matthias Döbele (C 403/01), ECLI:EU:C:2004:584.

Dagmara Kornobis-Romanowska emphasizes that the doctrine of an indirect effect of directives leads to the same result as the direct effect but it happens through the use of a technique of judicial interpretation of domestic law[31]. Nina Półtorak emphasizes that this interpretation is a new reading of a given national regulation in the light of the objective of the effective legal protection of an EU claim[32].

The last element of the process of ensuring effective judicial protection is the adjustment of the procedures to the needs of proceedings in a "European" case, i.e. one where the court decides on the basis of EU law. This is an extremely complex issue because, as a rule, in EU law the principle of procedural autonomy of the Member States applies. This means that they retain their exclusive competence in the organization of their judicial system and the formulation of procedural norms (of course, only in those areas that have not been transferred to the EU). In one of its judgments, the CJEU confirmed that "in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law"[33]. Consequently, when talking about the indicated principle, two aspects should be distinguished: institutional autonomy, which is related to the organization of courts, and procedural autonomy.

The first of the indicated aspects has a much wider meaning. When analyzing the concept of institutional autonomy, it should be emphasized that it is of special importance. It means that the EU Member States are free to shape public structures that are responsible for performing obligations under EU law. Consequently, it includes the possibility to freely choose central and local government bodies, even private ones, which are responsible for fulfilling EU obligations, and to equip them with specific competences[34]. On the other hand, when referring directly to the organizational structure and the principles of operation of national courts, it should be noted that this area not only falls within the scope of the principle of institutional autonomy but, importantly, falls within the competence of the Member States. However, in line with the established position of the doctrine, the autonomy of the Member States in this respect is not absolute. As the CJEU emphasized, "although the organ-

[31] Kornobis-Romanowska D., Sąd krajowy w prawie wspólnotowym (The National Court in Community Law), Warsaw, 2007, 49.

[32] Półtorak N., Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych (Protection of Rights under European Union Law in Domestic Proceedings), Warsaw, 2010, 91-92.

[33] Judgment of the CJEU of 16 December 1976, case C 33/76 Rewe – Zentralfinanz, ECLI:EU:C:1976:188.

[34] Półtorak N., Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych (Protection of Rights under European Union Law in Domestic Proceedings), Warsaw, 2010, 53.

isation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law".[35] This issue is currently the topic of a wide-ranging debate, especially in the context of reforms of the judicial system implemented in Poland, Hungary, or Romania[36]. The Court of Justice confirmed the competence of the Member States to organize the judicial system, however, it made a reservation that it must be implemented in accordance with the EU values provided in Art. 2 TEU. There is a view in the literature on the subject that the Member States, as democratic states, are, firstly, obliged to guarantee the independence, impartiality and respect of their own courts, and secondly, the states cannot be waived from responsibility for infringement of EU law by indicating a specific internal organization[37].

On the other hand, procedural autonomy is directly related to procedural rules. In the literature on the subject, it is assumed that it means "the entirety of the base conditions, that is, all issues relating to the comprehensive set of methods of pursuing claims and enforcement of law provided for by the national law, (...) and even more extensively as the entirety of national regulations concerning the jurisdiction of a court to decide on a particular case"[38]. Therefore, it is the competence of the Member States to define the competence of national courts to hear cases in the field of Community law, and the conditions and procedural measures relating

[35] Judgment of the CJEU of 19 November 2019, joined cases C 585/18, C 624/18, C 625/18, ECLI:EU:C:2019:982.

[36] This issue goes far beyond the scope of the present study. Cf. e.g.: Judgment of the CJEU of 27 February 2018, case C 64/16 Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117, Judgment of the CJEU of 24 June 2019, case C 619/18 The Commission v. The Republic of Poland, ECLI:EU:C:2019:531, Judgment of the CJEU of 5 November 2019, case C 192/19 The Commission v. The Republic of Poland, ECLI:EU:C:2019:924, Judgment of the CJEU of 15 July 2021, case C 791/19 The Commission v. The Republic of Poland, ECLI:EU:C:2021:596, Judgment of the CJEU of 2 March 2021, case C 824/18 AB and Others, ECLI:EU:C:2021:153., Judgment of the CJEU of 18 May 2021, joined cases C 83/19, C 127/19, C 291/19, C 355/19, C 397/19, ECLI:EU:C:2021:393, Judgment of the CJEU of 22 February 2022, case C 430/21 Curtea de Apel Craiova, ECLI:EU:C:2022:99. This issue is also widely commented on in the literature. See e.g.: Curt C. C., Romanian Commitment to Independence of Justice and Anticorruption Refeormas under CVM and Rule of Law Incentives. Same Considerations on Case – Law of Constitutional Court, Transylvanian Review of Administrative Sciences, No 65 E/2022; Krzysztofik E., The Definition of National Court Within the Meaning of EU Law. Considerations in the Context of the Polish Reform of the Judicial System, TEKA 1/2020.

[37] Mik C., Sądy polskie wobec perspektywy przystąpienia Rzeczypospolitej Polskiej do Unii Europejskiej (Polish Courts in View of the Prospect of Poland's Accession to the European Union), Przegląd Prawa Europejskiego 1 (2), 1997, 21.

[38] Kornobis-Romanowska D., Kompetencje wspólnotowe sądów krajowych – przegląd zagadnienia, in: Stosowanie prawa wspólnotowego w prawie wewnętrznym z uwzględnieniem prawa polskiego (Community Competences of National Courts - Overview, The Application of Community Law in Domestic Law, Including Polish Law), edited by D. Kornobis-Romanowska, Warsaw, 2003, 64.

to proceedings before courts (procedural time limits, conditions of admissibility of a complaint, rules of evidence)[39]. However, it should be borne in mind that this rule applies only to the extent to which an EU regulation concerning the indicated organizational issues has not been adopted. Then the principle of institutional autonomy does not apply, but the principle of primacy of EU law does. Again, this principle does not mean the absolute exclusivity of the Member States. There are two restrictive clauses in the case law: ensuring the equivalence and the effectiveness of EU law. The first means that claims based on EU law cannot be treated worse in court than similar claims based on national law[40]. Therefore, it should be assumed that the procedural rules and sanctions applicable to a complaint based on EU law cannot be less favorable than for complaints based on national law. On the other hand, the latter restrictive clause is directly related to the obligation to ensure the effectiveness of EU law also in the context of procedural norms. It means that the national law needs to guarantee effective and adequate legal protection of claims based on EU law, i.e. that the procedural provisions of the Member States will not make it virtually impossible or excessively difficult to pursue claims based on EU law[41]. Any procedural regulations that directly or indirectly impede, actually or potentially, the effectiveness of EU law should be considered incompatible with this law. In such a case, this rule allows for the non-application of the national norm. It is for the national court to decide whether the national law cannot be applied due to it being incompatible with EU law.

IV. Referral for a Preliminary Ruling and the Obligation to Ensure the Effectiveness of EU Law

The procedure of a preliminary ruling was introduced already in the Founding Treaties and is a special form of support for national courts in the process of ensuring the effectiveness of EU law. It should be noted, however, that it is addressed not only to common courts but also to other entities that will obtain the status of a national court within the meaning of EU law. According to the well-established position of the CJEU and the Information Note, it is an autonomous concept of EU law[42]. However,

[39] Judgment of the CJEU of 16 December 1976, case C 33/76 Rewe – Zentralfinanz, ECLI:EU:C:1976:188.

[40] Wróbel A., Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej (Procedural Autonomy of Member States. The Principle of Effectiveness and the Principle of Effective Judicial Protection in European Union Law), Ruch Prawniczy, Ekonomiczny i Socjologiczny rocznik LXVII – z., No1, 2005, 44.

[41] C 33/76 Rewe, Judgment of the CJEU of 16 December 1976, C 45/76 Comet, ECLI:EU:C:1976:191.

[42] Information note on references from national courts for a preliminary ruling, OJ EU 2005/C 143/01.

there is no uniform, autonomous definition of this concept[43]. The Court of Justice decides on a case-by-case basis whether the question was submitted by an entity that is to be considered a national court within the meaning of EU law. The analysis of the case-law allows one to distinguish certain features that must occur cumulatively in order to assume that the entity is entitled to refer a question for a preliminary ruling. Basically, it indicates two groups of premises: material and systemic. The first group includes the permanent nature and the condition that the entity operates on the basis of legal provisions, obligatory jurisdiction, adjudicates in disputes between the parties (inter partes), applies the law, issues decisions independently and impartially[44]. However, the literature on the subject indicates that the catalog of premises is not a closed one and it is not possible to establish a hierarchy among them, and their meaning may vary depending on the situation[45]. The Advocate General emphasized that "the case-law is casuistic, very elastic and not very scientific, with such vague outlines that a question referred for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted"[46]. The latter group, i.e. the systemic premises, in the initial period, were not controlled by the CJEU, which explicitly assumed that every common court is a court within the meaning of EU law. Currently, due to the extensive discussion that is taking place at the EU level around the judicial system reforms in the Member States, doubts have arisen as to whether this assumption is correct[47].

[43] The Court defined the concept of a court for the purposes of the EAW (Judgment of the CJEU of 10 November 2016, case C 452/16 PPU, Openbaar Ministerie vs Krzysztof Marek Półtorak, EU:C:2016:858) or Brussels I Regulation (Judgment of the CJEU of 9 March 2017, case C-484/15, Ibrica Zulfikarpašić vs Slaven Gajer, EU:C:2017:199); however, in the literature on the subject there is no uniform position on whether these definitions also refer to Article 267 TFEU.

[44] See e.g.: Judgment of the CJEU of 21 January 2020, case C 274/14 Banco de Santander, ECLI:EU:C:2020:17, 51.

[45] Frąckowiak-Adamska A., Bańczyk P., Formułowanie pytań prejudycjalnych do Trybunału Sprawiedliwości Unii Europejskiej. Praktyczny przewodnik (Formulating Questions for a Preliminary Ruling to the Court of Justice of the European Union. A Practical Guide), WKP, 2020, 75.

[46] Opinion of RG Colomer of 28 June 2001, C-17/00, François De Coster vs Collège des bourgmestre et échevins de Watermael-Boitsfort, EU:C:2001:366, 14.

[47] It is worth indicating here the judgment of the CJEU in case C 658/18. The Italian Magistrates Court raised doubts as to its own competence to refer questions for a preliminary ruling to the CJEU in the light of the interpretation made in cases of judges of Portugal and Poland. In another judgment, in case C 272/19, the CJEU analyzed the status of the German administrative court in terms of its dependence on the legislative and executive powers in the process of appointing judges and in terms of the judges exercising their functions. In this case, the court itself drew attention to the process of appointing judges, according to which: 1. Judges are appointed and promoted by the Minister of Justice; 2. The evaluation of judges is regulated by the Ministry of Justice in accordance with the same rules that apply to officials; 3. The personal data and service information of judges is administered by this Ministry, which therefore has access to this data; 4. Officials may be appointed as temporary judges to meet temporary staffing needs; 5. The said Ministry defines the external and internal organization of the courts, allocates court personnel, means of communication and computer equipment, and also decides on official travels of judges abroad.

The Court of Justice emphasized that common courts must also fulfill the conditions of independence and impartiality.

However, the most important issue from the perspective of this study is the purpose of the questions referred. As mentioned above, courts are obliged to ensure effective judicial protection of claims under EU law, while ensuring uniform application and interpretation. Pursuant to the provisions of Art. 19 para. 1 TEU, only the CJEU is capable of examining the legality of EU law and interpreting its provisions legally. Consequently, if a national court, in the process of applying EU law, has serious doubts as to the legality or interpretation of EU law, it may or must refer a question for a preliminary ruling to the CJEU[48]. It should be emphasized that the decision is an expression of the discretionary power of the national court. As indicated by the CJEU itself, "Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of European Union law, or consideration of their validity, which are necessary for the resolution of the case. National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate"[49]. Additionally, "it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court"[50]. The CJEU found that "it should be borne in mind that the fact that the parties to the main actors did not raise a point of European Union law before the referring court does not preclude the latter from bringing the matter before the Court of Justice"[51]. It stipulated that the procedure of a preliminary ruling relates to a specific situation where the national court has doubts as to the norm of EU law in the case pending before that court and that it does not "restrict this procedure exclusively to cases where one or other of the parties to the main action has taken the initiative of raising a point concerning the interpretation or the validity of European Union law, but also extend to cases where a question of this kind is raised by the court or tribunal itself, which considers that a decision thereon by the Court of Justice is 'necessary to enable it to give judgment'"[52].

[48] For more see e.g.: Krzysztofik E., The System of Legal Protection in the European Union, in: Introduction to European Union Institutional Law, Lublin, 2013.

[49] Judgment of the CJEU of 5 October 2010, case C 173/09 Georgi Ivanov Elchinov, ECLI:EU:C:2010:581, 26.

[50] Judgment of the CJEU of 31 January 2013, case C 26/11 Belgische Petroleum Unie VZW and Others, ECLI:EU:C:2013:44.

[51] Ibid.

[52] Ibid.

The analysis of the case law of the CJEU shows that it found the application of the provisions of the German Code of Civil Procedure and the Bulgarian provisions of the Code of Administrative Procedure incompatible. According to these provisions, assessments made by a higher court are binding on another national court in cases where they deprive the lower court of the right to refer a question to the CJEU pursuant to Art. 267, if the lower court rules after its ruling was annulled by the court adjudicating in a higher instance[53]. It is also worth paying attention to the position of the CJEU regarding the obligation to apply judgments of Constitutional Courts by domestic courts. In the judgment in the Filipiak case, the CJEU emphasized that "the deferral by the Trybunał Konstytucyjny of the date on which the provisions at issue will lose their validity does not prevent the referring court from respecting the principle of the primacy of Community law and thus declining to apply those provisions"[54]. In its judgment in case 430/21, the CJEU emphasized that "an ordinary court is required, in order to ensure the full effectiveness of the rules of EU law, to disregard, in a dispute before it, the rulings of a national Constitutional Court which refuses to give effect to a judgment given by way of a preliminary ruling by the Court of Justice, even where that judgment does not arise from a request for a preliminary ruling made, in connection with that dispute, by that ordinary court"[55]. Consistently, the CJEU took the position that national courts, ruling as EU courts, are not bound by judgments of Constitutional Courts if they prevent the application of the answer given to the question referred by them. The discretionary power of the national court acting as an EU court to refer questions for a preliminary ruling means that it cannot bear the negative consequences of exercising this right. The Court took a similar position in the case of Łowicz, stating that "Provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot, therefore, be permitted […]. Indeed, the mere prospect, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions referred to in the preceding paragraph"[56].

[53] For more see: Frąckowiak-Adamska A., Bańczyk P., Formułowanie pytań prejudycjalnych do Trybunału Sprawiedliwości Unii Europejskiej. Praktyczny przewodnik (Formulating Questions for a Preliminary Ruling to the Court of Justice of the European Union. A Practical Guide), WKP, 2020, 79-80.

[54] Judgment of the CJEU of 19 November 2009, case C 314/08 Krzysztof Filipiak, ECLI:EU:C:2009:719.

[55] Judgment of the CJEU of 22 February 2022, case C 430/21 RS, ECLI:EU:C:2022:99.

[56] Judgment of the CJEU of 26 March 2020, case C 558/18 Miasto Łowicz, ECLI:EU:C:2020:234, 58.

V. Conclusions

The principle of effectiveness of EU law, despite the lack of an explicit basis in EU primary law, is the source of principles regulating the nature of EU law and the manner of its application. It particularly affects the performance of duties by domestic courts, which, according to the wording of Art. 19 para. 1 item 2 TEU, is one of the elements of the EU judicial system. It is based on a systemic dualism that includes the CJEU and national courts. When analyzing the implementation of the principle of effectiveness, it should be noted that it covers two areas. The first is of general nature and concerns the obligation to ensure the effectiveness of EU law, and the second – the subjective one – is related to the obligation to ensure the effectiveness of EU law in a specific case by granting adequate protection to the rights of an individual that derive from EU law. In this aspect, the courts are of key importance, as they implement it through the systemic principle of effective judicial protection. It is a guide that indicates how to proceed and what principles should be followed in the process of application of EU law. This process consists of several stages, the implementation of which is subordinated to one goal – to guarantee effective judicial protection and thus the effectiveness of EU law. First, the court examines whether a given claim is based on a norm that has a direct effect, which will determine the next stage of action. Then, by referring to the principle of direct effect, it subsumes and, if necessary, applies the principle of primacy of EU law or a pro-EU interpretation. The last element that indirectly implements the principle of effectiveness of EU law is the referral for a preliminary ruling. If a national court finds that there are doubts as to the interpretation or legality of an EU norm, it may turn to the Court of Justice with a question. It should be noted that national courts do not have the competence to interpret or examine the validity of EU law. Of course, in certain situations they may use the acte eclere or acte clair doctrine, however, both of them are exceptional and are based on the earlier case law of the CJEU. Thus, in order to guarantee a uniform interpretation of EU law, it is necessary to obtain the position of the CJEU. The Court draws attention to the particular significance of the questions referred for a preliminary ruling by creating a number of exceptional rights for national courts in the process of application of EU law. Their analysis may lead to the adoption of the thesis that almost proves that the court adjudicating in a European case is 'detached' from the national system. The literature on the subject uses the concept of the European status of judges, which emphasizes their subordination to the principles of EU law in the process of application of this law. It should be emphasized that each court appointed in accordance with the rules set in the law of a Member State is subject to the rules stated

by the law, in particular the constitution. However, the position of the CJEU allows for the assumption that when adjudicating on the basis of EU law, a national court may not apply specific solutions provided for in the national law. When referring to the example of Romania, the CJEU found that a national court may not apply the provisions of the statutes if, in its opinion, they violate EU law, even if the Constitutional Court had previously found that they were consistent with the constitution, including the constitutional clause of compliance with EU law[57].

References

Barcik J., Wentkowska A., Prawo Unii Europejskiej po Traktacie z Lizbony (The European Union Law After Lizbon Treaty), wyd. 2, Warsaw, 2011.

Brzeziński P., Unijny obowiązek odmowy zastosowania przez sąd krajowy ustawy niezgodnej z dyrektywą Unii Europejskiej (The EU Obligation of a National Court to Refuse to Apply a Law that is Inconsistent with the European Union Directive), Warsaw, 2010.

Curt C. C., Romanian Commitment to Independence of Justice and Anticorruption Refeormas under CVM and Rule of Law Incentives. Same Considerations on Case – Law of Constitutional Court, Transylvanian Review of Administrative Sciences, no 65 E/2022.

Frąckowiak-Adamska A., Bańczyk P., Formułowanie pytań prejudycjalnych do Trybunału Sprawiedliwości Unii Europejskiej. Praktyczny przewodnik (Formulating Questions for a Preliminary Ruling to the Court of Justice of the European Union. A Practical Guide), WKP, 2020.

Kornobis-Romanowska D., Kompetencje wspólnotowe sądów krajowych – przegląd zagadnienia, Stosowanie prawa wspólnotowego w prawie wewnętrznym z uwzględnieniem prawa polskiego (Community Competences of National Courts - Overview, The Application of Community Law in Domestic Law, Including Polish Law), edited by D. Kornobis-Romanowska, Warsaw, 2003.

Kornobis-Romanowska D., Sąd krajowy w prawie wspólnotowym (The National Court in Community Law), Warsaw, 2007.

Kowolik-Bańczyk K., Wykładnia prowspólnotowa (tzw. pośredni skutek), Stosowanie prawa Unii Europejskiej przez sądy (The Pro-Community Interpretation (The So-Called Indirect Effect), The Application of European Union Law in Courts), edited by A. Wróbel, Warsaw, 2007.

Krzysztofik E., The Definition of National Court Within the Meaning of EU Law. Considerations in the Context of the Polish Reform of the Judicial System, TEKA, No1, 2020.

Krzysztofik E., The System of Legal Protection in the European Union, in: Introduction to European Union Institutional Law, Lublin, 2013.

Łazowski A., Zasada lojalności, in: Zasady ustrojowe Unii Europejskiej (The Principle of Loyalty, in: The Systemic principles of the European Union, edited by J. Barcz, Warsaw, 2010.

Miąsik D., System prawa Unii Europejskiej (The System of European Union Law), T. 2, Warsaw, 2022.

Mik C., Sądy polskie wobec perspektywy przystąpienia Rzeczypospolitej Polskiej do Unii Europejskiej (Polish Courts in View of the Prospect of Poland's Accession to the European Union), Przegląd Prawa Europejskiego, No1 (2), 1997.

[57] Judgment of the CJEU of 22 February 2022, case C 430/21 RS, ECLI:EU:C:2022:99.

Półtorak N., Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych (Protection of Rights under European Union Law in Domestic Proceedings), Warsaw, 2010.

Rowiński W., Nakaz dokonania wykładni prounijnej jako dyrektywa wykładni systemowej (The Order to Provide a Pro-EU Interpretation as a Directive of a Systemic Interpretation), Ruch Prawniczy, Ekonomiczny i Socjologiczny, Rok LXXVIII – zeszyt, No1, 2016.

Sołtys A., Relacja zasady bezpośredniego skutku i zasady pierwszeństwa prawa Unii Europejskiej w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości (The Relationship Between of the Principle of Direct Effect and the Principle of Primacy of European Union Law in the Light of the Latest Jurisprudence of the Court of Justice), Europejski Przegląd Sądowy, czerwiec, 2022.

Wróbel A., Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej (Procedural Autonomy of Member States. The Principle of Effectiveness and the Principle of Effective Judicial Protection in European Union Law), Ruch Prawniczy, Ekonomiczny i Socjologiczny rocznik LXVII – z., No1, 2005.

Wyrozumska A., Zasady działania UE, Instytucje i prawo Unii Europejskiej (The Principles of Operation of the EU, Institutions and Law of the European Union), edited by J. Barcz, M. Górka, A. Wyrozumska, Warsaw, 2020.

Legal Sources

Judgment of the Court of Justice of 15 July 1964, case C 4/64 Costa v. ENEL, ECLI:EU:C:1964:66.

Judgment of the Court of Justice of 17 December 1970, case C 11/70 Internationale Handelsgesellschaft, ECLI:EU:C:1970:114.

Judgment of the Court of Justice of 16 December 1976, case C 33/76 Rewe – Zentralfinanz, ECLI:EU:C:1976:188.

Judgment of the Court of Justice of 9 March 1978, case C 106/77 Simmenthal, ECLI:EU:C:1978:49.

Judgment of the Court of Justice of 19 June 1990, case C-213/89 Factortame, ECLI:EU:C:1990:257.

Judgment of the Court of Justice of 5 October 2005, joined cases of Bernhard Pfeiffer (C 397/01), Wilhelm Roith (C 398/01), Albert Süß (C 399/01), Michael Winter (C-400/01), Klaus Nestvogel (C 401/01), Roswitha Zeller (C 402/01) and Matthias Döbele (C-403/01), ECLI:EU:C:2004:584.

Judgment of the Court of Justice of 13 March 2007, case C 432/05 Unibet, ECLI:EU:C:2007:163.

Judgment of the Court of Justice of 19 November 2009, case C 314/08 Krzysztof Filipiak, ECLI:EU:C:2009:719.

Judgment of the Court of Justice of 5 October 2010, case C-173/09 Georgi Ivanov Elchinov, ECLI:EU:C:2010:581.

Judgment of the Court of Justice of 31 January 2013, case C 26/11 Belgische Petroleum Unie VZW and Others, ECLI:EU:C:2013:44.

Judgment of the CJEU of 26 February 2013, case C 399/11 Stefano Melloni v. Ministerio Fiscal, ECLI:EU:C:2013:107.

Judgment of the Court of Justice of 3 October 2013, case C 583/11 P Inuit Tapiriit Kanatami, ECLI:EU:C:2013:625.

Judgment of the Court of Justice of 10 November 2016, case C 452/16 PPU, Openbaar Ministerie vs Krzysztof Marek Półtorak, EU:C:2016:858.

Judgment of the Court of Justice of 9 March 2017, case C-484/15, Ibrica Zulfikarpašić vs Slaven Gajer, EU:C:2017:199.

Judgment of the Court of Justice of 27 February 2018, case C 64/16 Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117.

Judgment of the Court of Justice of 19 November 2019, joined cases C 585/18, C 62/18, C 625/18, ECLI:EU:C:2019:982.

Judgment of the Court of Justice of 5 November 2019, case C 192/19 The Commission vs The Republic of Poland, ECLI:EU:C:2019:924.

Judgment of the Court of Justice of 24 June 2019, case C 619/18 The Commission vs The Republic of Poland, ECLI:EU:C:2019:531.

Judgment of the Court of Justice of 21 January 2020, case 274/14 Banco de Santander, ECLI:EU:C:2020:17.

Judgment of the Court of Justice of 26 March 2020, case C 558/18 Miasto Łowicz, ECLI:EU:C:2020:234.

Judgment of the Court of Justice of 15 July 2021, case C 791/19 The Commission vs The Republic of Poland, ECLI:EU:C:2021:596.

Judgment of the Court of Justice of 2 March 2021, case C 824/18 AB and Others, ECLI:EU:C:2021:153.

Judgment of the Court of Justice of 18 May 2021, joined cases C 83/19, C 127/19, C 195/19, C 291/19, C 355/19 and C 397/19 Asociația „Forumul Judecătorilor din România", ECLI:EU:C:2021:393.

Judgment of the Court of Justice of 22 February 2022, case, C 430/21 RS Curtea de Apel Craiova, ECLI:EU:C:2022:99.

Opinion of the Court of Justice of 8 March 2011 1/09, OJ EU 2009 C 220/04.

Opinion of RG Colomer of 28 June 2001, C-17/00, François De Coster vs Collège des bourgmestre et échevins de Watermael-Boitsfort, EU:C:2001:366.