

**Polish Civil Judges as European Union Law Judges:
Knowledge, Experiences and Attitudes**

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**Polish Civil Judges as European Union Law Judges:
Knowledge, Experiences and Attitudes**

**Poolse civiele rechters als Europese Unie rechters:
kennis, ervaringen en opvattingen**

Thesis

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by
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Dla mojego kochanego męża Patrick'a

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LIST OF ACRONYMS AND ABBREVIATIONS

AG – Advocate General
CCO - Law on Common Courts Organisation
CMLRev. – Common Market Law Review
CYELS - Cambridge Yearbook of European Legal Studies
CT – Constitutional Tribunal
EIoP - European Integration Online Papers
ECB – European Central Bank
ECtHR – European Court of Human Rights
ECJ – European Court of Justice
ECLR – European Constitutional Law Review
EIoP – European Integration online Papers
ELJ - European Law Journal
EJLE – European Journal of Law and Economics
EJLS – European Journal of Legal Studies
EPS – Europejski Przegląd Sądowy
ERA - Academy of European Law
ERPL – European Review of Private Law
Fordham ILRev – Fordham International Law Review
GC – General Court
GLJ – German Law Journal
HLRev – Hofstra Law Review
HanseLRev – Hanse Law Review
ICLQ – International and Comparative Law Quarterly
Int J Constitutional Law – International Journal of Constitutional Law
IO – International Organization
JCMS – Journal of Common Market Studies
JL – Journal of Laws
JLEO – The Journal of Law, Economics & Organization
JPL – Journal of Politics and Law
LC- Legal Consciousness
LR – Legal Realism
LQR. - Law Quarterly Review
L&SRev – Law&Society Review
MLR – Modern Law Review
NLR- New Legal Realism
n.y.r. – not yet reported
OJ – Official Journal
Oxf.JLS – Oxford Journal of Legal Studies
PiP – Państwo i Prawo
PSC – Polish Supreme Court
TEU – Treaty on European Union
TEC – Treaty on European Community
TFEU – Treaty on the Functioning of the European Union
W&MLRev - William and Mary Law Review
WLRev - Wisconsin Law Review
YPES – Yearbook of Polish European Studies

General Introduction

“Every national court in the European Community is now a Community law court. National judges have a duty, in common with the European Court of Justice, to see that Community law is respected in the application and interpretation of the Community Treaties. In fact national courts probably interpret and apply Community law more often than the two Community courts do. The national court is the natural forum for Community law. One can be more precise; every national court, whatever its powers, is a Community court of general jurisdiction, with power to apply all rules of Community law.”

-John Temple Lang¹

Normative perspective

Trivial as it may sound, it is yet necessary to acknowledge that the European Union (EU)² and national laws are closely interwoven and that the process of *Europeanisation* of national law and national legal systems has been progressing with an unswerving pace.³ EU law has been increasingly affecting a great number of national legal areas by means of a very intense law-

¹ Lang (1996), p.1.

² The original title of the project referred to the decentralized European Community judges. However, in the course of the research process the European Community ceased to exist. The introduction of the new Treaty regime through the Lisbon reform Treaty has had profound consequences for the operation of the European Union but also for the nomenclature and articles numbering applied in the present research project. Whereas the conducted survey employed the EC nomenclature, the evidence gained therefrom has to be presented in terms of EU law. The reference to EC law or the European Community could not yet be fully avoided. At some points the reader will therefore come across the Treaty articles as numbered under the former regime, especially the frequently cited jurisprudence of the ECJ and national courts refers to the EC Treaty and EC law. Also, under the new regime the European Court of Justice has officially become the Court of Justice of the European Union. For the sake of consistency and clarity it was decided to refer to the Court as to the ECJ, European Court of Justice or simply the Court. The present study is based on the state of affairs up until the 1st of December 2011.

³ It should be observed that the term ‘Europeanisation’ is a very broad one and is used in various branches of social and political sciences. In all of them it has its own meaning and context. Regardless of the context, the term always refers to a process of domestic adaptation in a specific area (political, economical, institutional or cultural) as a result of the membership in the EU. For the purpose of this book the term is used in its legal context, that is to say it refers thus to the process of transformation in the legal area, i.e. it covers EU activities that affect national legal sources and the process of adaptation of legal actors to the new legal reality imposed by the law of the Union. For more on the processes of Europeanisation and the respective definition see for instance: Wouters et al (2008), pp.5-6; Börzel&Risse (2000); Knill&Lehmkuhl (1999); Jans et al (2007), pp.3-5.

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making process and through the case-law of the Court of Justice of the European Union. By 2008 the body of generally binding secondary EU legislation encompassed nearly 12000 legislative acts, out of which 10 000 were regulations and 1700 were directives.⁴ Although EU law pertains predominantly to the sphere of public and administrative law, in the course of time European Union rules have affected to a greater or lesser extent virtually all areas in national law categories, including those that were for a long time guarded against such influence. In that regard, EU rules Europeanised not only national public, constitutional⁵ and administrative⁶ laws but also the field of private law. They forced changes in, *inter alia*, employment, social security, environmental, business, asylum or consumer protection national laws. Likewise, in the sphere of criminal law harmonization has become an important phenomenon in recent years.⁷ This dramatically expanding process of Europeanisation has led to the increase of the number of sources of law and a rapid transformation of national laws in various fields. What is more, not only has European Union law brought about changes in national substantive law but it also has affected national procedural rules. At present, it is fair to say that the majority of national legislation has its roots in Brussels and Strasbourg.⁸ In fact, it may be argued that there is nearly no area of national law that has not been affected by the process of legal integration in the European Union.⁹ By and large, national laws have become Europeanised to an immense extent.

The foregoing gains a very particular importance if seen in the light of the fact that the law of the European Union can directly affect interests of individuals in the EU, that is to say

⁴ From 25th Annual Report from the Commission on monitoring the application of Community law (2007), COM (2008) 777 final, p.2. It should not be forgotten that the legislative body encompasses also binding decisions and an enormous amount of soft law measures.

⁵ On the process of Europeanisation of national public and constitutional laws see Jans et al (2007).

⁶ For more see for instance Ladeur (2002) and Eliantonio (2009).

⁷ For more on the European influence on national criminal laws see Corstens&Pradel (2002).

⁸ See Prechal et al (2005), p.4.

⁹ In relation to the Europeanisation of national laws process terms such as 'harmonization', 'homogenization', 'unification', 'approximation' or 'convergence' are used interchangeably, see Twigg-Flesner (2008), p.9; Stein (1964), p.5. In fact, the terms harmonization and approximation are synonymous but it should be noted that harmonization is mostly used with regard to EU directives. Unification and homogenization are much more extensive for they assume a thorough replacement of national provisions by a new set of law. Under the former Treaty regime, it was mostly referred to the approximation of national laws whereas the term harmonization was used only in Art.93 EC concerning turnover taxes, excise duties and other forms of indirect taxation. In all other issues the term approximation was used. For more see Van Gerven (2004), pp.505-532 and Van Gerven (2008) pp.400-414. Under the TFEU, in turn, the term harmonization occurs more frequently, that is to say 34 times.

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it is capable of creating rights and obligations not only in relation to the contracting Member States but also its citizens. This principle, being one of the most revolutionary characteristics of the legal system of the EU¹⁰, was established by the ECJ as early as 1963 in the landmark *Van Gend&Loos* ruling.¹¹ Importantly, the system of the Treaties creates a system of judicial protection at the level of the European Union but it does not establish separate EU courts in each Member State which could protect the rights individuals derive from Union's law. It occurs that individuals can gain a direct access to the European Court of Justice in order to protect their rights flowing from EU law only in very limited situations which are enshrined in Articles 263 (ex Art. 230 EC)¹² and 340 (ex Art. 288 EC) of the Treaty on the Functioning of the European Union (TFEU). Put crudely, individuals can resort to the Court only to protect themselves against illegal actions of the Union.¹³ As a consequence of the above described judicial architecture, the disputes between EU institutions and between the institutions and Member States or individuals fall under the jurisdiction of the Court in Luxembourg. What emerges clearly is that disputes with regard to EU law that arise in vertical situations, i.e. between individuals and public authorities of the Member States or in horizontal situations, i.e. between individuals are heard in national courts and tribunals. It is the underpinning premise of the present research project that the national courts are obliged to protect those rights and, at the same time, are expected to ensure *effet utile* of EU law, regardless of what

¹⁰ See Albors-Llorens (1996), p.7.

¹¹ Case 26-62 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1: "(...) this view is confirmed by the preamble of the Treaty, which refers not only to Governments but also to peoples (...) The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member states but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."

¹² And consequently in Art. 265 and 277 TFEU. The relevance of both is however rather limited.

¹³ What is more, in the context of the legality review, the access to the Court for individuals has been quite problematic for decades. Under the former Treaty system the conditions under which individuals could directly gain standing in the annulment procedure were namely very restrictive. The issue of *locus standi* of individuals in direct actions has been a subject of much controversy and criticism and therefore it has generated an extensive academic analysis. Under the Lisbon Treaty regime the standing requirement for non-privileged applicants is modified but in practice it improves only slightly what has been confirmed very recently by the Court in order T-18/10 *Inuit Tapiriit Kanatami and others v. European Parliament and Council of the European Union* [2011] ECR n.y.r. For more on the issue of locus standi of individuals under the present Treaty regime see Eliantonio (2010), pp.127-128.

General Introduction

their national legislation provides.¹⁴ In that sense, all national courts have potentially become decentralized EU courts and, consequently, all national judges have become EU law judges. It is observed that “national judges play a fundamental role in the multilevel system.”¹⁵

This involvement of the national judges in the process of legal integration in the Union is one of the most outstanding features of the legal order of the EU. In order for national judges to fulfill this constitutive task, the law of the European Union provides them with various mechanisms which are to facilitate this process. Those follow from, *inter alia*, the fundamental principles of EU law such as supremacy, direct effect, indirect effect, effectiveness and from the procedure of preliminary ruling before the ECJ. Hence, one can speak of the Europeanisation of the national courts which is of a two-fold dimension. On the one hand, a bulk of the legal provisions applied in the daily practice by national judges is of EU origin. On the other hand, the function of a national judge has been Europeanised as she¹⁶ has become responsible for ensuring the uniform application and effectiveness of European Union law.

From the normative¹⁷ point of view, the European Union expects much from the national judge. It endows her with new tasks and responsibilities and imposes new obligations on her. Seen from another perspective, the new obligations and tasks are at the same time new competences which, at least from the theoretical point of view, empower the judge by giving her judicial tools which were traditionally not foreseen under national constitutional and institutional frameworks.¹⁸ Being an EU law judge is about fulfilling those obligations, but in order for a judge to do so a considerable dose of willingness, trust and engagement on her part seems necessary. The developments in jurisprudence across different Member States evidently show that the relationship between national judges and EU law has mostly been somewhat

¹⁴ From Koopmans (1993), p.9.

¹⁵ From Martinico (2011), p.84.

¹⁶ Throughout this work a judge will be referred to as a female judge. Such a choice is underpinned by two major reasons. The first one relates to the fact that the majority of Polish judges of ordinary courts are females. The second is of a purely personal character and relates to the author’s affinity with gender equality studies.

¹⁷ In the present study the word ‘normative’ refers to what the law ought to be and what it prescribes.

¹⁸ As observed by Bobek: “In classical narratives of the story called the European integration, national judges are said to have “mandate” under EC law; they are “empowered” by EC law, or, in the less thrilling versions of the story, they just become “Community judges.” With powers come duties and responsibility (...)”, see Bobek, *The new European judges and the limits of the possible* [in] Łazowski (2010), p.127.

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complicated and marked with tensions and distrust.¹⁹ It is also suggested that despite the fact that the national judge has never before been such a powerful player in the process of rights enforcement, a proper and uniform use of the new tools which were assigned to her by EU law may be faced with various problems. Different authors suggest that national judges might, *inter alia*, lack adequate knowledge of EU law, be unfamiliar with the methods of legal interpretation as practiced by the Court of Justice, lack foreign languages skills or simply have no access to EU law sources. Others point to the features of the autonomous legal and judiciary systems of Member States, characteristics of the national legal culture which might create obstacles to the fulfillment of the EU law expectations, boundaries of judicial discretion or the national procedural obstructions.²⁰ Consequently, it is suggested that the uniform fulfillment of the expectations stemming from EU law by national judges cannot be taken for granted. The foregoing motion, which constitutes the point of departure of the present study, is adequately reflected in the following illustration from practice.

Practical Perspective

In June 2004, shortly after Poland joined the European Union, Mr Brzeziński purchased an old Volkswagen Golf in Germany which he then imported to Poland. In accordance with the Polish law, excise duty applied to the second-hand vehicles originating from other Member States. Mr Brzezinski dutifully submitted a simplified AKC-U declaration pertaining to the acquisition of a vehicle and paid PLN 855 by way of excise duty. Several days later Mr Brzeziński requested reimbursement of the excise duty he had paid which, in his opinion, had been wrongly charged, stating that the charging of such a duty is contrary to Articles 28, 30 and 110 TFEU (then Articles 23 EC, 25 EC and 90 EC). By his decision, the Head of the Customs Office in Warsaw rejected that request. In September 2004, Mr Brzeziński lodged a

¹⁹ Evidence coming from different Member States shows that national judges do not necessarily want to fulfil the role which is put on them by EU law. France is the best example illustrating the problem. As claimed by Plötner, “France is one of the Member States in which Community law has had the greatest difficulties to be fully integrated and recognised as supreme to national law.” See Plötner, *Report on France* [in] Slaughter et al (1998), p.41, see also Mehdi (2011).

²⁰ For the discussion on the potential obstacles to the fulfilment of EU law expectations by national judges see for instance: Bobek (2008a); Kühn (2005); Prechal et al (2005); various authors in Jansen et al (1997); Łętowska (2005), pp.3-10; Wentkowska (2003b); Wentkowska (2003a), pp.71-100; Biernat (2005), pp.159-177; Łazowski (2001).

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complaint against that decision before the Head of the Customs Office in Warsaw. By decision of January 2005, the latter upheld the decision of the director of the Warsaw Customs Office and rejected the claim before him. Eventually, Mr Brzezinski brought his case to the Voivodship Administrative Court (VAC) in Warsaw against the decision dismissing his complaint. He asked for the decision to be set aside and for the customs administration to be ordered to reimburse him the amount of the excise duty he had paid on the ground that it is incompatible with the aforementioned European provisions. In his response to this plea, the Head of the Customs Office in Warsaw argued that the plea alleging infringement the Treaty was unfounded and asked for the action to be dismissed.

Mr Brzeziński was not the only one confronted with such a problem. Similarly, Mr Piórkowski purchased a second-hand car in Germany and had to pay excise duty after importing it to Poland. Mr Piórkowski also requested a refund of excise duty at the Head of the Customs Office in Olsztyn. The Head of the Customs Office in Olsztyn rejected that motion. Mr Piórkowski appealed to the Head of the Customs Chamber who upheld the decision of the Head of the Customs Office. Mr Piórkowski lodged a complaint at the VAC in Olsztyn and claimed the non-conformity of national law with the EU rules on free movement of goods and with the provisions of the Polish Constitution. Also the Voivodship Administrative Courts in Lublin and Łódź dealt with a similar complaint. As a matter of fact, dozens of look-alike cases were being settled before administrative courts across the country. There was one striking difference between them though: the final judicial decision taken by a respective judge. The Court in Olsztyn, not knowing how to proceed, formulated a question of law and referred it to the Polish Constitutional Court. In its reference the court expressed its doubts as to the constitutionality of the provisions included in excise duty act if read in conjunction with Art. 110 TFEU and stressed that national courts are not competent to review the legality of national statutes, the competence which belongs to the Constitutional Tribunal.²¹ The Court in Lublin in its judgment of 25 May 2005²² was of the opinion that the respective national provisions were at variance with EU law since they infringed the principle of equal treatment of similar domestic and imported goods. The court decided to set aside the

²¹ See procedural decision of the Constitutional Tribunal of 19 December 2006, P 37/05.

²² Judgment of VAC in Lublin of 25 May 2005 I SA/Lu 77/05.

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national provisions and consequently the decisions of the respective customs office. Interestingly, the same court but adjudicating in a different bench dismissed a similar case since it found that the excise duty concerned constitutes one of the elements of the Polish tax system and the fact of charging excise duty was in conformity with the Treaty.²³ Likewise, the VAC in Łódź dismissed the complaint against the local Customs Office by stating that it can merely assess the conformity of the respective decision to the binding legal provisions.²⁴ In case of Mr Brzezinski, the VAC decided to stay the proceedings and refer a preliminary question to the ECJ on the conformity of the respective national provisions with articles 28, 30 and 110 TFEU. In January 2007 the ECJ held that the Polish excise duty on second-hand vehicles was incompatible with Article 110 TFEU.²⁵

Explanatory Perspective

The above discussed cluster of cases illustrates how intricate it has become to function as a national judge at a crossroads of national and European Union law. How was it possible that virtually the same factual backgrounds, virtually the same claims and the same legal provisions led the concerned judges to totally different judicial decisions? Why did some of the judges ensure the *effet utile* of EU law and protected the rights of individuals stemming from it while others disregarded the claims? What prompted the judge in Warsaw to refer her questions to the ECJ and why did the judge in Olsztyn decided to resort to the Constitutional Tribunal instead? Those and other absorbing questions might come to the mind of the reader. All those questions are yet empirical in nature and cannot be answered by means of a bare examination of normative models of judicial behaviour and/or analysis of the concerned judicial pronouncements. In other words, they would require a comprehensive, interdisciplinary research in order to be addressed and ultimately answered.

Nearly from the beginning of the existence of the European Communities, later the European Union, political and legal scholars have been aiming at providing multifarious and frequently competing theories regarding the problem of the determinants of behaviour of

²³ Judgment of VAC in Lublin of 11 February 2005, SA/Lu 690/004.

²⁴ Judgment of VAC in Łódź of 23 June 2005, I SA/Łd 1059/04.

²⁵ See case C-313/05 *Maciej Brzeziński v. Dyrektor Izby Celnej w Warszawie* [2007] ECR I-513.

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national judges in the process of European Union integration. This interdisciplinary stream of thought, which clearly goes beyond the narrow theoretical and doctrinal legal considerations, pays attention to, *inter alia*, the issues of judicial co-operation and dialogue between the European Court of Justice and national judiciaries and especially the role national judges play in this process. Individual writers focus on, for instance, the role of the ECJ in the integration processes, the cooperation between the ECJ and national constitutional courts, the reasons of the judicial dialogue between the European and the national judges (or the lack thereof) or the role national litigants play in the preliminary reference procedure. In the opinion of the scholars and in accordance with the evidence presented by them, different factors bear on the way judges behave when confronted with EU law. This stream of judicial politics is represented by Slaughter, Mattli, Stone Sweet, Weiler, Micklitz, Wind and Alter, to name just a few.²⁶ Without tracking the intricacies of various alternative explanations of the national courts' acceptance of the doctrines of supremacy and direct effect and their support for the preliminary ruling procedure any further, suffice it to say that the literature offers four general forms of explanations of national courts participation in the processes of legal integration in Europe. Those are: legalism which rests on the authority of the law argument²⁷, neo-realism which assumes that the behaviour of national judiciaries and their approach to EU law is mostly motivated by national political and economic interests²⁸ and neo-functionalism which

²⁶ The volume *The European Court and national courts – doctrine and jurisprudence. Legal change in its social context* edited by Slaughter, Stone Sweet and Weiler published in 1998 is one of the most outstanding, interdisciplinary and complex works on the relationship between the ECJ and the courts of Member States. In this book various academics undertake an attempt to illustrate the process of reception of EU law by national courts and the reasons thereof. The contributions come from both legal and political science. For more about different accounts of legal integration in the framework of the European Union, judicial politics and theories attached to this see for instance: Volcansek (1986); Weiler (1993); Selck et al (2007); Alter (1998); Alter (2009); Kilpatrick (1998); Mattli&Slaughter (1998); Burley&Mattli (1993); Mattli&Slaughter (1996); Golub (1996); Micklitz (2005); Wind (2010).

²⁷ Legalists, also called formalists, assume that the jurisprudence of the ECJ is binding on national courts and for that reason national courts fulfill the requirements which EU law puts on them. Expressed differently, the acceptance of the ECJ's jurisprudence by national courts rests on its authority and the 'power of the law'. The situations when judges refuse to apply EU law may have their roots in misunderstandings or lack of knowledge on part of judiciary. Hence, national judges fulfill the responsibilities put on them by the ECJ due to legal logic and reasoning. Weiler claims that although most formal and for that reason most naive theory does have a significant force, see Weiler (1993), p.423.

²⁸ Neo-realists suggest that national governments and political concerns influence the behaviour of national judiciaries and their approach to EU law. In accordance with the neo-realist theory, a pure calculation of the national political and economic interests bear on the way judges proceed with EU law and accepts the principle

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basically amounts to judicial empowerment theory and puts forward that particular personal motives and objectives and self-interest encourage judges and other legal actors to participate in the process of legal integration within the EU.²⁹ Finally, the inter-court competition theory, which is a nuanced stream of the judicial empowerment doctrine, is based on the thesis that national courts use EU law and participate in the dialogue with the ECJ in order to maximize their judicial interests in the process of “bureaucratic struggles” between different levels of judiciary.³⁰ While all those theories are accused of not being free from drawbacks and weaknesses³¹, they do, however, provide many relevant and interesting insights and clues on how and foremost why judges do (not) participate in the process of legal integration within the European Union.

of supremacy of EU law and the political actors may influence the courts through various channels. Whereas there is some evidence that may indeed judges response to political preferences and political actors may try to influence the judicial behaviour, such evidence is not sufficient to acknowledge the neo-realist theory valid, for more see Alter, *National courts acceptance of European Court Jurisprudence: a critical evaluation of theories of legal integration* [in] Slaughter et al (1998), pp.234-238

²⁹ Neo-functionalism focuses on individual judges and other actors and their interests in the process of EU integration. In accordance with this theory, the ECJ provided legal actors with various personal incentives which aim to encourage them to participate in the processes of legal integration. In that sense, the national courts might make use of the preliminary ruling procedure for different motives which in general fall under the concept of the judicial empowerment. The manner the judges are empowered may take various forms, for instance it allows them to conduct judicial review – a task which would normally be reserved for constitutional courts - or consider more sophisticated judicial problems and legal inquiries. This thesis is based on the assumption that judges work to enhance their own authority in order to control legal and political outcomes and to reduce the control of other governmental institutions. For more see for instance Stein (1981) and Weiler (1994). For a general overview see Stone Sweet (2000), pp.164-165 and Stone Sweet&Brunell (1998a). Another stream of judicial empowerment doctrine emphasizes the crucial role national litigants and private actors have played in establishing and enhancing the processes of legal integration within the Union. EU law allowed national actors to protect their rights and interests flowing therefrom before national courts. In consequence, private actors provided national courts with new issues and questions whereby they activated the preliminary reference procedure and kept the machine running. This thesis is closely associated with the theory of legal integration as the result of transnational processes which claims that the level of preliminary references from the Member States depends on the intensity of transnational commercial activity and the density of EU law. For more see: Burley&Mattli (1993); Mattli&Slaughter (1998); Stone Sweet&.Brunell (1998b); Mattli&Slaughter (1996).

³⁰ Alter’s theory of inter-court competition is rests on the assumption that the references to the European Court of Justice should be seen in the context of competition between various judicial actors, see Alter, *Explaining national courts acceptance of European Court Jurisprudence: a critical evaluation of theories of legal integration* [in] Slaughter et al (1998), pp.227-252.

³¹ In that regard, the legalist theory is seen as too naïve, the realist theory does not seem to be sufficiently substantiated by evidence, neo-functionalism is not capable of explaining, *inter alia*, the different trends between different Member States and within the States themselves, see Alter, *Explaining national court acceptance of European court jurisprudence: a critical evaluation of theories of legal integration* [in] Slaughter et al (1998), pp.229-246. The inter-court competition theory is, in turn, criticised for seeing the judiciary through the perspective of competition and power seeking, see Micklitz (2005), pp.432-436.

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The present research project runs parallel to the aforementioned studies in trying to understand the way national judges behave in the context of EU law and explaining whether and how the judges adapt to the new legal circumstances, i.e. the way judges approach EU law and fulfill the expectations following therefrom. However, it takes a different, more pragmatic, point of departure and is premised on a distinct theoretical framework whereby it adds another perspective to the problem. In order to achieve this, the present study takes a step back and looks at the process of the impact of EU law on the daily functioning of national judges and the way national judges perceive the role of EU law in their daily practice by focusing on three set of problems which relate to: the *knowledge* of EU law among national judges, their *experiences* with resorting to it and the application thereof and their *attitudes* towards the new role imposed on them by EU law. In that sense, the study investigates the process of Europeanisation of the functioning of national judges from a more aggregate level, that is to say it addresses the problem of general reception of the legal order of the Union and the legal expectations imposed by it by national judges. For that purpose the project turns to the stream of socio-legal theory.³² The foregoing implicates that next to applying the black-letter method this study also employs social science research methods which go beyond the normative and theoretical models of the functioning of national judiciaries. By employing a distinct methodological and theoretical approach, this study provides new insights into the functioning of national judges in the context of EU law.

Socio-Legal Perspective

By approaching an extensive group of Polish civil judges this study provides empirical, i.e. quantitative and qualitative evidence which illustrates the impact of EU law on the daily functioning of national judges and the way the judges approach the law of the European Union and the tasks following therefrom. In that sense, the picture of the functioning of national judiciary in the EU capacity is drawn from a judge's individual and therefore also subjective perspective.

³² Fix-Fierro (2003), p.139 provides a brief and concise account of the sociological model of the law and claims that "(...) the sociological model of the law, law is not about logic, but about social structures, variables, factors, attitudes and the like, or, more simply, about 'how people actually behave' (...)"

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The choice of Poland is motivated by several reasons. First, Poland is a New Member State³³ of the European Union which, in contrast to the Old Member States, is not yet given much attention in the academic writing.³⁴ The process of implementation of the enormous body of EU law into the Polish legal system, which was the main formal requirement upon the accession to the Union, was rather hasty and pressured.³⁵ As opposed to the judges in the Old Member States, who were gradually and step by step getting familiar with the legal changes imposed by the law of the European Communities, later the Union, the Polish judges did not have much time to adjust to the new legal circumstances, it was rather a “shock therapy.”³⁶ Second, soon after the country joined the EU the Polish Constitutional Tribunal indicated that it is not willing to unconditionally accept the supreme position of the law of the Union which, arguably, might induce various problems attached to the exercise of the new EU law powers by national courts of lower instance.³⁷ Third, shortly before the commencement of the present study, a parallel project concerning the functioning of national judges as EU judges in the Netherlands and Germany – two Old Member States of the Union³⁸ - was initiated (hereinafter HiiL Report).³⁹ In that sense, gaining an empirical data for Poland would allow to highlight the differences between the functioning of the judges in the New and Old Member States of the European Union. One could namely assume that there should be considerable disparities in the manner judges from the Old and New Member States approach and accommodate EU law

³³ The term New Member States refers to those states which joined the EU in the process of so-called Eastern Enlargement in year 2004 (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia) and 2007 (Bulgaria and Romania).

³⁴ See Reimann (2002), p.692. It should yet be acknowledged that the body of writings concerning the judiciaries in the New Member States is increasingly growing, the most recent example concerning all New Member States is the comprehensive volume edited by Łazowski (2010).

³⁵ From Łętowska&Wiewiórowska-Domagalska (2007), pp.280-281.

³⁶ From *ibid*, p.280. The authors claim that “Polish lawyers had to accept all these regulations at once and be prepared for the far-reaching consequences of such changes”, see p.281.

³⁷ See judgment of the Constitutional Tribunal on the European Arrest Warrant of 27 April 2005, P 1/05 and judgment of the Constitutional Tribunal on the Accession Treaty of 11 May 2005, K 18/04.

³⁸ The Federal Republic of Germany (West Germany) and the Netherlands are two original founding states of the European Communities. The German Democratic Republic (East Germany) became part of the European Community as part of a newly united Germany which was formally concluded on the 3rd of October 1990 after the fall of the Berlin Wall in 1990.

³⁹ Project by Nowak, Amtenbrink, Hertogh and Wissink which commenced in 2007 and was financed by the Hague Institute for the Internationalisation of Law (HiiL). The project resulted in a publication: *National Judges as European Union Judges. Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands*, Eleven International Publishing, The Hague 2011. In the present study the term ‘HiiL Report’ refers to this final publication.

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in their daily practice. More precisely, it could be anticipated that the judges from a New Member State might lag behind their counterparts from the Old Member States in the manner they adapt to the legal circumstances imposed by the law of the Union for the reason of, for instance, a lack of adequate EU law knowledge or limited experiences with the application thereof. Fourth, the affinity of the author with the Polish legal system, the national legal culture and the local language naturally implied the respective choice.

The present study is a descriptive attempt at evaluating and explaining how and why Polish civil judges of lower ordinary courts participate in the process of legal integration within the European Union. Put differently, this study attempts at looking how national judges approach EU law and perceive its role in their daily judicial decision-making. For the foregoing purpose, the study focuses on three *a priori* established set of problems which relate to the knowledge of EU law and of the mechanisms of its application among national judges, the daily experiences of judges with the application of EU law and their personal attitudes towards the law of the European Union and the new role it imposes on them and the Union itself. The three clusters of variables are scrutinized in a broader institutional and operational legal framework of the daily judicial functioning. In that sense, the study first establishes the formal, legal context in which the judges function and respectively it focuses on the way judges **personally** construct the EU legality, the way they perceive and understand their function as EU law judges and the way they experience the law of the European Union in their daily practice.

By and large, the present project is guided by the theoretical framework provided by *Legal Consciousness* studies whereby it maps the way European Union law is received and operated in the everyday practice of the courts and illustrates the potential motives that might drive national judges to participate (or not) in the process of legal integration within the Union and the (practical) problems they might come across while exercising the new EU law competences. It follows from the foregoing that a part of the problems which are touched upon in the present study is of extra-legal character and therefore has largely been neglected in the academic legal writing. This study does not aim at providing clear-cut and rigid answers to all the questions which have been raised so far. Instead, it aims at drawing an aggregate and more nuanced picture of the judicial behavior in the context of EU law, indicating the

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problems attached to the judicial functioning vis-à-vis EU law and signaling the potential factors which may have influence thereupon.⁴⁰ The foregoing is achieved by applying a socio-legal methodology whereby it enriches the increasingly growing body of empirical research in law.⁴¹ One of the ultimate goals of this study has a pragmatic and educational dimension, that is to say it aims at delivering a set of means that could possibly facilitate the functioning of the national judges as EU judges. With everything considered, this study focuses on the Polish civil judges and the way they think and act while dealing with the law which is imposed from the outside of the state, that is to say when they deal with European Union law.

Rather than focusing on the field of administrative law and jurisdiction, which have traditionally been very closely intertwined with the law of the European Union, the present study takes as its focal point the field of civil law and jurisdiction which has been subject to an intense Europeanisation process only in the course of the last two decades and is therefore paid a rather scant attention on part of legal scholars. What is more, it concerns the functioning of lower court judges, that is first and second instance courts, the operation of which is mostly unexplored in the academic writing.⁴² Eventually, it also juxtaposes selected elements of the gained empirical evidence with similar evidence following from the parallel project for Germany and the Netherlands (HiL Report).

Five themes are central to this book. First, the theoretical and methodological premises of the present research project are discussed. Second, the legal framework of the study is illustrated. In that regard, the process of Europeanisation of the national legal systems and the implications thereof for the national judiciaries are touched upon and, subsequently, the factual obligations which are put on national judges by means of EU law are discussed. Put differently, Chapter 2 addresses the issue of the theoretical model of a national judge as an EU law judge which follows from the EU law expectations. In Chapter 3 the legal environment comprising the elements of the judicial architecture in Poland is elaborated upon. Such an

⁴⁰ See Oldfather (2007) for a general overview of interdisciplinary research into the problem of judicial behaviour and the variety of methodological tools employed for that purpose.

⁴¹ See Ulen (2002), p.875 who discusses the role of empirical and experimental approaches to the study of law and claims that “increased empiricism in the law is vital to the future of the law as a science.”

⁴² Traditionally, the most academic attention is paid to the functioning of the national constitutional and supreme courts.

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exercise is necessary to understand the institutional and operational context in which the concerned judges operate and to grasp the potential institutional obstacles to the fulfillment of the expectations stemming from EU law. Chapter 4 and 5 illustrate the quantitative and qualitative findings gained in the course of the empirical study. Next, the comparative chapter which pulls together selected results for the Netherlands and Germany follows. Importantly, the conclusions included in each chapter are of a tentative and generalized character. It is the purpose of the last part of this study to compile all the findings following therefrom in an attempt to tell the story of the functioning of Polish civil judges as EU law judges to the fullest extent possible. Next to that the last part of the work proposes a set of recommendations and solutions which could possibly facilitate the functioning of national judges in their EU capacity.

Chapter 1

Theoretical and Methodological Premises

1. Introduction

It has become clear from the preceding General Introduction that in order to see how judges function in the context of EU law the present study not only explores the field of strict law but it also seeks to answer the question whether and what (extra-)legal phenomena may bear on the operation thereof. Hence, the study widens the perspective in which the law operates by other determinants, be it social, economic or cultural. What has been argued so far is that a pure normative and formal legal theory is incapable of providing a good explanation of judicial behavior and should be discarded as unsatisfying. As it is claimed “(...) normative legal theory rules out most systematic behavioral inquiries about law; it treats legal theory as largely distinct from social scientific inquiry.”⁴³ Hence, it is necessary to turn towards the empirical legal theory and adapt a distinct methodological approach which makes it possible to provide “a more nuanced understanding of law and legal institutions.”⁴⁴ This chapter takes as its point of departure the underpinning theoretical premises of the project. Subsequently, the research questions are developed, followed by the methodological design applied in the present study. Eventually, the theoretical and methodological limitations of this study are discussed.

⁴³ From Cotterrell (1989), p.217.

⁴⁴ From Franck (2008), p.804. The author elaborately discusses, *inter alia*, the problem of the empirical dimension of scholarship in the area of law, methodological aspects thereof and the benefits of integrating the empirical prism into the legal scholarship.

2. The overarching theory

2.1. Theory of legal adjudication: Legal Realism and the New Legal Realism

It can be observed that the underlying theoretical framework of this research is to some extent underpinned by Legal Realism (LR) – a family of legal theories of adjudication that was developed in the United States and Scandinavia in the first half of the 20th century.⁴⁵ Realists have found a disjunction between the ‘law in the books’ and ‘the law in action’⁴⁶ or put differently, between what the law ought to be and what the law is in practice. The most basic assumption of this theory was that judges base their decision on non-legal considerations rather than on the law itself.⁴⁷ It pointed at the personal and accidental factors in judicial behavior.⁴⁸ The realists concluded that law is often rationally indeterminate. The theory is an empirical, naturalized and descriptive theory of adjudication that seeks the causes of judicial decisions.⁴⁹ For that reason, many of the realists believed in the necessity to apply an interdisciplinary approach to law.⁵⁰

The respective theory is too broad to be considered here in more detail and many of its elements are not applicable to the context of the present study.⁵¹ Therefore it should be sufficient just to keep in mind that the LR has considerably borne on the development of other, distinct streams of legal thought such as law and economics, critical legal studies or law-and-society, without assuming too much about other underlying philosophical elements of

⁴⁵ It is claimed that legal realism was rather a movement in thought and work about law, not a school of legal thought, see Llewellyn (1931), pp.1233-1234.

⁴⁶ See Leiter (2002), p.24. Legal realism was exposed to hard criticism for being weak, inconsistent, based upon false premises and being at odds with the whole idea of normative legal theory. See also Green (2005), pp.1915-2000; Fisher et al (1993); Cotterrell (1989), pp.182-215; Green (2009) on the discussion on differences between realists and positivists.

⁴⁷ Realists claimed that in deciding cases “(...) judges react primarily to the underlying facts of the case, rather than to applicable legal rules and reasons (...)”, see Leiter (2001), p.278.

⁴⁸ Some of the realists that belonged to the so-called ‘idiosyncrasy wing’ asserted that the personality of the judge is a core factor in the process of adjudication, see Leiter (2010), pp.258-259.

⁴⁹ See Leiter (2002), p.16.

⁵⁰ Realists looked to behaviorist psychology and sociology in order to explain how the law works. For those reasons, some accused the legal realism of simply falling under the category of behavioristic psychology.

⁵¹ Most importantly, the legal realism theory seems to entirely downplay the legal factors which are at stake. Moreover, it the theory developed in the common law system and for that reason many of its elements are difficult to be utilized for the sake of this study.

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it. More recently a school of New Legal Realism (NLR) which reaches for the theoretical grounds of Legal Realism has emerged.⁵² It aims at studying the law from the bottom-up approach⁵³ and focuses on the role of law in lives of ordinary people but also on understanding the underlying reasons of judicial decisions by establishing hypotheses and looking into large sets of data.⁵⁴ By combining diverse social science methods and perspectives (so-called integrative interdisciplinary approach) the NLR allows to construct a very nuanced and rich picture of the operation of the law. In contrast to LR, the NLR does not disregard the role of law as it stands in the books since it assumes that it constitutes a part of the overall binding legal system. It also pays attention to transnational and international issues and domains and the aspect of legal pluralism and human rights.⁵⁵ The goal of NLR is to “create translations of social science that will be useful even to legal academics and lawyers who do not wish to perform empirical research themselves, while also encouraging translations of legal issues that will help social scientists gain a more sophisticated understanding of how law is understood “from the inside” by those with legal training.”⁵⁶ Finally, the NLR promotes new teaching methods in legal education in which traditional legal material would be necessary but not sufficient means to the proper understanding of the law.⁵⁷ With everything considered, it can be concluded that the present study fits into the NLR stream.

2.2. Law-and-society and Legal Consciousness theory

Having established that the general theoretical framework underpinning the study could be seen in the light of the NLR stream it is essential to consider law-and-society theory which is classified as one of the successors of the realism movement and is, basically speaking,

⁵² In June 2004 a first New Legal Realist Conference took place in Madison, Wisconsin, US which was a response to increasingly emerging voices from scholars with regard to the necessity of more theoretically and methodologically rich empirical research into legal setting. For more see for instance Erlanger et al (2005).

⁵³ The motto of the NLR reads: “Studying law from the ground-level up to the top”, see the leading website of the NLR: <http://www.newlegalrealism.org> (last accessed 20 March 2012).

⁵⁴ See Miles&Sunstein (2007), p.2.

⁵⁵ For more see Merry (2006).

⁵⁶ From Erlanger et al (2005), p.336.

⁵⁷ Ibid, p.359.

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concerned with the effects of law on behavior of individuals.⁵⁸ As it will be shown, different areas of contemporary law-and-society theory provide the present study with many interesting theoretical, methodological and empirical clues that can be employed therein.

The present study addresses the issue of how the law which is enacted and imposed from the outside of the state, and therefore could be seen as ‘foreign’ (nonstate) law, is approached by a closed group of actors who deal with law on their daily and professional basis.⁵⁹ It will thus explore the way officials behave when they are faced with questions of European Union law which exists in parallel to the national legal order.⁶⁰ However, not only are the systems parallel but they are also intertwining. It is generally assumed that in modern legal systems state officials accept the authority of the state law and consequently apply it.⁶¹ Yet, in the present research the ‘foreign’ law is considered and for that reason the aforementioned assumption is put into question. Law-and-society theory recognizes the social consequences of legal pluralism and parallel and intersecting legal orders and emphasizes the necessity of further exploration thereof. That is to say, it points out the desirability of research on how different and intersecting legal dimensions affect behaviour of groups or individuals and *inter alia* officials of the state.⁶² Be that as it may, there has been very little research with regard to that matter so far.⁶³ Seen in this light, this study partly occupies that niche.

Another stream of scholarship which constitutes the overarching theoretical and methodological framework of the present research originates from the already mentioned legal

⁵⁸ See Cotterrel (1989), pp.207-208. Law-and-society movement developed in the US and other countries from the 1960s onwards. It originates in sociology of law and is mostly concerned with the impact and/or effectiveness of law, i.e. it examines the impact of law on behavior.

⁵⁹ Using the term ‘foreign law’ for the law of the European Union is necessarily a simplification used for the sake of explaining theoretical and methodological underpinnings of the study. This ‘foreignness’ of the law of the European Union should be understood in the light of the fact that EU law is enacted outside of the state (nonstate law) and not by the national legislator. As a matter of fact though, EU law should be seen as an integral part of the national legal order, not as a foreign, or alien, element to it. The ECJ was clear on that point in case 6/62 *Flaminio Costa v. E.N.E.L* [1964] ECR 00585, paras.3 and 7 of the summary where it stated that the Treaty created its own legal system which became an integral part of the legal orders of the Member States.

⁶⁰ The term ‘parallel legal orders’ is used to describe a situation when a society has more than one legal order, i.e. apart from the state law also other systems (international, religious) exist within the same society or territory.

⁶¹ See Galligan (2006), p.295.

⁶² *Ibid*, pp.169-172.

⁶³ One of the existing studies is a study on the dilemmas that are faced by Indonesian judges when they have to decide cases on the basis of competing - customary, state and religious - legal orders; see Bowen (2000), pp.97-127.

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consciousness (hereinafter LC) studies. The notion of legal consciousness is rather a broad one and encompasses different dimensions but it always refers to the process of law perception and understanding and the process of compliance with law. Galligan has presented six ways legal consciousness can be understood. The first one reflects the idea that the very expression of social relations is an expression of law. The second sense of legal consciousness refers to the manner officials and citizens perceive legal orders as valid and binding. The third meaning of legal consciousness concerns the sense of commitment to the legal order and specific laws.⁶⁴ It is rather apparent that both dimensions are closely intertwined. The underlying idea of the fourth sense is based on the assumption that laws influence the way people perceive wider issues and entails creation of new expectations that go beyond the law as such.⁶⁵ The fifth dimension deals with the way people assimilate ideas about law directly or indirectly. Eventually, the sixth sense of legal consciousness relates to the law as an instrument used to advance the interests of individuals and groups. This sense is mostly associated with disadvantaged or marginal groups in society. For the purposes of the present study the second and third form of legal consciousness are most relevant.

Another constitutive theory in this field has been established by Ewick and Silbey who constructed three varieties of legal consciousness. The authors of *The Common Place of Law: Stories from Everyday Life* deal with ordinary people's understandings of the law and the varieties of legal consciousness that they reveal. In a nutshell, they explore how different people perceive, imagine, use, respond to, invoke and experience the law and legality.⁶⁶ In that respect, legal consciousness focus on the way the law is used by individuals. However, in order to know the uses of law it is necessary to know why, when and how the law is used, but also why and when it is not employed.⁶⁷ Legal consciousness is about the way people behave but also about the attitudes they have to actions which may be undertaken.⁶⁸ According to the authors, the phrase legal consciousness is used to “name participation in the process of

⁶⁴ Galligan (2006), pp.336-337.

⁶⁵ Ibid, p.338.

⁶⁶ See Ewick&Silbey (1998) and Ewick&Silbey (1992). The authors collected accounts of the law from more than four hundred people originating from different social and ethnic classes and with different educational backgrounds. On the basis of those accounts they distinguished different forms of legal consciousness.

⁶⁷ See Ewick&Silbey (1992), p.737.

⁶⁸ See Hoffmann (2003), p.694.

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constructing legality.”⁶⁹ The concept of legality is distinct from the concept of the law. Whereas the law is reflected in a set of formal and normative institutions, the legality will refer to the way those legal institutions are shaped and translated in everyday action.⁷⁰ The notion of legal consciousness is therefore employed in order to identify the manner particular individuals understand what the law is and what it means for their social relations. At this point the notion of a ‘particular individual’ should be emphasized. By focusing on ‘individual’ or ‘micro’ experiences of law, the legal consciousness studies distinguish themselves from the legal culture studies which concern a ‘macro’ or group phenomenon.⁷¹ At the same time legal culture and legal consciousness intersect and intertwine with each other whereby they visualize how particular actions amass into institutional forms.⁷²

Against the above-described background, the authors of *The common place of law* identified three forms of legal consciousness, these are: *before the law* (distinctive consciousness of legality), *with the law* (instrumental consciousness of legality) and *against the law* (resistant consciousness of legality). The particular varieties of legal consciousness carry the following features:

- Persons being *before the law* perceive the law as a distinct and remote, autonomous, majestic, separate, impartial but authoritative and mostly predictable sphere of law that can be engaged but only in particular situations. They may sometimes feel frustrated about their own

⁶⁹ From Ewick&Silbey (1998), p.45.

⁷⁰ See Blackstone et al (2009), p.633.

⁷¹ International encyclopedia of social and behavioral sciences (2001), p.8624: “Legal culture refers to an aggregate level (macro or group) phenomenon: legal consciousness usually refers to micro level social action, specifically the ways in which individuals interpret and mobilize legal meanings and signs.” There is no rigorous concept or definition of legal culture, the notion requires therefore much caution. The broadest definition of legal culture belongs to Friedman who refers to it as the “ideas, values, expectations and attitudes towards law and legal institutions, which some public or some part of the public holds”, see Friedman (1997), p.34, on the discussion with regard to the concept of legal cultures. Friedman distinguishes between lay legal culture which is hold by the general public and internal legal culture hold by legal professionals such as lawyers and judges, see Friedman (1977), p.76. Cotterell (2011), p.11 claims that “(...) legal culture should be seen as a multi-faceted view of legal experience presented especially through the perceptions, words and actions of those participating in it.”

⁷² From International encyclopedia of social and behavioral sciences (2001), p.8628.

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powerlessness.⁷³ Persons *before the law* see the law as “somewhere else, a place very different from everyday life (...) as a realm removed from ordinary affairs.”⁷⁴ Persons before the law distinct themselves from it.⁷⁵ Subjects before the law are convinced of legitimacy of the law which however remains a distinct domain of life.

- Persons acting *with the law* see the law as an axiomatic part of their daily practice which they eagerly engage with.⁷⁶ It is a game that can be played and an available and effective instrument that can be used, as a tool which allows achieving different objectives. In this account “legality is understood to be a game of skill, resource, and negotiation, where persons can seek their own interests legitimately against others.”⁷⁷ Persons *with the law* engage with the law and utilize it instrumentally.
- Persons *against the law* can be characterized as resistant to it, as trying to avoid or omit it. They feel powerless and have cynical attitude to it. Law is observed as an arbitrary product of power *against* which they struggle.⁷⁸ Subject against the law feel “virtually incapacitated”⁷⁹ and *resist* and distrust the law.⁸⁰

It is yet important to bear in mind that the above-explored forms of legal consciousness may not necessarily accurately correspond to any particular individual since “(...) an individual might, in the context of various interactions or events, express all three forms of consciousness (...) a person may express a multifaceted and possibly contradictory

⁷³ Ewick&Silbey (1998), pp.47, 74-108.

⁷⁴ Ibid, p.47.

⁷⁵ Ibid.

⁷⁶ Ibid, pp.48, 108-164.

⁷⁷ International encyclopedia of social and behavioral sciences (2001), pp.8627-8628.

⁷⁸ Ewick&Silbey (1998), pp.28, 47, 165-220.

⁷⁹ International encyclopedia of social and behavioral sciences (2001), p.8628.

⁸⁰ See Nielsen (2000), p.1060.

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consciousness.”⁸¹ In that sense, the scholars also concluded that legal consciousness of a specific individual may comprise contradictory understandings and usages of the same legal phenomenon.⁸² By establishing how individual embodiments of consciousness of law operate simultaneously, Ewick and Silbey show that legality is one, enduring construction.⁸³

It is one of the primary objectives of the present study to see whether the theory established by the above-mentioned authors may in any way translate in distinct research framework and circumstances, that is to say whether it can be applied to legal professionals who in their institutional authority permanently deal with law and legal rules. Put differently, it is aimed to see whether distinct formations of legal consciousness (*with, before, against*) with regard to EU law are present among national judges. Alternatively, depending on the outcomes of the empirical study, it might be necessary to reconceptualise the theory of legal consciousness in order for it to be better suited for the purposes of the judiciary.

The foregoing observations evidently trigger various theoretical and methodological inquiries with regard to the present study. The most important and obvious reason thereof is the fact that law is an axiomatic part of the practice of courts, it is permanently present in their everyday work and it has a professional dimension. Judges - professional legal actors - are supposed to be the mouth of law and any professional activity they perform is supposed to be premised thereon.⁸⁴ In contrast, most of the characters featuring in *The common place of law* rarely experienced the so-called common existence and operation of the law since it was mostly an intrusive and remote aspect of their everyday life.⁸⁵ In other words, the presence of law in everyday life of a judge has a totally different nature than that of an ordinary citizen. In that sense, one can speak of legal consciousness which is internal to the system of law. Legal consciousness which is ‘internal’ to the system of law stands in contrast to its ‘external’ form

⁸¹ Ewick&Silbey (1998), p.5.

⁸² See also Kostiner (2003), p.329.

⁸³ See Nielsen (2000), p.1060 who observes that “Ewick and Silbey’s typology is instructive but it is not meant to be a discrete set of options to describe the legal consciousness of particular individuals at particular times. Instead, in mapping the terrain of legal consciousness, Ewick and Silbey explain these prototypes as culturally available schema to be referenced and employed in different ways and at different times.”

⁸⁴ In accordance with Montesquieu (1832), p.99 judges are merely the mouth of law (*la bouche qui prononce les paroles de la loi*).

⁸⁵ See Ewick&Silbey (1998), p.15.

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which is presented by ordinary citizens.⁸⁶ For the foregoing reasons in the context of the present study, a law first perspective needed to be applied.⁸⁷ What is more, since the primary objective of the research project was to infer what role EU law plays in the daily judicial practice, it was necessary to focus on this aspect of adjudication. In that sense, the theoretical premises have been considerably narrowed down. Secondly, from the normative point of view, judges are to observe the law as it is enshrined in legal structures and sets of written and unwritten rules. Theoretically speaking, they cannot *resist* the law since by agreeing on becoming judges they become subordinate to the rule of law and are expected to conform to it. Those are undoubtedly legitimate observations and at the same time arguments which would speak against the reasonableness of establishing different forms of legal consciousness among judges. Nonetheless, the place EU law occupies in the daily practice of a national judge is distinct from that of national law. Regardless of what the doctrine says, EU law constitutes an element of adjudication which might be seen as imposed from the outside. The developments in national jurisprudence in different Member States evidently show that the doctrines stemming from EU have not been automatically accepted and integrated by national judges.⁸⁸ Furthermore, the EU legal order is autonomous and separate from the national legal order, although theoretically speaking it constitutes an integral part of it. Also, for a Polish judge, EU law is still a rather novel part of a daily practice, too some extent indeterminate and indefinite. Furthermore, the national institutional and constitutional frameworks including the jurisprudence of the national supreme courts might create situations when unequivocal legal answers are scarce and where judges can execute some discretionary powers. Finally, as observed by Ewick and Silbey, the form of legal consciousness may vary across time and it reflects knowledge and experiences with law. In that sense, it is worth examining to what extent the knowledge of EU law and a rather short experience with resorting to it might determine a judge's legal consciousness. For all the foregoing reasons, the assumption that a

⁸⁶ Hence, one can also speak of the external legal culture which is the legal culture of ordinary people and the internal legal culture which is shared by those who perform law related tasks in the society, see Friedman (1989), p.1580.

⁸⁷ Silbey (2005), pp.348 and 355. In case of popular legal consciousness the authors claim to avoid the so-called law-first perspective but rather focus on normal daily life of people and see how legal institutions and concept emerge in the daily practices.

⁸⁸ See note 19.

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judge conforms to (EU) law might be put into question. Finally, the purpose of the legal consciousness studies is not only to see how persons construct legality by (not)invoking the law but also to see how they make sense of law and what their attitudes towards and conceptions about the law are. As observed by Ewick and Silbey, legal consciousness is not only what people do but also “what they say”.⁸⁹ By inferring what the understandings of the law individuals have, Ewick and Silbey were enabled to establish what the role the law might possibly play in disputes they take part in. Likewise, by finding out how individual judges comprehend the role EU law plays in their practice, it would be possible to indicate how it will be operationalized. With everything considered, the study of legal consciousness in the context of present research aims at exploring how judges conceive of EU law in relation to their daily practice whereby it allows to see whether judges comply with it and when they think it is necessary to comply with it.

One of the most tangled aspects of legal consciousness studies is the extent to which the phenomenon may be discovered, defined, recorded and measured, if at all.⁹⁰ The initial theoretical and at the same time methodological assumption of the present study was to explore and assess the forms of legal consciousness through the use of six vignettes which were included in the questionnaire.⁹¹ In the context of the present study, a vignette is a brief description of a hypothetical legal problem which the judge could potentially deal with. Each problem was clearly linked to an EU law aspect. The three different forms of legal consciousness were reflected in the vignettes; two vignettes for each form. In line with Silbey and Ewick’s theory it was assumed the form ‘with the law’ would be mirrored in an instrumental use of EU law. In that sense, judges with the law would use EU law only when for instance the parties to the proceedings wished to rely on EU law or when EU law would

⁸⁹ See Ewick&Silbey (1998), p.46.

⁹⁰ See Hertogh (2004), pp.461-463 on the empirical methods which used to be employed by researchers in the earlier phase of the legal consciousness discourse and the methods which are used in more recent studies. The author notices a shift from purely statistical methods which were commonly used in the 1970s to the methods which fall under the category of descriptive ethnography.

⁹¹ The method is based on the technique of anchoring vignettes which was developed in 2004 by King et al and used in social sciences in order to avoid different interpretations of identical questions by respondents and to provide them with a common reference point. See King et al (2004), pp.191-207 and King&Wand (2007), pp.46-66. The anchoring vignettes website: <http://gking.harvard.edu/vign/> provides information on the issue and a library of examples.

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offer a better solution of the dispute. Furthermore, it was established that judges ‘against’ the law would simply disregard EU law and the principle of its supremacy. Finally, judges ‘before’ the law would unconditionally observe the principle of supremacy of EU law and consequently unconditionally apply EU law. In their preferred answers to the vignettes, judges had to decide whether they would proceed in the same or in a different way than the hypothetical judge pictured in the respective vignette. Alternatively, judges could indicate that they would not know how to proceed. The answer the judge would opt for would allow to categorize her as falling into one of the legal consciousness schemes. Each vignette provided room for explanation of the respective choice.

3. Research questions

As it has become apparent, the overarching objective of the present study is to find out how national judges experience EU law in their daily practice and what the reception of the legal order of the EU and the judicial obligations following from it is among the Polish civil judges of lower courts. The foregoing inquiry cannot be answered in vacuum though. Therefore, it is necessary to respond to two following general research questions:

- What are the knowledge of, experiences with and attitudes towards European Union law among national judges of lower courts adjudicating in the area of private law in Poland?
- Are Polish civil law judges ‘before’, ‘against’ and ‘with the law’ of the EU and if so, when are national judges ‘before’, ‘against’ and ‘with the law’ of the EU?

In differentiating and analyzing the way the judges experience and perceive the law of the European Union, three general clusters of problems had been determined. Those three clusters revolve around the issues attached to the knowledge of, experiences with and attitudes towards EU law.

Knowledge of EU law

The European Union has been built and based on law. A good knowledge of it for those who are obliged to apply seems a basic and core condition for the proper functioning of national judges as EU law judges.⁹² National judges are thus expected to possess an adequate level of knowledge and understanding of European Union legal system. Be that as it may, the knowledge of EU law cannot be taken for granted. Hypothetically, huge volumes of legal measures produced in Brussels/Strasbourg in combination with the Luxemburg case-law may possibly pose a considerable obstacle to any ordinary national judge.⁹³ Also, the knowledge of judges with regard to European Union law depends on their training and education in the field and their access to the EU provisions and case-law of the ECJ which presumably are hampered. In that regard, it could be hypothesized that national judges are more familiar with national law sources than they are with EU law sources. The empirical part of the survey which relates to this problem explores what the level of EU law knowledge among national judges is, how judges can obtain it and whether they can easily access the sources of EU law. This part does not aim at exploring what exactly the judges know about EU law but what the general level of that knowledge is and how judges remedy contingent lack of such knowledge. Exemplary questions regarding this part of the study read: how would you assess your knowledge of EU law? Which sources do you use to improve your knowledge of EU law? Is the EU law training offer satisfactory?

Attitudes towards EU law

In this part the personal attitudes and conceptions concerning EU law, EU integration and the new role which is put on national judges by means of EU law are investigated. The following questions are posed: do national judges perceive themselves as European Union judges? What

⁹² The importance of continuous education in the field of EU law is stressed by many scholars, see for instance Prechal&Van Ooik (2006), pp.12-14; Frąckowiak (2003), pp.313-319; Garlicki (2000), pp.194-195.

⁹³ See *The personal experience of a Hungarian national judge after the accession of her country to the European Union*, public hearing at the Committee of Legal Affairs, European Parliament, 11 June 2007, available online at: www.europarl.europa.eu/comparl/juri/hearings/20070611/marosi_en.pdf (last accessed 13 September 2011).

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are the attitudes towards the principle of supremacy of EU law and what are the views on the EU shared by the judges? What is the level of trust into the institutions of the Union? ⁹⁴

Some of the questions posed in this cluster clearly link to the issue of perceived legitimacy since, in accordance with a socio-legal concept of the notion, legitimacy is “basically a matter of procedures, faith in law, in processes and institutions, not in results (...) Legitimacy means an attitude (and behavior) about institutions and processes.”⁹⁵ Put differently, in the context of the present study the concept of legitimacy relates to the acceptance of and trust into the exercise of public power by the institutions of the Union as reflected by the national judges.⁹⁶ The issue of attitudes toward law naturally raises “the nagging question about the way attitudes translate into behavior.”⁹⁷ And yet, as observed by Friedman, it is rational to assume that such a relationship exists since, as it is suggested by the theory, attitudes people take towards law bears on the way they make use of that law.⁹⁸ The author also observes that the knowledge of the law is undoubtedly relevant for the attitudes towards law.

Experiences with EU law

In order to properly function in her EU capacity a judge must correctly understand the way a multi-dimensional legal system operates⁹⁹, that is to say she ought to understand the system of intertwining national and EU legal orders. The issue of experience is obviously very closely

⁹⁴ Several questions in this cluster were patterned on the standard inquiries employed in the regular Eurobarometer surveys concerning the public opinion across the EU which are conducted by the European Commission, for more see http://ec.europa.eu/public_opinion/index_en.htm (last accessed 13 December 2011).

⁹⁵ See Friedman (1977), p.141. In this context a descriptive or sociological concept of legitimacy is employed which is understood as a subjective judgement of the functioning of the institutions of the Union and the powers they exercise. The sociological legitimacy is, thus, different from the normative form thereof. It should however be observed that there are various definitions, aspects and sources of legitimacy. As claimed by Sadurski “while very important, the notion of ‘legitimacy’ is notoriously ambiguous, and many confusions would be avoided if the discussants clarified what notion of legitimacy they have in mind (...)”, Sadurski (2011), p.2. The author addresses the issue of *inter alia*, sociological versus normative legitimacy.

⁹⁶ See also Amtenbrink (2009), pp.12-17 and Momirov (2011), pp.32-36.

⁹⁷ Friedman (1977), p.77.

⁹⁸ *Ibid.*

⁹⁹ In the academic literature various concepts are used; the notions of multi-level, multi-layered, multi-centered or multi-dimensional legal order are used interchangeably even though they are not entirely overlapping. The term “multidimensional legal order” is borrowed from Amtenbrink (2009) who describes as intertwining “the legal orders of states with a new, supranational legal order”, see pp.23 and 44-53. See also Pernice (2009), pp.372-374.

linked to that of knowledge. Nevertheless, even a satisfactory knowledge of EU law does not necessarily result in a proper application of that law.¹⁰⁰ Moreover, such application may be hampered by national rules. Arguably, national judges, in order to understand the way multi-dimensional order operates and subsequently to operationalized it, are actually forced to change the way they perceive law and their own judicial roles. The two central questions in this respect relate to the actual experiences with the application of EU law in the daily practice and the feasibility of the rules of EU law application. Exemplary questions read as follows: what is the impact of EU law on the daily practice? What are the practical problems while applying European law? Are the obligations of harmonious interpretation and *ex officio* application of European law clear enough? Is the preliminary ruling mechanism comprehensible and practicable?

The specific inquiries that were included in the questionnaire which was distributed among the judges pertain to those three groups of issues. Subsequently, the semi-structured interviews revolved around those three aspects.

4. Methodological approach

4.1. Interdisciplinary study

The present study goes beyond narrowly defined legal research which is usually focused on a bare exposition of the current legal position. It integrates both legal and empirical, that is to say quantitative and qualitative methods based on fact finding. Thus, this research comes in the shape of an interdisciplinary study combining legal and social science methodology.¹⁰¹

The research methods are, on the one hand, a theoretical analysis of European and national judicial architecture and, on the other hand, an empirical assessment of daily functioning of the Polish civil judges in the context of the law of the European Union. Generally, the research can be described as a confrontation study between the law in the books

¹⁰⁰ See Garlicki (2000), pp.217-218; Wyrozumska (2000), pp.219- 228.

¹⁰¹ On the possibilities of interdisciplinary research into law, especially the pragmatic and positivist approach to the problem in question, see Van Klink & Taekema (2008).

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and day-to-day reality, i.e. law in action. As aforementioned, the empirical data collection circle adopts the scheme which has been developed in the context of the projects conducted for the Netherlands and Germany (HiiL project). The confrontation between theoretical standards, that is to say the expectations imposed on national courts by European law, and background realities, i.e. the way the judges function in practice while dealing with European law issues, was carried out through the distribution of a questionnaire among the judges and, subsequently, by conducting in-depth, semi-structured interviews with 25 of them.¹⁰² Finally, a comparative study was carried out, taking the results of empirical research for three countries, that is to say Poland, Germany and the Netherlands, into account.

All in all, explaining the functioning of national judges as EU judges is carried out from two points of departure. The first part of the study focuses on the way judges ought to behave and what is expected from them by means of EU law. In the second part a functional/factual approach is employed which tries to seek an answer to the positive question on how judges approach European Union law and why they behave the way they do.

4.2. Legal research

The main objective of this part of the study is to identify and describe features of the legal regime that are relevant to the actions of judges. It comprises, on the one hand, an analysis of the processes of Europeanisation of national laws and the legal expectations which are put on national judges by means of EU law and, on the other hand, the national legal architecture which includes the structures, mechanisms, legal instruments and techniques, procedures and remedies present in Poland and to a more limited extent in Germany and the Netherlands. It also signals the areas of friction between national and European Union law that may be essential to the understanding the way the judges function and apply EU law which in turn

¹⁰² See the following subsections on the exact execution of the empirical part of the study. Additionally, the relevant institutions responsible for training of the judges were consulted and four different 2, 3 or 4 days long trainings covering different aspects of EU law and teaching methods of EU law which were organized by the Polish National School of Judiciary and Public Prosecution across the country were attended. The participation in the trainings was also used to test the initial (paper) version of the questionnaire and to distribute information about the survey.

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allows to see whether the national legal framework creates any obstacles to the adequate functioning on national judges as EU law judges.

Simply put, the elaboration on the legal environment is approached in two ways. First, the obligations imposed on national judges by EU law are explored (top-down approach). Subsequently, the national legal and judiciary systems and the way they correspond with European law are examined (bottom-up approach). In analysing the judicial architecture in the European Union, the expectations imposed on national judges and national legal and judiciary systems and the place of the EU law therein the research employs classical methods applied in legal sciences such as a literature survey and an analysis of EU and national statutory law and case-law.¹⁰³ This part of research results in a theoretical and purely normative discourse on the legal position of the subjects in question from the lawyer's point of view.

4.3. Empirical research

In analyzing the functioning of national judges as EU judges and their knowledge, experiences and attitudes with regard to EU law the study turns away from the traditional doctrinal legal black letter analysis to instead embrace social science methods that seek to look behind the scene of formal law in order to discern the manner in which judges function. It has emerged from the foregoing discussion that the study aims at mapping the legal consciousness of national civil judges. Such an endeavor induces one constitutive question though, namely: whether and to what extent can the behavior and legal consciousness of judges be explored and measured in an objective manner? In other words, to what extent can a judge be reduced to a "statistical aggregate" only?¹⁰⁴ The answer to this question has important practical consequences and implications for the methodological inquiry choices.

¹⁰³ At this point it should be emphasized that the access to the jurisprudence of ordinary courts in Poland is heavily obstructed. In practice only the case-law of the Supreme Court is accessible while the pronouncements of ordinary courts are virtually inaccessible for the general public. This stands in contrast to the case-law originating from the administrative courts which offer an open on-line access to their jurisprudence.

¹⁰⁴ From Bogdan&Taylor (1975), p.4.

4.3.1. A mixed research design

Standard indexes can be used in order to objectively measure for instance the way judges assess their knowledge of law. Yet, it is questionable to what extent the conceptions, views and feelings with regard to EU law can be measured and understood by means of purely objective, quantitative data. For those reasons a mixed research design is applied to the empirical part of the study.

The first part of the empirical study was based on the distribution of questionnaires which delivered rich quantitative data that allowed to see what the general trends with regard to the knowledge of, experiences with and attitudes towards EU law among the judges are.¹⁰⁵ The second part of empirical research was based on a qualitative and subjective method, i.e. semi-structured interviews. This method allowed knowing judges personally and see them as they are construct their own legal reality and understanding of EU law. Moreover, it made it possible to explore the concepts the nature of which was lost in the quantitative approach, e.g. frustration or indifference. Put differently, the interviews assisted with interpreting and understanding the individual lived experience and practice with EU law. The method of qualitative interviewing brings the study to a research paradigm called interpretivism. Interpretivists assume that the social sciences ought to be concerned, not simply with quantifying what actually happens in social phenomena, but in providing an interpretation of events and phenomena in terms of how the people involved perceive and understand their own experience. The interpretivist framework of inquiry sees the reality that is local, culturally bound, relative and specifically constructed and rejects the notion of value-free research. Interpretivists look for understanding of a particular context, for the motives and intentions that direct human behaviour.¹⁰⁶

¹⁰⁵ Groves et al (2004) provide a very detailed overview of survey methodology, i.e.: sampling frames and errors, methods of data collection, guidelines for writing good questions, evaluation of survey and so forth.

¹⁰⁶ Interpretivism is interchangeably called constructivism or cultural theory, see Hantrais (2009), p.58. In accordance with Willis three research paradigms can be distinguished, i.e.: postpositivism, critical approach and interpretivism, see Willis (2007). However, different authors apply different classifications. Sometimes, interpretivism is viewed as a part of the critical theory. On the contrary, Bogdan and Taylor (1975) concern positivism and phenomenologist approach as the two basic ones while Chalmers (1982) lists five general alternatives, i.e. empiricism, postempiricism, critical theory, sociological and anarchistic. Collingridge&Gantt

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Traditionally, quantitative and qualitative methods and the research paradigms which underpin them were in stark contrast or even hostile to each other. This phenomenon is sometimes referred to as the paradigm wars. The contrasting epistemological, ontological and philosophical positions of the paradigms constituted the center of the problem.¹⁰⁷ However, the modern trend, based on the pragmatism position, is that of theoretical and methodological pluralism, that is to say the use of mixed methods and the integration of quantitative and qualitative data in one research (sometimes called triangulation or MMRD - Multiple Method Research Design).¹⁰⁸ Multiple-method researchers base their approach to data on a moderate relativistic epistemology that justifies the value of knowledge from many sources in place of elevating one source. The mixed-strategy approach is a point of departure for the present study as well. Such a methodological choice made it possible to examine the various facets of the posed research questions and to explore the different angles of problem at stake.¹⁰⁹ Put differently, the application of the mixed-strategy approach in the present study is underlain by the complementarity argument in accordance with which mixed approaches are employed in order to seek elaboration, enhancement, illustration, clarification of the results of one method with the results from another.¹¹⁰

(2008) list three approaches to qualitative studies, those are ethnography, existential phenomenology and grounded theory. All in all, there seems to exist kind of ambiguity in the field and the boundaries between the paradigms are somewhat blurred. Moreover, once we turn to the issue of research designs and techniques we encounter notable obscurity. Virtually almost every handbook on qualitative research presents a different view on the issue. This could be, however, explained by the fact the qualitative research has gained considerable popularity during the last decades and has witnessed increasing methodological pluralism.

¹⁰⁷ It should be underscored that some writers have been immensely reluctant to accept that quantitative and qualitative data can be combined. According to Kuhn the paradigms within the field are incompatible since their fundamental beliefs cannot be reconciled, see Kuhn (1970), pp.148-150. See also Hantrais (2009), p.98 for a table compiling the dominant features of quantitative and qualitative research methods and consequently the research paradigms.

¹⁰⁸ Triangulation, also called cross-examination, refers to the research tool based on more than one methodological tool. The purpose of triangulation is to validate the obtained data. In accordance with Cohen et al (2007), p.141 triangulation is “an attempt to map out, or explain more fully, the richness and complexity of human behaviour by studying it from more than one standpoint and, in so doing, by making use of both quantitative and qualitative data.”

¹⁰⁹ See Spicer, *Combining qualitative and quantitative methods* [in] Seale (2004b), p.294; Bryman (2008), pp.13-25 and Bryman (2006), pp.97-113. Also Fielding&Fielding (2008), p.571; Hantrais (2009), pp.105-108.

¹¹⁰ See Bryman (2006), p.105 and Greene et al (1989), p.259. It is however important to acknowledge that: “(...) theoretical triangulation does not necessarily reduce bias, nor does methodological triangulation necessarily increase validity. Combining results from different analytic perspectives or methods may offer a fuller picture but not necessarily more ‘objective’ or ‘valid’ one. When we combine theories and methods we do so to add breadth

4.3.2. Access to the group and sampling

The project concerns judges adjudicating in ordinary courts of first and second instance, that is to say district and regional courts¹¹¹, and more precisely their civil departments. In order to adequately reflect the knowledge of, experiences with and attitudes towards EU law present in the judiciary a randomly selected group of judges would have to participate in the survey. It is yet by no means novel to state that the judiciary is a protected and closed group greatly sheltered from any exterior intrusion. For the foregoing reason the manner in which judges should and could be approached and the process of gaining access to the representatives of the group remained one of the largest technical and methodological impediments in the present study and involved numerous steps.¹¹² It namely occurred that a direct access to the judges and the method of probability sampling were impossible in practice. Ultimately, in the course of September 2009, the Polish National School of Judiciary and Public Prosecution¹¹³ sent a letter to the presidents of 5 judicial districts informing them about the survey on-line, its purpose and the access details.¹¹⁴ The presidents were inquired to forward the letter to the chosen by them subordinate courts in such a way that a hundred judges working at the civil

or depth to our analysis, not because we subscribe to a single and ‘objective’ truth (...)”, from Fielding&Fielding (2008), p.560.

¹¹¹ For more on the structure of the judiciary in Poland see Chapter 3. Appellate courts were excluded from the research project for two major reasons. First of all they cannot be considered to be the courts which are proximate to individuals as, in fact, they are at the apex of the judiciary structure. Also, the access to judges at the appellate level was impeded.

¹¹² The Supreme Court, representatives of the academic world, the Ministry of Justice and the Polish National School of Judiciary and Public Prosecution were taken into consideration and approached in order to gain access to the judiciary.

¹¹³ Krajowa Szkoła Sądownictwa i Prokuratury (National School of Judiciary and Public Prosecution), see www.kSSIP.gov.pl.

¹¹⁴ There are 11 judicial districts in Poland, those are: Białystok, Gdańsk, Katowice, Cracow, Lublin, Łódź, Poznań, Rzeszów, Szczecin, Warsaw and Wrocław. For the list of the appellate courts see the website of the Ministry of Justice, at <http://bip.ms.gov.pl/pl/rejstry-i-ewidencje/lista-sadow-powszechnych/> (last accessed 10 October 2011). The districts chosen for the purpose of the survey were: Gdańsk, Warsaw, Poznań, Rzeszów and Białystok which represent both central and peripheral areas. At the moment of the survey there were 4535,08 judges working in first and second instance courts adjudicating in the divisions which were included in the project and 10 409 judges working in all instances and all chambers of common courts, including the Supreme Court (data for the whole country). With regard to the judicial units which were included in the survey it should be observed that there were in total 2689,91 judges adjudicating in the chambers and instances included in the study. Data imparted by the National School of Judiciary and Public Prosecution originating from the internal letter exchange of 10 September 2009 between the Ministry of Justice and the National School.

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chambers of the ordinary courts in the respective judicial district would be informed. The chosen judges were supposed to cover all age groups, represent both genders and all areas of expertise and work in both big cities and small towns. The process of completion of the questionnaire took place between October and December 2009. After 5 weeks the presidents of the selected courts were reminded about the survey by the School of Judiciary and Public Prosecution. In addition to that, in order to maximize the response rate and increase the size of the sample, both the questionnaire and information about the internet survey were circulated during the trainings in EU law for national judges the author participated in. The judges approached during the trainings were also requested to inform their colleagues with regard to the survey on-line. In the subsequent stage 25 semi-structured, in-depth interviews were conducted with judges who in the questionnaire expressed their consent to be interviewed. The interviews took part in the period between February and June 2010.

With everything considered it should be emphasized that the reality of empirical research and particular circumstances of the judicial environment did not allow for the random and independent probability sampling method and had to rely on the method of non-probability convenience sampling and network sampling.¹¹⁵ This, in turn, has significant consequences for the external validity of the gained data and the method in which it was analysed and presented.

¹¹⁵ Probability and non-probability sampling are two general sampling methods. In principle, a representative and unbiased sample can only be achieved in the course of probability sampling which in turn allows to employ the method of inferential (also called analytical or inductive) statistics and to make generalizations about the whole population. By and large, probability sampling is a preferred method of sampling but there are many instances where probability sampling is not feasible or practical which was also the case in the present study. In order to conduct probability sampling a list of the population (sampling frame) is necessary. Although a sampling frame for the Polish civil judiciary was as such available, the judges conditioned their participation in the survey on the approval from their supervisors. This in turn necessarily enforced the change in the manner the judges should be approached. From the informal exchange of information between the author and the National School of Judiciary and Public Prosecution it also followed that the presidents of particular courts refused to forward the letter informing about the survey to the judges working in the respective courts. For more on the sampling methods see Bloch, *Doing social surveys* [in] Seale (2004b), pp.173-177. See also Polit&Beck (2010), p.1453 on the persisting “myth of random sampling in quantitative research (...) in which virtually all researchers conspire when they apply standard statistical tests to analyse their data, in violation of the assumption of random sampling” and Gentry&Hofzyer (1977), p.106 who claim that “all too often the researcher, not wanting to identify his sample as a non-probability one, stretches the concept of probability and uses evaluative techniques not consistent with his sampling methodology.”

4.3.3. Questionnaire's structure and the picture of the sample

The questionnaire was designed in a manner which made it possible to assess in a systematic and objective way the variables relating to knowledge, experiences and attitudes of national judges.¹¹⁶ In principle, it was patterned on the version of the questionnaire which was designed for the parallel project for Germany and the Netherlands. However, many contextual, linguistic and technical adjustments were brought therein. Also, on request of the National School of Judiciary and Public Prosecution additional questions were asked which pertained to, for instance, the availability and quality of EU law trainings for the judiciary.¹¹⁷ The questions included in the survey concerned, inter alia, the frequency of EU law the national judges encounter, the level of EU law knowledge, the clarity of the mechanisms of the application of EU law, forms of education in EU law and generally speaking judges' attitudes towards the Union, its law, EU law institutions and the new role which is put on them by EU law. Moreover, questions concerning the gender and age of the respondents, the respective judicial unit and the chamber the judge adjudicates in were included.¹¹⁸ The questionnaire was anonymous but it included a question whether a judge agrees to be interviewed at some future date which implied the necessity of providing some personal data. The survey was based on pre-coded/fixed-choice questions in which a limited number of answers were given. Additionally, an open-ended question at the end of the questionnaire was included. The questionnaire also encompassed six vignettes with some room for explanation of the choice the judge made. The questionnaire was prepared in both on-line and paper version.

The response rate to the survey should, in overall, be seen as very satisfactory. After 2 months of survey 373¹¹⁹ questionnaires were filled in, out of which 300 in their entirety. Quite a number of questionnaires were eliminated due to either carelessness (contradictory answers,

¹¹⁶ For clues on how to collect questionnaires data, design a questionnaire and analyze quantitative data see Seale (2004a).

¹¹⁷ The School for the Judiciary and Public Prosecution facilitated the access to the civil judiciary under the condition of including several questions concerning the concerned matters.

¹¹⁸ Both Polish and English version of the questionnaire can be found in Annex II and III attached at the end of this book.

¹¹⁹ Out of this number 336 were filled out on-line and 37 were filled out by judges approached during the trainings in EU law.

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only neutral answers) or the fact of not belonging to the target group (criminal judges). Eventually, 313 questionnaires were taken into consideration in the analysis, of which 281 are entirely filled out.¹²⁰ Once the process of the questionnaires distribution and collection was completed, the data was processed, quantified and analyzed.¹²¹

The aim pursued with the data collection was to draw a general picture of the impact of EU law on the functioning of national civil judges, see general trends with regard to the three clusters of variables and indicate the possible problems and phenomena that are existent with regard to the judicial functioning in the context of EU law. The method of non-probability sampling, which, as already mentioned, was the only possibility to execute the empirical part of the study, implies that it is difficult to assume true unbiasedness in the sample which in turn precludes using the technique of inferential statistics. Therefore in this study foremost the method of simple descriptive statistics technique was employed.¹²² This method allowed to describe the facts happening in the immediate surveyed group. The distribution of answers provided by the judges is displayed through percentages (ratio/frequency distribution). In some instance the method of bivariate statistics using the cross-tabulation method is employed in order to see relationship between two variables in the population at hand.¹²³ In order to

¹²⁰ A number of judges discontinued filling out the questionnaire in the last stage including the vignettes.

¹²¹ The data was processed and quantified by means of an Excel Spreadsheet. In case of Germany and the Netherlands, the process of preparation of the questionnaires, their quantification and statistical analysis was assisted by a professional institution specializing in survey methods. In case of Poland the whole process of setting the questionnaire on-line, coding and quantifying data was carried out by the author of this study.

¹²² Descriptive statistics summarize the data in quantitative terms, i.e. they present the facts about the immediate surveyed group. In that sense they are different from inferential statistics which allows to make general propositions about the whole population (so-called external validity). In principle, statistical inference may take place in sets of data that origin from systems based on random variation. In other words, only random samples justify employing the method of statistical inference, see for instance Gentry&Hoftyzer (1977), p. 107 who claim that “(...) unless the sample is truly random, the use of the various techniques of statistical inference are unwarranted and the application of such techniques can lead to incorrect conclusions because of possible “built-in” biases of the sampling procedure. When a non-probability sample is employed it would be prudent to acknowledge it as such, and to avoid the tools of statistical inference that are valid only within the context of random sample.” It is yet worth emphasizing that there is no full agreement with regard to the foregoing as some authors suggest that random sampling is not required if the sample is not biased. Inferential statistics start with establishing a hypothesis concerning relationship between two measured variables and aim at finding out whether the data supports the hypothesis.

¹²³ Univariate statistics present the data concerning a single tested variable. Bivariate statistics look for relationships between two variables such as for instance age and attitude. For more see Bloch, *Statistical reasoning: from one to two variables* [in] Seale (2004b), pp.324-339.

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make generalizations¹²⁴ and enhance the validity of conclusions the present study employs the concept of proximal similarity model as developed by Campbell which allows to extrapolate the gained results to a broader group of people.¹²⁵ The method relies on rich and descriptive information of the study context and the observed population in order to see how the sample corresponds with the entire population (so-called gradient of similarity).¹²⁶

With regard to the foregoing it should be observed that female judges constituted 58 percent of the respondents and male judges accounted to 42 percent of the respondents which quite accurately reflects the uneven gender distribution which is present in the Polish judiciary.¹²⁷ 75 percent of the surveyed judges adjudicated in the first instance courts and the remaining 25 percent in both first and second or only in a second instance courts which quite adequately reflects the general distribution in the number of judges between first and second instance courts in Poland.¹²⁸ The response rate per judicial unit was yet somewhat unbalanced

¹²⁴ For the definition of generalization see Polit&Beck (2010), p.1451 who observe that “generalization is an act of reasoning that involves drawing broad conclusions from particular instances – that is, making an inference about the unobserved based on the observed.”

¹²⁵ See Campbell (1986), pp.73-76. As observed by Witte&Howard (2002), p.282 “(...) the proximal similarity model depends on a theoretically informed assessment of non-random nature of a sample to avoid the pitfalls of a pure convenience sample.” Trochim&Donnelly (2006), p.34 observe that the proximal similarity model is “a model for generalizing from your study to another context based upon the degree to which the other context is similar to your study context.” See also Collingridge&Gantt (2008), pp.391-392. In that sense, it is necessary to consider the features of the actual gained sample and the features of the population to which the results would be generalized.

¹²⁶ In line with Trochim&Donnelly (2006), p.35 a gradient of similarity is “the dimension along which your study context can be related to other potential contexts to which you might wish to generalize. Contexts that are closer to your along the gradient of similarity of place, time, people, and so on can be generalized to with more confidence than ones that are further away.”

¹²⁷ In accordance with the data collected by the Central Statistical Office in 1995 female judges constituted 57 percent of the total number of judicial appointments, 64 percent in 2000 and 2004 and 61 percent in 2005, see Statistical Yearbook of the Republic of Poland 2006, p.160, to be found at: <http://bip.ms.gov.pl/statystyki/tablgus2006.pdf> (last accessed 10 May 2010). From the exchange of letters with the Ministry of Justice it follows that in 2009, 2010 and 2011 female judges constituted respectively 63,76; 63,91 and 63,97 percent of the total number of ordinary courts judges in Poland; document DSO-061-63/12 in possession of the author. In 2008 and 2009 the percentage rate of new female judges nominations reached 63 percent, that is 372 out of 586 in 2008 and 732 out of 1157 in 2009. The reader might also notice that total number of new nominations in 2009 is much higher if juxtaposed with the preceding years. Information provided by the Ministry of Justice, reference number DK-I-126-78/10, document in possession of the author.

¹²⁸ In accordance with the data provided by the National School of Judiciary and Public Prosecution originating from the internal letter exchange of 10 September 2009 between the Ministry of Justice and the National School it follows that out of the total number 72 percent of judges worked in district courts and 28 percent in regional courts. The possibility for a judge to adjudicate in both first and second instance capacity is statutory possible. First of all, the regional courts operate in both first and second instance depending on the subject matter of the dispute. Next to that, it is common that a first instance judge fulfils both positions, that is to say she works in a

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and shows overrepresentation of judges from the Białystok judicial unit which can be classified as periferial (28 percent of the total number of responses) and underrepresentation of judges from the Warsaw unit classified as central (12 percent) followed by Poznań unit (19 percent), Rzeszów (17 percent), Gdańsk (14 percent) and other units (8 percent).¹²⁹ 60 percent of the judges who filled out the questionnaire adjudicated in civil chambers, 22 percent in labour and/or social security chambers and 18 percent in company chambers.¹³⁰ The age distribution across the sample is shown in the graph below. It is yet difficult to infer to what extent the sample reflects the situation in the entire population as official statistical data concerning the age distribution across the judiciary is unavailable.¹³¹

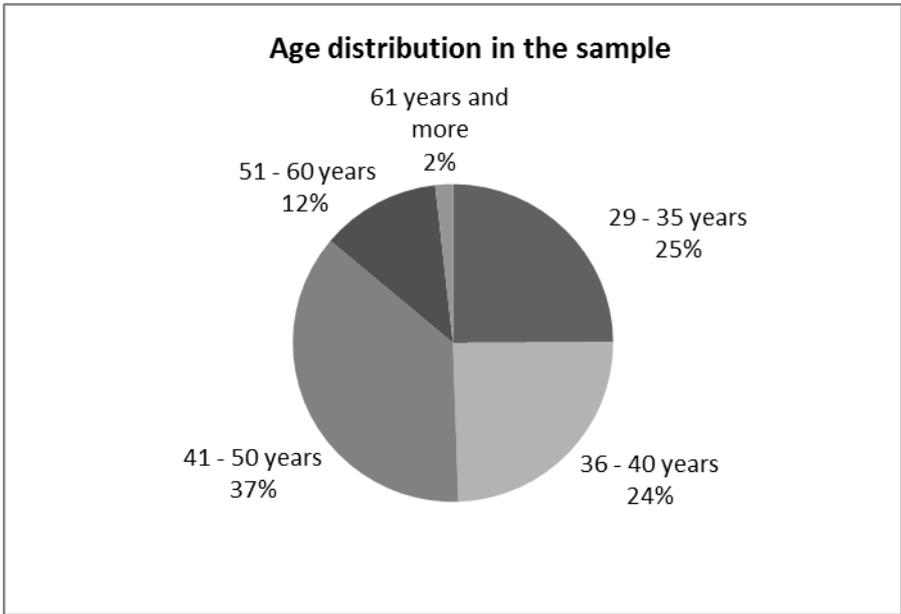
court of first instance and she is ‘delegated’ to a second instance court for an indefinite period of time by a decision of the Minister of Justice or for a period of one month a year by a decision of the president of a district court. Such possibility is regulated statutory in Law on Common Courts Organisation, art. 77.

¹²⁹ n=282.

¹³⁰ Whereas at the time of the survey 69 percent of the concerned judges in district courts worked in civil chambers, 14,5 percent in employment and social security chambers and 16,5 percent in commercial chambers. With regard to the regional courts 60 percent worked in civil chambers, 12 percent in commercial chambers and 25 percent in employment and social security chambers. Data imparted by the National School of Judiciary and Public Prosecution originating from the internal letter exchange of 10 September 2009 between the Ministry of Justice and the National School.

¹³¹ The maximal retiring age in judiciary is 65 years which may be extended to 70 years on a special wish of a judge and after an approval from the National Council of the Judiciary of Poland. However a judge has a statutory right to retire at the age of 55 for female judges and 60 for male judges, see for more Law on Common Courts Organisation of 27 July 2001, O.J. 98 item.1070, art.69. Any information concerning the virtual age distribution in the judiciary was unavailable since “it requires additional facts establishment and involves further data processing. In addition, in line with the Law on the access to public information, art.3 p.1 (OJ No 112, p.1198 with amendments) processed data may be made available to the applicant only if proven that making the info accessible is of particular importance for the matters of public policy” as argued by the Ministry of Justice in their response DK-I-126-78/10 to the author’s inquiry.

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n=284¹³²

The selective non-response bias which implied that only those judges who are experienced and interested in EU law would participate in the empirical, both quantitative and qualitative, part of the study posed a significant concern prior to the commencement of the survey stage.¹³³ The results highlighted that as a matter of fact the gross majority of the judges who participated in the empirical (both quantitative and qualitative) part of the study did not have any or had very limited practical experience with EU law and the knowledge thereof which might suggest that the fear of the selective non-response bias was to a large extent unfounded. With everything considered it can be observed that the size of the sample, the distribution of the basic characteristics and the fact that the group of judges is homogenous in terms of their education, career path and the general operational setting would seem to indicate a rather adequate representativeness of the sample. It should, however, be emphasized that with the

¹³² The question concerning the age of the judge was included in the final part of the survey which explains why it does not overlap with the total number of analysed questionnaires.

¹³³ Non-response bias takes place in statistical surveys and occurs when participants who respond to the survey differ in the outcome variable from those who do not respond at all whereby it results in a loss of accuracy in population estimates. For more on non-response bias see Lahaut et al (2002).

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proximal similarity model the generalizations necessarily remain theoretical¹³⁴ and may only indicate trends which are present in the population.

4.3.4. Semi-structured interviews

It is claimed that a face-to-face interview is the most flexible form of data collection, has the greatest potential and allows to help and motivate the respondents.¹³⁵ Moreover, it permits optimal communication and both verbal and non-verbal cognition.¹³⁶ 25 judges participated in the qualitative part of the study.¹³⁷ They covered all the appellate districts which took part in the survey and originated from provincial, middle size cities as well as courts in the biggest cities. The age distribution fluctuated between 31-years-old and 60-years-old. 5 judges adjudicated in the second instance courts and the remaining 21 in the first instance.¹³⁸ Most of the interviews were recorded¹³⁹ and in the later stage transcribed in a Word document. Subsequently they were analyzed and coded¹⁴⁰ with the aim of locating statements and opinions reflecting social schemes and looking for common patters and phenomena that would allow generating a theory. In that sense, the method of analytic generalization was employed which relies on distinguishing “between information that is relevant to all (or many) study participants, in contrast to aspects of the experience that are unique to particular participants.”¹⁴¹

¹³⁴ Trochim&Donnelly (2006), p.35 who claim that with the proximal similarity model for external validity does not allow for generalizing with certainty as the generalizations will always remain “a question of more or less similar.”

¹³⁵ Creswell (1998) and Maxwell (2005) provide useful clues on how to conduct and organize interviews, negotiate research relationship with participants in the survey, use protocols, store and order qualitative data. See also Seidman (1997).

¹³⁶ See De Leeuw (2008), p.317. For extensive guidelines on qualitative interviewing consult Seale (2004a), pp.253-269.

¹³⁷ An interview was conducted with each judge who gave her consent to be interviewed in the questionnaire. One of the interviewed judges was approached through another channel.

¹³⁸ In addition to that a dozen on-going interviews were conducted during the trainings in EU law for national courts which were followed by the author. Those have not directly been included in the analysis but allowed to gain additional insight into the range of the existent problems.

¹³⁹ Several interviewed judges did not give their consent to be recorded.

¹⁴⁰ The analysis of the transcribed interviews has become one of the longest and most tangled parts of the research process.

¹⁴¹ See Polit&Beck (2010), p.1453.

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The qualitative part of the study proved to be a great technique allowing to get to know the judges personally and to observe them as they construct their own legal reality and understanding of EU law. Consequently, it allowed to develop explanations of the quantitative results and to identify further problems attached to the functioning in the context of EU law. It illustrated the way judges behave and provided a contextualized understanding of judicial experience with EU law and delivered invaluable insights into the cause-effect relationships of the way judges function which subsequently facilitated to draw fuller pictures of the instances of legal consciousness and the existent social schemes attached to them.¹⁴² Put differently, the interviews greatly assisted with interpreting and understanding an individual lived experience with EU law and allowed to (re)conceptualize the theory of legal consciousness so it would fit the specific research context.

One of the largest concerns of the empirical study was the pitfall attached to the fact that people tend to give a good impression of themselves and also the institutions which they identify and/or feel they represent.¹⁴³ Presumably, this rule also applied to the present research interview setting. It was therefore somewhat surprising that most the judges who agreed to be interviewed did not hesitate to, for instance, admit their incompetence in the area of EU law and its application or share the frustration about the new role which EU law assigned to them. Since face-to-face interviews are the “Rolls Royce” of data collection¹⁴⁴ they required much care, time and expenses.

¹⁴² It should yet be observed that there is more than one recipe for doing qualitative research. As Maxwell (2005), p.79 formulates it: “The appropriate answer to almost any question about the use of qualitative methods is: it depends (...)” Another important implication is that in qualitative research there is no single valid description of a situation but that the description always corresponds with the purpose(s) of a study, see Hammersley (1991), pp.195-203. Further confusion stems from the fact that there are no clear distinctions between qualitative research methods and the nomenclature used in the field. What in one case is called ethnography, can be given a name of a fieldwork, a participant observation or an interpretive case study in another research. For the purpose of this study, it should be sufficient just to bear the latter aspect of qualitative methods in mind; regardless of its ‘ethnomethodological survey’, an ‘interpretative case-study’ or a ‘symbolic interactionism’ name.

¹⁴³ See Alvesson (2003), p.21.

¹⁴⁴ Seale (2004a), p.318.

4.4. Comparative research

The last part of the study involves elements of comparative research as the results for Poland are juxtaposed with the available data concerning the functioning of civil judiciaries in EU law context in other Member States. Such a comparison facilitates the process of sharpening of the focal point of analysis of the subject under study and suggests new perspectives. In a similar vein, a comparative study allows to propose common measures of a more general nature, also at the EU level, which might possibly facilitate the functioning of national judiciaries in the EU capacity. A cross-national comparison gives a means of confronting findings in an attempt to identify and illuminate similarities and differences in the way national judiciaries function as decentralized EU courts.¹⁴⁵

In the framework of the present research it is necessary to observe that any comparative exercise had to rest on an adequate empirical data, that is to say it requires a process of juxtaposing the responses of national judges to the law of the European Union and the way judges look upon EU law. Such an exercise is only possible if an appropriate empirical data is available for other Member States. As a matter of fact, the empirical evidence pertaining to the way national judges function in their European Union capacity is very scarce and comes down to the corresponding research project for Germany and the Netherlands, several empirical studies which focus on selected aspects of EU law in particular countries¹⁴⁶ and the survey commissioned by the European Parliament on the role of the

¹⁴⁵ As it is claimed “a comparative approach is better suited to generate findings of a broader validity. It also brings the research design closer to the dynamic reality of European integration where Community legal rules and principles are forged against a background of divergent national legal and institutional approaches and then transmitted back for implementation and enforcement in the same national environment. Only a comparative analysis of legal change under European influence allows us to test contradictory claims of convergence and divergence of legal systems, of harmonization or of disintegrative influences of European law on national law.”, see Bakardjieva Engelbrekt (2009), p.239.

¹⁴⁶ See for instance Wind (2010), pp.1039-1063 in which the author scrutinizes the reasons of (not) referring preliminary questions to the ECJ by Danish and Swedish judges and suggest that judges in both countries are very reluctant to refer questions and will very likely use the *acte clair* doctrine to avoid preliminary references. Similarly Wind et al (2009), pp.63-88. See also the Report of the Swedish Kommerskollegium (Trade Council) of 30 March 2005 referred to by Wind (2010), p.1053 which was based on interviews with Swedish judges which pointed out that the majority of Swedish judges were not sufficiently familiar with EU law and the preliminary ruling procedure but also with the dynamic forms of legal interpretation. The Report indicated that Swedish judges tend to interpret EU law on their own instead of referring their problems to the ECJ.

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national judge in the European judicial system.¹⁴⁷ The latter one, being an interesting and insightful report on the functioning of the national judges does not, however, offer an appropriate source of data which might be used for the purposes of the present study to a wider extent. The research method used by the executors of the project does not correspond with the research method applied in the present study and comprises several methodological shortcomings.¹⁴⁸ Therefore, the results of the mentioned study can only be utilized as an indicative of the situation and the problems attached to the functioning of national judiciaries. The other studies mentioned above are, in turn, very restrained with regard to the surveyed aspects. With everything considered, only the parallel HiiL project offers an appropriate source of data which can be used for the process of comparison. Yet, it should not be forgotten that the practical problems attached to gaining access to the respective national judiciaries, the peculiarities of each legal system and the national judicial architecture and the issues attached to the specificity of each language implied that the execution of the empirical part of the projects in the concerned Member States took a somewhat different form in each country. The research project in Germany was limited to the Land of North-Rhine Westphalia which might put into question the representatives of the group for the whole country, especially for the *Länder* which constituted part of the former German Democratic Republic. Moreover, the response rate in Germany was somewhat low and accounted to 10 percent. The project for Poland, in turn, embraces various judicial units which promptly reflected geographical distribution but does not include the judges adjudicating in the higher appeal courts. The Polish project also included social security judges who were neither included in projects for Germany where they constitute part of the specialized courts, nor in the Netherlands where the disputes relating social security are settled by administrative divisions of local courts. With

¹⁴⁷ See Committee on Legal Affairs, Draft report on the role of the national judge in the European judicial system, 2007/2027 (INI), to be found at <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=INI/2007/2027> (last accessed 8 March 2011).

¹⁴⁸ The survey covered a variety of courts including both administrative and private law courts which renders any comparison in the framework of the present study impossible. Moreover, whereas the project was aimed at all EU jurisdictions, nearly half of the answers (44 percent) originated from Germany, followed by Poland (19 percent) and several countries were not represented at all. Finally, a considerable part of the data is presented collectively for all the countries and all sources of law which makes it impossible to isolate data for a specific Member State, see p.13 and following of the Draft Report.

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everything considered, the respective data cannot be used in its entirety and without any reservations.

The well-known structural problem of comparative studies is “how to compare apples with apples and not oranges.”¹⁴⁹ Yet, with regard to the foregoing it should be observed that despite some differences in the organization of the respective judiciaries, all of them are based on the same model of justice. Namely, they all belong to the civil law tradition group based on a clear separation of powers where judges constitute a separate body of legal profession, are law graduates admitted to the profession through a public examination and are obliged to follow a long judiciary training and the majority of them have a life-long low profile judicial career in a highly bureaucratic and hierarchical judiciary organisation.¹⁵⁰ Finally, all of them are subject to the law and are impartial and independent in their office. Also, it should not be forgotten that the primary objective of the comparative section is not to compare the legal systems of the three countries as such but to compare the problems attached to the functioning of national judges as EU judges which have become and the responses and solutions to those problems which followed from the surveys. In that sense, the functional comparative method comes to avail since it “is factual, it focuses not on rules but on their effects, not on doctrinal structures and arguments, but on events.”¹⁵¹ Put differently, the concerned method pays attention to “the organic responses of legal systems. It is the response that is identified and compared.”¹⁵² Since the comparison focuses on selected aspects of legal systems (judiciary and legal profession) and it comprises countries belonging to the same societal context it can be classified as a micro- and intra-cultural comparison.¹⁵³ The exercise is carried out at an aggregate, meta- level and is preceded by a brief presentation of several features of the legal orders of Germany and the Netherlands which comprise the most relevant characteristics of their national constitutional frameworks, the organization of the judiciary and the civil procedure.

¹⁴⁹ From Makinwa (2009), p.343.

¹⁵⁰ See Fix-Fieero (2003), p.155 for the common traits of the civil model of justice.

¹⁵¹ Michaels (2006), p.342.

¹⁵² From Makinwa (2009), p.344.

¹⁵³ See De Cruz (1999), pp.227-230.

5. Methodological and theoretical limitations of the study

Due to the lack of congruent projects the present study has come across several serious methodological and technical challenges and obstacles, foremost in the empirical phase of it. Many of the problems emerged only in the course of the empirical part of the study or even afterwards, that is to say during the phase of assessment of both quantitative and qualitative data. Identifying these issues at this point is however necessary to understand the discussion in the subsequent chapters. It also makes it possible to learn from the mistakes and to improve and enhance the methodological tools in order to avoid similar problems in potential future research.

First of all, this research has blended different, i.e. legal, sociological and partly political perspectives in one study. It has worked with not yet fully-fledged socio-legal theory applied in a novel environment. Likewise, different research methods and techniques have been employed. Such an exercise easily triggers doubts and confusion among (legal) scholars. At the same time it has to be recognized that no single perspective or approach can reflect an entire and satisfactory picture of the object under scrutiny, especially if the main aim of the study is to find out what is actually happening on the ground and how national judges receive and perceive the legal order of the Union.¹⁵⁴ Indeed, “(...) potential bias and distortion is the price we must pay to gain understanding of complex social settings.”¹⁵⁵ In order to partly reduce the validity threats in this study, the methods of an intensive and long-term involvement with the object of the study¹⁵⁶, rich data set, triangulation and comparison have been applied.¹⁵⁷ The study has also been enriched by many insights from various legal and political scholars who offer arguments that seem to plausibly explain some of the results.

The major technical and methodological concern, as in any empirical research based on a survey, related to the direct access to the objects of the study and even to any public information about the objects of the study. The judiciary constitutes an extraordinary group in

¹⁵⁴ See Stone Sweet (2000), p.5.

¹⁵⁵ From Bogdan&Taylor (1975), p.13.

¹⁵⁶ Which comprises not only survey and interviews but also participation in EU law trainings, visiting different courts across the country, consulting authorities involved with the functioning of the judiciary and academics.

¹⁵⁷ For the mentioned methods see Maxwell (2005), pp.109-114. See also Bogdan&Taylor (1975), pp.9-13.

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that regard as it is very closed, hermetic and protected from any external influence. Hence, gaining access to the judges accounted to a thorny and long-lasting process. The success of the survey has thus utterly been dependent upon the consent of the presidents of the courts to take part in the survey and consequently, willingness of the judges to participate and share their perspectives on EU law in the quantitative and qualitative part of the study. Another difficulty was attached to the fact that the survey took an on-line form which might, arguably, have discouraged older generation judges to participate in it and made it impossible to participate for those judges who experience obstacles with regard to access to the internet. By and large, the fact that it was impossible to employ the method of probability sampling renders it difficult to gauge the representativeness and unbiasedness of the surveyed group with a full certainty. This in turn closes the door to further inferential analysis of the quantitative data and constitutes one of the biggest drawbacks of the present study.

Further obstacles concern the construction of the survey and the formulation of the questions enshrined therein. Linguistic particularities of languages and local legal circumstances induced that it was not possible to directly employ the questionnaire of the twin project which was designed for Germany and the Netherlands in the Polish context. Moreover, the questionnaire failed to address several aspects which became apparent and significant only *a posteriori*. Likewise, it occurred that some questions were prone to various interpretations by the judges.¹⁵⁸

Additional problems related to the construction of the anchoring vignettes which were initially designed to reflect the embodiments of legal consciousness. As Chapter 5 will illustrate, the vignettes occurred to be underpinned by several presumptions that, in some instances, proved to be insufficient to understand and explain the forms of legal consciousness. The most fallacious one was the assumption that all judges possess a minimum level of knowledge of EU law and are knowledgeable of the basic mechanisms of its application. The startlingly high proportion of judges, which in nearly each case amounted to one-third of the group, who would not know how to proceed with, *summa summarum*, quite straightforward EU law problems and the remarks judges provided to the vignettes which

¹⁵⁸ For similar problems with regard to design of a survey which was tested among Dutch and Scottish lawyers see Örüçü (2007), p.446.

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delivered many fresh, distinct clues coerced the author to reconsider the initial premises. Put differently, the vignettes seem to have disregarded some of the factors which, *a posteriori*, proved to have influence on the way judges make decisions. In that regard, the author agrees that qualitative (interviewing) methodology is better suited and necessary for conducting the legal consciousness analysis.¹⁵⁹ Yet, the foregoing is not intended to discard the relevance and significance of quantitative research for purposes of legal consciousness discourse. It should, however, be emphasized that only qualitative research makes it possible to understand the dynamics of the process and investigate in detail the social schemes, informal context and other agents which quantitative methods were not able to capture.¹⁶⁰

Finally, the questionnaire provided for a ‘neutral’ answer possibility to many of its motions. The fact that a considerable number of the Polish civil judges chose for this option with regard to many survey questions have initially resulted in a significant dose of confusion as to a correct interpretation of the results. However, as both the quantitative and qualitative data seem to suggest, the ‘neutral’ stance towards many of the motions proposed in the survey might be explained by the fact of a scant and short experience with the application of EU law in the daily practice of civil courts and limited knowledge of judges in that regard.

The present study supports the observation that every social science method produces results which embrace a certain level of doubt.¹⁶¹ Despite those concerns, the study made it possible to enrich the already existing picture of the functioning of national judges as EU law judges and provide new insights into the existing theories. Indeed, looking into the minds of judges is not a simple assignment. In particular, it requires abandoning certain conventionalism and traditional (legal) methods and approaches. With this point, it is, perhaps, worth recalling Everson and Eisner who assert that “(...) confusion and challenge, however, are also masters of opportunity (...) for the select methodological *cognoscenti*, confusion and trial transmute into core disciplinary opportunities as the challenges of integration are deemed to be no longer treatable within the confines of, say, the law, political

¹⁵⁹ See Hoffmann (2003), p.700; Nielsen (2000), pp.1062-1063.

¹⁶⁰ See Poteete et al (2010), p.10.

¹⁶¹ Ibid, p.4.

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science, or economic theory, but are instead necessitating of the wholesale re-orientation and re-dedication of academic discourse (...)"¹⁶²

¹⁶² Everson&Eisner (2007), pp.42-43.

Chapter 2

The EU's Expectations of its Judges

1. Introduction

Having established the main theoretical and methodological foundations of the present study it is necessary to sketch the legal framework thereof. This framework is of a twofold nature. On the one hand, it relates to the fact of an increasing impact of EU law on the national legal orders, and in particular on the sphere of private law and jurisdiction.¹⁶³ This process of Europeanisation of national legal sources has namely a profound bearing on the functioning of national courts, at least from the theoretical point of view, and constitutes therefore crucial background information. On the other hand, the present chapter regards the factual duties and expectations which are put on national courts by means of *acquis communautaire*. Thus, the present section addresses how national judges *ought to* function as decentralized EU judges, i.e. how they are expected to respond to EU law and decide EU law cases. In that sense, the second aim of the present chapter is to draw a theoretical model of the functioning of national judge as an EU law judge. It must, however, be emphasized that the set of normative obligations which are put on the national judge does not reflect the entire picture. In fact, the judicial tasks attached to EU law are underpinned by several expectations of (extra-legal) nature without which those tasks may not be adequately fulfilled. The latter will also be addressed in the course of this chapter.

The scope of obligations of national judges with relation to EU law which will be examined are limited to those general principles which have their roots in the systemic

¹⁶³ For the purpose of this study the term private law, in contrast to public law, refers to laws that regulate relationships between individuals operating in their private capacity. In that respect, also labour, consumer or company law will constitute part of private law. And yet it should not be forgotten that the notion of private law is a confusing one and may be understood in various ways. It should also be recognized that the private – public law divide is increasingly blurred, there are fields of law which share components of both areas which are also called functional fields of law. For more see Alpa (2000), pp.324-325 and Hesselink (2002), pp.228-230.

doctrines of EU law that govern the judicial enforcement of that law and the relationship between national and Union legal orders, i.e. general principles of EU law which are deduced from the nature of the EU. It is necessary to notice that the entire issue pertaining to the obligations imposed on national judges by EU law has been subject to an extensive academic attention and is, therefore, thoroughly explored in the academic writing.¹⁶⁴

2. Setting the scene: progressive Europeanisation of national private law

As indicated before, it is the underlying premise of the present study that national laws are progressively Europeanised. The national legal systems and sources have mostly been affected in the process of harmonization through the adoption of EU regulations and directives pertaining to particular realms of substantive law.¹⁶⁵ This process is also called positive harmonization since it introduces new provisions into national laws from the top.¹⁶⁶ Furthermore, the jurisdiction of the ECJ has played an important role in the process of Europeanisation of national law since the Court can interpret EU law provisions by means of preliminary rulings. For this process the term of negative harmonization is sometimes used since ECJ's case-law induces convergence across national legal systems by striking down national legislation that is at variance with EU law, abolishing the differences with regard to

¹⁶⁴ For an elaborate overview of the role of national courts with regard to EU law see Claes (2005); Koopmans (1993); Arnulf (2006); Lenaerts et al (2006); Kornobis-Romanowska (2007); various authors in Wróbel (2005); O'Keefe (2000); Prechal (2006), Konciewicz (2004), pp.78-80; Golub (2004); Sinaniotis (2006); Lang (1997b); Schermer&Waelbroeck (2001); Obradovic&Lavranos (2007); Jans et al (2007); Van Harten (2011), pp.23-59.

¹⁶⁵ In accordance with Article 288 TFEU (ex. Art. 249 EC), a regulation is a measure of general application which is binding in its entirety and directly applicable in all Member States whereas a directive binds those Member States to which it is addressed and only as to the results to be achieved. Directives always require implementing measures. As Prechal formulates it: "the very purpose of directives is their implementation in national law." See Prechal (2006), p.131.

¹⁶⁶ Two forms of this type of harmonization can be distinguished, that is minimum and maximum harmonization. With the former one, Member States can keep or adopt more stringent legislation which will go beyond the framework of law imposed by the Union. Minimum harmonization measures set only minimum standards with which the Member States must comply. They can however provide for optional provisions (higher standards) which Member States can but do not have to implement. Maximum harmonization, interchangeably called total or full harmonization, does not leave any margin of discretion to the Member States which are obliged to implement the measure in the exact meaning provided by it. Total harmonization has originally been achieved by means of regulations but at present also directives are used for that purpose.

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interpretation of the Treaties and secondary EU measures, establishing minimum standards and removing barriers to the process of EU integration.¹⁶⁷

With this also the sphere of national private laws has undergone rapid transformation over the last two decades and has become one of the areas subjected to intense harmonization. It should be stressed that the EU's encroachment on the realm of private law has been greatly sensitive an issue since private law remains, as such, within the national competences domain.¹⁶⁸ This is reflective of the constitutional limitations of the legislative competences the EU enjoys in this field.¹⁶⁹ It does not therefore come as a surprise that the issue of possibility of harmonization of national law in the private sphere has been controversially debated. And yet, national private laws which were hardly affected by EU legislation at the beginning of the European integration process, have eventually become a subject of profound convergence processes. The Union increasingly encroached on national civil laws by employing the arguments of the necessity of completion of the internal market, elimination of distortion of competition and obstacles to free cross-border trade and transaction in the EU or strengthening of consumer protection.¹⁷⁰ From this brief discussion it becomes apparent why most of the measures enacted in the area of private law, especially contract law, are adopted under Article 114 TFEU (ex 95 EC).¹⁷¹ At the same time it also explains why family law is arguably the only sphere of private law which has so far eluded harmonization processes in its entirety.¹⁷²

¹⁶⁷ See Barnard&Deakin (2002); Hepple (2005), pp.193-224; Weatherill (2005), pp.2-3; Scharpf (1996), pp.15-39.

¹⁶⁸ Under the former Treaty regime, Art.3 EC Treaty did not include any action in the sphere of private laws as an objective of the Community. Also at present the Union does not have either exclusive or shared or supporting competences in the area of private law as such. It does however list the sphere of internal market, social policy or consumer protection under the field of shared competences, see Article 4 TFEU. For more on the situation before the Lisbon Treaty see Weatherill (2006), pp.89-103.

¹⁶⁹ See Weatherill (2001), pp.339-398 and Reich (2005), pp.383-407.

¹⁷⁰ Which were the primary objectives of the EC under the former Treaty regime and are now either exclusive or shared competences of the Union. The process of the so-called competence creep occupies much place in the academic writing, for an overview see Vogenauer&Weatherill (2005), pp.821-837. Some authors argues that the process of harmonization of private laws may indeed be perceived as one of the elements necessary to complete the achievement of a fully-fledged, internal market in the EU see Twigg-Flesner (2008), p.11 and Weatherill (2001), pp.346-350. It must be however acknowledged that the argument of the necessity of convergence of private laws for purposes of the internal market is debatable an issue and has been questioned ever since, see for instance Joerges (2004), pp.159-189.

¹⁷¹ Article 114 TFEU (ex Art.95 EC) introduced by the Single European Act in 1987, allows the Union to adopt measures for the approximation of the provisions which aim at the establishment and functioning of the internal market. The measures are to be adopted by qualified majority voting and in accordance with the co-decision

The ongoing process of convergence of national private laws has become in a short time one of the main points of political, legal and academic discourse in Europe. The Commission adopted several communications on European contract law.¹⁷³ The most recent Green Paper of the Commission of 2010 puts forward seven instruments of European contract Law.¹⁷⁴ Similarly, the European Parliament has adopted several resolutions on the possibility of harmonization of national private laws in which it was ascertained that harmonization of some parts of that law would be necessary to attain the objectives of the internal market¹⁷⁵ or would even be essential for its existence.¹⁷⁶ The demand for more unified private law rules for the whole EU entailed the emergence of the idea of uniform European private law in the form of non-binding instruments such as the European Civil Code, European Contract Law or the

procedure which allows the European Parliament to exert considerable influence on measures being adopted. Before 1987 Art.94 EC was mostly used in order to adopt measures in private law area.

¹⁷² The lack of any EU harmonizing measures in the area of family law does not imply that there are no attempts at such actions at all. More recently an intense academic discussion with regard to the possibility of Europeanisation of family law has been taking place, for more see instance Boele-Woelki&Martiny (2007), pp.125-143

¹⁷³ See Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final, OJ C 225/1; Communication from the Commission to the European Parliament and the Council. A more coherent European contract law. An Action plan, COM (2003) 68 final, OJ C 63/1; Communication from the Commission to the European Parliament and the Council. European contract law and the revision of the *acquis*: the way forward, COM (2004) 651 final. The first document was aimed at facilitating a fundamental discussion and consultation about possible development paths in the sphere of contract law across the EU. The second one is considered as a further step in the ongoing process of discussion on the developments in European Contract Law and the Common Frame of Reference. In the last document the Commission points out that further action is needed in order to improve the quality and coherence of *acquis* in the contract law sphere.

¹⁷⁴ See Green Paper from the Commission on policy options towards a European Contract Law for consumers and businesses of 1 July 2010 COM (2010) 348 final. The options comprise of binding and non-binding instruments such as: publication of the results of the Expert Group on a Common Frame of Reference in the area of European Contract Law, creating an official “toolbox” for the legislator which could be used as a reference tool by the Commission, Commission recommendation on European contract Law which would be addressed to the Member States, a Regulation setting up an optional instrument of European Contract Law, a directive on European Contract Law, a regulation establishing a European Contract Law, a regulation establishing a European Civil Code. The options were supposed to serve as a basis for public consultation of relevant stakeholders which run until 31 January 2011.

¹⁷⁵ See for instance resolution A2-157/89 of the European Parliament on action to bring into line the private law of the Member States, OJ C 158/400 and resolution A3-0329/94 on the harmonization of certain sectors of the private law of the Member States, OJ C 205/518.

¹⁷⁶ Resolution B5-0228, 0229-0230/2000, OJ C 377/326 at point 28. In one of his articles Smits attempts to apply elements of evolutionary theory to law and puts forward a thesis that the more unified/homogeneous the economy (environment) in the EU becomes, the more uniform private law will be. See Smits (2008), p.487.

Draft Common Frame of Reference.¹⁷⁷ Not surprisingly, the feasibility and constitutionality of such tools is being put into question by some authors.¹⁷⁸

Leaving aside the question whether the EU has the competence to adopt generally binding legal measures aiming at complete harmonization and whether such measures are truly desirable at the European level, it must be emphasized that the Union has already unified or harmonized particular areas of national private laws mainly by means of several Treaty articles, numerous directives and regulations and through the case-law of the ECJ. European Union measures have affected the core elements of national private laws to such extent that it is generally accepted to speak of European Private Law.¹⁷⁹ At present, EU directives pertain to a broad range of national legislation in the field of private law, such as for instance products liability, environmental damage, late payment in commercial transactions, general product safety or equal treatment in the workplace.¹⁸⁰ Contract and tort law and consumer protection occupy the central position within the area of harmonized private law. In this domain partial harmonization has taken place with regard to, *inter alia*, contracts negotiated away from business premises, package travel contracts, unfair terms in consumer contracts, consumer credit contract, contracts with regard to immovable properties on a time-share basis, distance sale contracts, sale of consumer goods and associated guarantees contracts, self-employed commercial agents or liability for damages for defective products.¹⁸¹ Furthermore, the bulk of

¹⁷⁷ The issue is a very broad one and anything more than a passing reference to it goes beyond the scope of this work. There exist academic networks dealing with the problem, for instance Joint Network on European Private Law (CoPECL) associating such groups as the Study Group on a European Civil Code and the Research Group on the Existing EC Private Law, Acquis Group and Accademia dei Giusprivatisti Europei in Pavia. Also family law has gradually gained much attention, especially through the Commission on European Family Law (CEFL) which addresses the principles of that law in Europe. The literature on the subject is in abundance, for more see for example Vaquer (2008); Twigg-Flesner (2008); Hartkamp et al (2004); Hondius (2000), pp.385-416; Schulze (2005), pp.3-19; Keirse (2011), pp.34-51; Smits (2007), pp.219-240; Hesselink (2011), pp.441-469.

¹⁷⁸ See for instance Legrand (1996), pp.52-81; Legrand (1997), pp.44-63; Smits (2007), pp.226-227, Smits (2010), pp.26-40, see also discussion by various authors in Hartkamp et al (2004).

¹⁷⁹ See Smits (2004), pp.229-245, Schulze (2005), p.15.

¹⁸⁰ More about the process of private law harmonization by means of directives in Müller-Graff (2004), pp.77-100 and Keirse (2011), pp.42-45.

¹⁸¹ See for instance the following EU directives: Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products as amended by Directive 1999/34/EC; Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises; Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents; Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and

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EU directives pertain to labour law area and social security rules. In this domain, the issues of equal treatment of men and women, discrimination in workplace, protection of employees in case of the sale of an undertaking, posting of workers or collective redundancies occupy the central position.¹⁸² Commercial and company law, (intellectual) property law are also subjected to partial approximation. In the sphere of commercial and company law, Union rules concern for instance commercial agents, mergers and takeovers of assets or annual accounts of undertakings whereas in the field of intellectual property several directives concern semiconductors and software protection and trade mark law.¹⁸³

administrative provisions of the Member states concerning consumer credit as modified by Directive 90/88/EEC, 98/7/EEC and 2008/48/EC; Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. For other relevant directives see Annex I.

¹⁸² See for instance the following EU directives: Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002; Council Directive 91/383/EC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship; Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex; Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community; Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, consolidating Directives 77/187/EC and 98/50/EC. For other relevant EU directives see Annex I.

¹⁸³ See for instance the following EU directives: First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member states relating to trade marks; Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs; Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain related to copyrights in the field of intellectual property; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases; Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs; Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies; Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies; Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids; Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies. For other relevant EU directives see Annex I.

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In addition to the above, EU regulations, which aim at the unification of laws, affect, *inter alia*, national civil procedure or social security laws to a certain extent.¹⁸⁴ The rules applicable in civil procedures in cross-border litigations relating to for instance the recognition and enforcement of judgments in civil and commercial matters or the service of (extra)judicial documents play a particularly important role in that regard.¹⁸⁵ It might thus be inferred that European measures aim at harmonizing particular national civil procedural rules.¹⁸⁶ A very special place is also occupied by European Union competition law which is covered under Articles 101 and 102 TFEU and several EU regulations and under Article 107 TFEU which concerns the issue of state aid.¹⁸⁷ In order to grasp the dimension of the harmonization of national private laws a list of the most important EU *acquis* in the area is provided in Annex I.¹⁸⁸ The annex, which is not intended to be exhaustive¹⁸⁹, encompasses approximately 150

¹⁸⁴ See for instance the following EU regulations: Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community; Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings; Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking evidence in civil or commercial matters; Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE); Council Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims; Regulation (EC) No 861/2007 of 11 July 2007 of the Council and European Parliament establishing a European Small Claims Procedure; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations. For other relevant EU regulations see Annex I.

¹⁸⁵ The field of the judicial cooperation in civil matters in the EU is a relatively new legal phenomenon in European law which pertains to, by and large, questions of jurisdiction, conflict of laws, enforcement of judgments, service of judicial and extrajudicial documents, taking evidence. In the academic writing the concepts of European private international law or European civil procedure are used. See for instance: Dickinson (2005); Storskrubb (2008).

¹⁸⁶ Several Community regulations in the field of civil procedure are based on Article 81 TFEU (ex 65 EC) which says that legal measures may be taken in the area of cooperation in civil and commercial matters with cross-border effects as far as is required for the proper functioning of the internal market. For a through overview of procedural harmonization in the EU see Storskrubb (2008).

¹⁸⁷ EU competition law has an extraordinary nature as the enforcement thereof is primary entrusted to the European Commission under Article 105 TFEU. However, since May 2004 also national authorities for competition and national courts are involved in the process of enforcement of EU competition law, see Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

¹⁸⁸ For a list of most EU directives in the area of private law see for instance Müller-Graff (2004), pp.90-100 and Annex I to the Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398 final, pp.19-44.

¹⁸⁹ The areas which are listed in the Annex I are reflective of spheres of law the judges participating in the survey are adjudicating in.

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EU directives and regulations covering different fields of private law and civil procedure and is a clear evidence of the immense influence of EU measures on national private laws.

The foregoing brief analysis supports the observation that EU directives and regulations play a crucial role in the process of Europeanisation of private laws. And yet, it is well known that directives are written in general language, may contain gaps and many of them are ambiguous in their substance, definitions and concepts.¹⁹⁰ This implies that the practical application of them is dependent upon the way they are interpreted. In that respect the ECJ has played a significant role in the process of further clarification of Union measures and shaping of European private law.¹⁹¹ At present, there is a large body of case law by the ECJ in the areas mentioned.¹⁹² In its jurisprudence the Court has attempted to clarify the scope of specific directives or regulations and explaining the notions of, for instance, consumer¹⁹³, unfairness of contract terms¹⁹⁴, refund of payments in the event of insolvency¹⁹⁵, liability for defective products and rules on damages¹⁹⁶, package holidays, travel and tours¹⁹⁷ or product liability risk defence term.¹⁹⁸ A great bulk of cases relates to the issue of equal treatment and gender discrimination in employment relationships and social security schemes¹⁹⁹,

¹⁹⁰ See Twigg-Flesner (2008), p.107.

¹⁹¹ Ibid, pp.49-50.

¹⁹² For more check for instance Mak (2008) and Rott (2005), pp.6-17.

¹⁹³ Case 361/89 *Criminal proceedings against Patrice Di Pinto* [1991] ECR I-1198.

¹⁹⁴ Joined cases C-240/98 to C-244/98C, *Océano Grupo Editorial SA and others v. Salvat Editores SA and others* [2000] ECR I-4941 and C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter, Ulrike Hofstetter* [2004] ECR I-3403.

¹⁹⁵ Case C-178/94 *Dillenkofer and others v. Federal Republic of Germany* [1996] ECR I-4845.

¹⁹⁶ C-168/00 *Simone Leitner v. TUI Deutschland GmbH & Co. KG* [2002] ECR I-2631 and C-203/99 *Henning Vedfeld v. Århus Amtskommune* [2001] ECR I-3569.

¹⁹⁷ Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v. Bundesrepublik Deutschland* [1996] ECR I-4845.

¹⁹⁸ Case C-300/95 *Commission v. UK* [1997] ECR I-2649.

¹⁹⁹ See for instance cases: 43/75 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455, C-149/77 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* [1978] ECR 1365, C-177/88 *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941, C-342/93 *Joan Gillespie and others v. Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board* [1996] ECR I-475. Several important cases concern the issue of age discrimination in employment relationships, see for instance cases: C-144/04 *Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981, C-555/07 *Seda Küçükdeveci v. Swedex GmbH & Co. KG* [2010] ECR n.y.r., C-341/08 *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR n.y.r.

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organisation of working time²⁰⁰, protection of employees and transfer of undertakings.²⁰¹ Frequently, the ECJ is asked to interpret the EU regulations in the field of transborder cooperation and jurisdiction of courts for instance the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.²⁰²

Next to interpreting secondary EU law legislation, the Court has given direct horizontal effect to several provisions of EU primary law, such as for instance the freedom of services and persons, which in turn will directly bear on agreements concluded by private parties.²⁰³ Also, the Court frequently rules on general principles of Union law, such as for instance non-discrimination, equality, proportionality or the right to effective judicial protection, which may indirectly bear on the proceedings in civil cases and their outcomes.²⁰⁴ All the above-discussed methods of Europeanisation of national legal systems are interacting with each other and have created a partially harmonized, multi-level private law system in the European Union.²⁰⁵ A system in which rules of national origin are intertwining with norms derived from EU law. As a matter of fact, the harmonization processes at the Union's level brought about a partition of private laws at the national level.²⁰⁶ It is argued that the system which has been established resembles a patchwork and is not necessarily deemed coherent and consistent.²⁰⁷ The so-called piecemeal or fragmentary approach to the process of

²⁰⁰ See case C-84/94 *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union* [1996] ECR I-5755, C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] ECR I-7963.

²⁰¹ See for instance cases C-499/04 *Hans Werhof v. Freeway Traffic Systems GmbH & Co. KG* [2006] ECR I-2397 and C-466/07 *Dietmar Klarenberg v. Ferrotron Technologies GmbH* [2009] ECR I-0000. For a general overview of cases in the realm of labour law check Sciarra (2001).

²⁰² The number of preliminary references from national courts on the interpretation and scope of application of the said Regulation is abundant, see for instance case C-111/08 *SCT Industri AB i likvidation v. Alpenblume AB* [2009] ECR I-0000.

²⁰³ See Keirse (2011), p.46

²⁰⁴ Ibid.

²⁰⁵ For a broad overview of the manner in which European law influence individual national private laws see for instance Hartkamp et al (2007).

²⁰⁶ See Joerges (2004), p.168 and Hesselink (2002), pp.37-44.

²⁰⁷ Smits puts forward that the system of European Private Law is fragmentary, arbitrary, inconsistent and ineffective and does not achieve the creation of a satisfactory level playing field for private enterprises in the EU. See Smits (2007), p.225. It should also be emphasized that directives may be incoherent between themselves for they are often prepared by different General Directorates of the European Commission, see Hesselink (2002), p.43.

harmonization²⁰⁸ that pertains to particular and discrete aspects of private law in combination with specific features of that law and peculiarity of every national legal system may arguably lead to situations when a correct implementation, application or enforcement of EU law may be impeded.

3. Europeanisation of national law: potential consequences for national judiciaries

In view of the foregoing it becomes evident that EU law has crept in the sphere of private relations and conferred, directly or indirectly, various rights on, *inter alia*, consumers, employees or undertakings. Those rights go hand in hand with numerous duties which are imposed on the respective parties. In situations when those rights are breached or the obligations are not met a dispute will very likely be heard and decided by a national judge adjudicating in the private law area.

As it has already been illustrated the greater part of measures in the field of private law is adopted in the form of directives which in many instances touch upon various core concepts of national law in the field of for instance contract or labour law. Pursuant to Article 288 TFEU (ex 249 EC) Member States are expected to transpose directives into their own legal systems in accordance with their own constitutional rules. Hence, the application and enforcement of EU legislation in the area of private law depends upon national transposition and implementation of directives into domestic legal systems. In fact, the progressive Europeanisation of national private laws implies that national judges adjudicating in this area deal with national norms introduced in order to implement EU law, or more precisely EU directives, on a daily basis. Arguably, in most cases a national judge will apply those originally EU law norms, i.e. national norm introduced in order to implement EU provision, automatically.²⁰⁹ It may therefore be inferred that national judges in various Member States

²⁰⁸ See Van Gerven (2004), p.525 and Smits (2007), p.225.

²⁰⁹ A directive is most often implemented into different parts of national civil code. Sometimes it may be partly implemented into a code and partly in separate statutes. See for instance Hesselink (2006), pp.59-69 and next chapter on the discussion on the implementation of EU directives into the Polish private law system.

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apply various and often divergent legal provisions which in fact have their roots in one and the same EU measure.²¹⁰ Alternatively, the national judge might be asked to enforce directly applicable provisions of EU regulations.

In view of the preceding discussion, it should yet be observed that the process of the national transposition of EU directives is a difficult and technically complex one and requires much care and workload on the part of a national legislator. Also, political factors may influence the processes of implementation of EU directives.²¹¹ It is thus by no means surprising that directives are well-known from being implemented incorrectly or belatedly.²¹² The central concern arises therefore in situations when it is put forward that a directive is not correctly implemented or not implemented at all. Further difficulties may be provoked by the fact that the correct application of an EU directive or regulation depends upon the way its provisions are interpreted since, for instance, the terminology and concepts enshrined therein may be broad, not sufficiently defined or ambiguous. In that sense, EU law sources may also play a soft role in the process of adjudication, as an interpretative aid or a supplementary or

²¹⁰ See for more Tin Tai&Teuben (2008), p.835.

²¹¹ There is a very broad range of academic, mostly political science, writing in that respect. Various authors point to distinct variables which may influence the process of EU directives transposition, see for instance Lampinen&Uusikylä (2007), pp.237-240 who point to the factors such as stable political culture, high public support for the EU, interests groups and efficient political institutions; Falkner at al (2007) who illustrate that administrative shortcomings, issue linkage or problems with interpretation may influence the transposition processes; Knill (1998) who points to the problem of low political attention and pressure with regard to the processes of transposition; see also Haas (1998); Versluis (2004) and Mastenbroek (2003). By and large, the authors argue that the implementation process differ greatly between the Member States but also across policy domains.

²¹² See for instance Prechal (1994), p.7. In its Annual Reports on the Monitoring the Application of Community/EU law, the Commission constantly claims that the proper and timely transposition of EU directives remains a problematic issue for the Member States. The statistics included in the annual reports are very telling in that respect. In 2007 there were 1196 events of non-communication of national measures transposing EU directives to the Commission, see 25th Annual Report from the Commission on monitoring the application of Community law (2007) Statistical Annex I to III, COM(2008) 777, SEC(2008) 2855, p. 3, in 2010 the number decreased to 855, see Letters of formal notice for non-communication sent by country 2010 to be found at: ec.europa.eu/eu_law/docs/docs_directives/lfm_ms_2010.pdf (last accessed 20 August 2011) It should be borne in mind that this numbers concern non-communication situations whereas in practice it is impossible to detect all instances of an incorrect application. See also information on the measures taken by the national authorities in each Member State to incorporate EU directives into their national law to be found at: ec.europa.eu/community_law/directives/directives_communication_en.htm (last accessed 13 May 2009) and Progress in notification of national measures implementing all adopted directives at: ec.europa.eu/eu_law/docs/docs_directives/mne_country_20091124_en.pdf (last accessed 20 August 2011). The last document shows that Poland has one of the lowest rates of notifications from among all the Member States with only Luxembourg, Italy and Greece doing worse.

subsidiary legal argument supporting the line of reasoning or allowing to re-construct the meaning of national provisions.²¹³ In addition to the above, it may also be claimed that a national provision is not compatible with a Treaty provision, i.e. it contravenes one of the freedoms of the internal market or a fundamental principle of EU law such as non-discrimination or proportionality.

These are but a few eventualities which implicate that the seemingly straightforward task performed by national judges in their daily practice becomes much more intricate when a question of EU law arises in a dispute. However, what really makes this task complex is the fact that in situations when an EU law element appears in a case, distinct judicial mechanisms ought to be applied. For instance, a national judge is expected to enforce a directly effective EU provision and give precedence to an EU law provision or, more likely in the context of private law, interpret national law in the light of Union law. This may also possibly involve the necessity of referring a preliminary question to the ECJ. The subsequent part of this work takes as its point of departure this dimension of the Europeanisation process, that is to say the factual legal expectations which are put on national judges by means of EU law.

4. Responsibilities of national judges following from EU primary law

In view of the seemingly significant role which is put on the national judiciaries by EU law it is rather surprising that only one provision of EU Treaties, that is to say Article 267 TFEU (ex Art. 234 EC) directly refers to national courts. This provision, which will be a subject of separate considerations²¹⁴, does not reflect the virtual position of national courts in the judicial architecture of the Union though.²¹⁵ Next to Article 267 TFEU, there are two other provisions that refer to national courts in an indirect way. Those are the second sentence of Article 19 (1) TEU, which was introduced only recently by the Treaty of Lisbon, according to which the Member States are responsible for providing effective judicial protection and Article 4 (3) TEU (ex Art. 10 EC) which enshrines the general principle of loyalty. Both of them embrace

²¹³ See Bobek (2006), p.266.

²¹⁴ See section 8 of the present chapter.

²¹⁵ See Maher (1994), p.231.

obligations which are of a very general but constitutive nature for the functioning of national courts and shall, therefore, be investigated in more detail.

The second sentence of Article 19 (1) TEU stipulates that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”.²¹⁶ The introduction of this article into the system of the Treaties finally codified and enhanced, though only partially²¹⁷, a broad line of jurisprudence of the ECJ which related to the obligation of the Member States, and consequently their courts, to ensure effective judicial protection of the rights individuals derive from EU law and finally filled in the legislative lacuna which existed in this field for many decades.²¹⁸ It should also be observed that the principle of effective judicial protection is very closely interwoven with the principle of national procedural autonomy and effectiveness which will be discussed in the later sections of this chapter.²¹⁹ Since the principle as such was not enshrined in the Treaties at the moment of the empirical part of the present study it seems necessary to briefly look into the origins of it.

The principle of effective judicial protection implies that the Member States must assure access to national courts. Those, in turn, are expected to effectively protect the rights individuals derive from EU law. In the case *Johnston* the Court clearly pointed out that all persons have the right to an effective judicial remedy if their rights stemming from EU law are infringed. In view of the ECJ, the task of ensuring effective judicial review relied upon the Member States and was a reflection of a general principle of law which underpins the

²¹⁶ See Barents (2010), p.715 for a brief overview of legislative history of the article.

²¹⁷ See Arnulf (2011), p.68. The author claims that the article should be included at the end of Art. 4(3) TEU since it seems misplaced as part of Art. 19 TEU which, as a matter of fact, regards the institutional architecture of the EU and the role of the ECJ within it, see note 19 of the article, p.53.

²¹⁸ See Barents (2010).

²¹⁹ In accordance with Jans *et al* the principle of effective judicial protection should be seen as an extension of the principle of effectiveness of EU law, see Jans *et al* (2007), p.51. See also the discussion in Prechal (2006), p.143 and Prechal (1997), p.4 where the author claims that the principle of effectiveness and effective judicial protection are not fully equivalent. Others claim that the principle as an emanation of the principle of effectiveness, see Miąsik, *Zasada proporcjonalności w prawie wspólnotowym i jej zastosowanie przez sądy krajowe* [in] Wróbel (2005), p.324. In view of those opinions, the fact that the Court held that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States is somewhat confusing, see case 222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para.18. In its recent judgment the Court stated, in turn, that the principle of effectiveness constitutes part of the principle of effective judicial protection, see joined cases C-317/08 to C-320/08 *Rosalba Alassini and others v. Telecom Italia SpA and others* [2010] ECR n.y.r., para.49.

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constitutional traditions of the Member States and is enshrined in articles 6 and 13 of the ECHR.²²⁰ The judgment carried several important implications. It established access to the courts as a fundamental principle common to all Member States. Anybody whose rights stemming from EU law are infringed has the right to seek and obtain an effective remedy in a competent court which must be independent and impartial.²²¹ The principle does not only concern situations when an individual directly relies on EU provisions but also situations when national implementing provisions are concerned. Thus, if a properly implemented directive does intend to regulate the issue of effective protection, the Member States are still obliged to ensure that the rights an individual can derive from the directive can be protected in a judicial process.²²² The right to effective judicial protection as pointed out by the Court is thus of a very general nature and applies to situations when legal decisions of national authorities which aim at applying EU law are in question.²²³ The requirement to establish effective review procedures has become a frequent issue in the jurisprudence of the ECJ, be it in relation to discriminatory treatment of employees or assessment of the facts and evidence.²²⁴ From the preceding brief summary it follows that the content of the right to effective judicial review as established by the ECJ is not well-defined and explicit.²²⁵ Furthermore, it is by no means easy to predict when the Court will utilize the principle of

²²⁰ Case 222/84 *Marguerite Johnston*, paras.18-19. See also cases: C-97/91 *Oleificio Borelli v. Commission* [1992] ECR I-6313, para.14; C-424/99 *Commission v. Austria* [2001] ECR I-9285, para.45; C-50/00 P *Unión de Pequeños Agricultores v. Council of the European Union* [2002] ECR I-6677, para.39; C-467/01 *Ministero delle Finanze v. Eribrand SpA* [2003] ECR I-6471, para.61.

²²¹ Case 14/86 *Pretore di Salò v. Persons Unknown* [1987] ECR 2545, para.7; case C-17/00 *François De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I-9445, para.17 and case C-506/04 *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg* [2006] ECR I-8613, paras.48-54 where the Court extensively elaborates on the notions of independence and impartiality.

²²² From Prechal (2006), p.143.

²²³ See case C-327/02 *Lili Georgieva Panayotova and others v. Minister voor Vreemdelingenzaken en Integratie* [2004] ECR I-11055, para.27.

²²⁴ Case C-120/97 *Upjohn Ltd v. The Licensing Authority established by the Medicines Act 1968 and Others* [1999] ECR I-223, paras. 33-36; case C-92/00 *Hospital Ingenieure Krankenhaustechnik Planungs- GmbH (HI) v. Stadt Wien* [2002] ECR I-5553, para.52 and case C-187/95 *Belinda Jane Coote v. Granada Hospitality Ltd* [1998] ECR I-5199, paras.22-24. In case *Verholen* the Court employed the principle of effectiveness and effective judicial protection in order to interfere with Dutch rules on *locus standi*. The plaintiff's wife had no standing to participate in the proceedings under Dutch law. Nevertheless, the Court extended the scope of the directive in issue to other persons who "may have a direct interest in ensuring that the principle of non-discrimination is respected as regards persons who are protected", see joined cases C-87/90, C-88/90 and C-89/90 A. *Verholen and others v. Sociale Verzekeringsbank Amsterdam* [1991] ECR I-3757, paras.23 and 25.

²²⁵ See Ward (2007), p.175. Arnall refers to the principle of effective judicial protection as to "an unruly horse", see Arnall (2011), p.51.

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effective judicial protection in an individual case. It is yet evident that for the national courts the principle of effective judicial protection is of very general and fundamental nature and implies that they are expected to effectively protect the rights individuals derive from EU law and to ensure adequate remedies if those rights are breached.

Likewise, the principle of loyalty/loyal cooperation, which determines the relations between the EU and its Members, is recognized as one of the fundamental, constitutional principles underpinning the existence of the Union.²²⁶ The indirect nature of the loyalty provision has not withheld the ECJ from greatly relying on it in order to expand the range of the obligations and duties of the Member States in relation to EU law.²²⁷ The ECJ started to employ this provision from the 1980s and ever since it has extensively employed this principle in order to expand the range of the obligations and tasks of the Member States in relation to EU law.²²⁸ The principle imposes obligations on the national public authorities to undertake any action necessary to secure the fulfillment of their obligations under the Treaty or resulting from an action of the Union. Furthermore, Member States are obliged to refrain from any action that could impair the accomplishment of the aims and objectives of the Treaty. The principle of loyal cooperation and good faith is addressed to the Members States in general and has been interpreted as covering all the organs of the State, i.e. it applies to legislative, executive, administrative and judicial authorities across all layers.²²⁹ The provision is broad and may bear various implications for national authorities in the process of the application and interpretation of EU law.²³⁰ This, in turn, has profound consequences for the functioning of national courts in their European capacity as the principle of loyal cooperation is claimed to

²²⁶ See Jans et al (2007), pp.37-41; Lang (2008), pp.75-76.

²²⁷ See Maher (1994), p.231.

²²⁸ See *ibid* and Hinton (1999), pp.344-347. Often it is claimed that the ECJ uses the article too often, too zealous if not too impudent and for political choices. Gormley claims that the article has become the most dynamic provision of the Treaty employed by the ECJ, see Gormley, *Some further reflections on the development of general principles of law within article 10 EC* [in] Bernitz et al (2008), p.303.

²²⁹ See for instance case 14/83 *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, [1984] ECR 1891, para.26 or case C-2/88 *Imm J. J. Zwartveld and others* [1990] ECR I-3365, paras.17-18. And yet, the provision is not one-sided. It applies to the Union institutions as well and obliges them to cooperate with the Member States and between each other. Likewise, it requires from the Member States to loyally cooperate with each other.

²³⁰ Hinton (1999), p.320.

constitute the ground for most of the judicial enforcement of EU law.²³¹ In that sense, the principle of loyalty does not create a specific duty in itself but it overarches all other obligations of national courts in relation to EU law. Many of the consequences of the provision are not substantive but of a procedural character and they primarily concern national courts.²³²

From the foregoing account it follows that the Treaty is not intended to regulate the tasks of national courts with relation to EU law in more detail. Leaving aside the mechanism of the preliminary ruling, the Treaty does not provide for any explicit rules and mechanisms based on which EU law can be invoked by individuals and should be applied by national judges. The tasks and competences of national courts have only been defined and established as a consequence of the case law of the Court of Justice, that is to say they are all judge made law. It was only the European Courts of Justice which, step by step, established that national judges are responsible for the application of EU law and explicated to national judges how they are supposed to apply EU law and which tools they are expected to utilize. In the academic writing, the duties of national courts are sometimes classified as belonging to either the first or second generation obligations groups.²³³ The first generation principles created the obligation for national courts to apply EU law, either directly or indirectly. Thus, the principles such as supremacy, direct effect or the obligation to interpret national law in the

²³¹ Lang (2008), pp.77 and 89-92; Lang (2006), pp.476-477; Lang (1997a), p.70. The author proclaims article 4(3) TFEU to constitute the basis for many other constitutional principles of EU law. Following the author's argumentation, most of the general duties imposed on national courts, for instance the duty to provide effective protection for rights derived from EU law, the duty to set aside national laws incompatible with EU law, the duty to interpret national law in the light of EU law, the duty to award compensation in cases of infringement of EU law by national public authorities and the duty to raise point of EU law of the court's own motion, to name just a few, are underpinned by the principle of loyalty.

²³² Lang (2008), p.110.

²³³ As a matter of fact, the term "second generation" was employed for the first time by De Wilmars (1981), p.379. For more check Claes (2004), p.103. Some authors use the word *constitutional* for the first generation issue since they are derived from the most crucial legal principles that are underpinning the entire legal system of the Union. See also Postulski, *Sądy państw członkowskich jako sądy wspólnotowe* [in] Wróbel (2005), pp.410-473 and Prechal (1994), p.150. In turn, Bermann applies the terms of first, second and third generation *fidelity challenges*, see Bermann (2008), pp.525-530. In accordance with this typology the first generation fidelity challenge encompasses primacy, direct effect and the use of the preliminary reference procedure. The second generation fidelity problems relate to effectiveness of EU law and operation of that law in practice. In that respect they concern rules on national procedural autonomy but also state liability. Third generation fidelity problems pertain to the application of the interpretations provided by the ECJ in the preliminary reference procedure or the compliance with the obligations of harmonious interpretation.

light of EU law must be mentioned. The second generation problems refer to the rule of effectiveness of EU law under national systems of judicial protection and availability of proper remedies in national legal systems. To be more specific, they pertain to the issue of practical possibility of the enforcement of the right that individuals derive from EU law. Somewhere in between those groups the obligations attached to the principle of state liability in damages for infringements of EU law and the consequences thereof for the functioning of national courts should be placed.²³⁴ Finally, the story of the role of national courts is completed by the preliminary reference procedure and the roles national judges play within it.

5. The obligation to ensure supremacy and direct effect of EU law

Two central principles which explain the position of national courts vis-à-vis EU law and their function with regard to it are the doctrines of direct effect and supremacy. Not only are both principles the most constitutive for the nature of EU law and its relationship with national law but they are also two cardinal principles for the functioning of national courts in their EU capacity. On the one hand, they are powerful tools in the hands of individuals and, on the other hand, they empower national courts by conferring on them competences which they would normally not have under national law. In a nutshell, the principle of supremacy read in conjunction with the principle of direct effect implicate that national courts are under the obligation to recognize and enforce directly effective EU law provisions when national provisions are in conflict with them. Those national provisions which are incompatible with EU law provisions must be set aside. The preceding synopsis does not reflect the whole meaning of both principles though. It is therefore necessary to look in more detail into the rationale standing behind both doctrines.

²³⁴ It is rather difficult to clearly classify the rule of state liability for, on the one hand, it has been called a general principle of EU law and, on the other hand, it is very closely related to the issue of effectiveness of EU law. In the present study the principle of state liability is addressed from the perspective of possible consequences of in compliance of national courts with the normative expectations imposed on them by EU law.

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The principle of supremacy and direct effect of EU law were established by the ECJ in several landmark cases.²³⁵ From the chronological point of view, direct effect was established earlier in the aforementioned *Van Gend&Loos* case.²³⁶ It is yet the principle of supremacy of EU law which is perceived to be a fundamental one for the maintenance and survival of the legal order of the Union²³⁷ and which is seen as a necessary precondition of direct effect.²³⁸

The principle of supremacy of EU law was established by the ECJ in its *Costa v. E.N.E.L* ruling in which the Court stated that the Treaty, being an independent source of law, cannot be overridden by national laws.²³⁹ The general assumption underlying the argumentation of the ECJ is the premise that EU creates its own legal system which becomes an integral part of national legal systems and the efficacy of it would be undermined if national law could take precedence over the law of the EU. The principle became a frequent subject matter of the jurisprudence of the ECJ and in the course of time was more precisely defined and deepened. In the *Internationale Handelsgesellschaft* case the Court established that any national provision, also one of constitutional nature, cannot take precedence over EU law in the case of incompatibility.²⁴⁰ The principle was given an added dimension in the *Simmenthal* judgment in which the Court established that national court must accordingly set aside any provisions of national law which may conflict with EU law whether prior or subsequent to the establishment of the respective European rule.²⁴¹ From the foregoing

²³⁵ Declaration No 17 attached to the Lisbon Treaty recalls that primary and secondary EU law take primacy over the laws of the Member States. It is yet debatable what the binding nature of the declaration is. The author does not agree with Beck (2011), pp.471-472 who claims that by means of the aforementioned declaration the principle of supremacy of EU law has been codified in the Lisbon Treaty.

²³⁶ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend&Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1.

²³⁷ See Timmermans, *Application of Community law by national courts: (limits) to direct effect and supremacy* [in] Jansen et al (1997), p.35.

²³⁸ The ECJ first established the principle of direct effect and only 2 years later it ruled on primacy. As Prechal observed: "Although direct effect and supremacy often go hand in hand, they are two separate concepts", see Prechal (1994), p.121.

²³⁹ Case 6/64 *Flaminio Costa v. E.N.E.L* [1964] ECR 585, part on the submission that the Court was obliged to apply the national law.

²⁴⁰ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para.3.

²⁴¹ See case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 585, paras.14, 16, 16, 21 and 24. That case-law has been reaffirmed on several occasions, see for instance: C-159/91 *Criminal proceedings against Jean-Claude Levy* [1993] ECR I-4287, para.9; C-347/96 *Solred SA v. Administración General del Estado* [1998] ECR I-937, para.30.

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discussion, it is clear that the ECJ provided no room for leeway for national bodies and courts. National courts are under the obligation to apply directly effective EU provisions when they are in conflict with national laws. Those national provisions which are incompatible with EU law provisions must be set aside.

This system of obligations soon proved to be rather troublesome for it required from national courts to execute tasks and jurisdiction which they would normally not exercise under national law or which would as a matter of fact go much beyond their constitutional competences and were not necessarily in accordance with the standing legal traditions.²⁴² This situation has become most evident in the *Factortame* case which arose out of a situation when, in accordance with national rules, there was no competence for English courts to grant interim relief to the applicants. In accordance with the claim of the applicant such situation was in breach of EU law. The ECJ was adamant in its attitude towards the issue of supremacy of EU law and decided the case in favour of the applicants. In accordance with the words of the Court, any national rule which may impede the full effect of Union law must be set aside by the national court.²⁴³ Importantly, the fact that such a rule should be set aside neither implies its nullification nor does it prevent its application in disputes that fall outside the scope of EU law. In the *IN.CO.GE '90* case the ECJ rejected the argument that the provisions found incompatible with EU law should be treated as non-existent. Put differently, domestic courts are obliged to disapply an incompatible national rule which is however not equivalent to rendering that rule null and void.²⁴⁴ From all the above it can thus be concluded that supremacy of EU law is based on the notion of supremacy in application.²⁴⁵ Finally, the functioning of the principle of supremacy is closely connected to the direct effect of the provision an individual wishes to rely on. This, as will be illustrated in the subsequent section, very much depends on the nature of that provision which might be different depending on the legal sources it is enshrined in.

²⁴² See Lasser (2009), p.248.

²⁴³ Case C-213/89 *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433, paras.20-22

²⁴⁴ Joined cases C-10/97 to C-22/97 *Ministero delle Finanze v. IN.CO.GE. '90 et al* [1998] ECR I-6307, paras.18-21.

²⁴⁵ See Kwiecień (2005), p.1485.

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The principle of direct effect as enshrined in the *Van Gend&Loos* case implies that EU law is an autonomous legal order which automatically constitutes an integral part of the legal orders of the Member States.²⁴⁶ In consequence, EU law can independently confer rights on individuals and allows them to directly rely on Union's norms in the disputes before national courts, provided that specified conditions are met.²⁴⁷ National courts are, in turn, obliged to give effect to those rights. The principle of direct effect was very widely elaborated upon in the *Simmenthal* case, in which the Court stated in a straightforward manner that in the context of judicial application of Community law direct effect signifies that EU law must be fully and uniformly applied by every national court whose obligation is to protect in its entirety the rights conferred on individuals by EU law.²⁴⁸ This approach presented by the ECJ carries substantive practical implications for national courts. It requires national judges to enable individuals to rely on EU law, that is to say the EU provisions are applied and consequently the rights of individuals flowing from EU law are protected.²⁴⁹

The foregoing synopsis does not reflect the full essence of the principle of direct effect though.²⁵⁰ What is more, the basic premise that provisions of EU law be directly effective does not implicate that all EU provisions are capable of producing such effect. In order for a primary or secondary law provision to be directly effective it must satisfy certain conditions, i.e. it must be clear, precise and unconditional.²⁵¹ Those conditions do however have different and intricate implications for different sources of EU law and they have undergone a

²⁴⁶ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend&Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1, part II, point B.

²⁴⁷ See Jans et al (2007), p.63.

²⁴⁸ Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 585, paras.14, 16 and 21.

²⁴⁹ In case 103/88 *Fratelli Costanzo SpA v. Comune di Milano* [1989] ECR 1839, paras.31-32 the Court broaden the meaning of the direct effect and included also national administrative bodies in the group of bodies that must apply directly effective EU provisions, so called administrative direct effect. See also cases: C-431/92 *Commission of the European Communities v. Federal Republic of Germany* [1995] ECR I-2189, C-224/97 *Erich Ciola v. Land Vorarlberg* [1999] ECR I-2517, paras.29-33. For more check Prechal (2000), pp.1049-1051.

²⁵⁰ See Craig&De Búrca (2003), pp.178-179, "(...) the concept of direct effect is not straightforward. Academic and even judicial uncertainty remains about the exact meaning and scope of the term." To make the issue even more obscure broad and narrow definitions of the principle can be distinguished. Furthermore, there exists a distinction between the notions of direct application and direct effect. In *Van Gend en Loos* the ECJ provided for a broad interpretation of the principle, simply stating that EU law can be invoked before national courts. The narrow, also called subjective, interpretation of the principle puts the impact on the ability of EU provisions to provide individuals with rights that can be protected before national courts.

²⁵¹ Case 26/62 *van Gend&Loos*, part II, point B.

substantial evolution over the years. Hence, in order to grasp the essence of the obligations imposed on national courts by the principle of direct effect it is indispensable to consider particular sources of EU law separately.

5.1. Ensuring direct effect of Treaty provisions

Whereas there is no provision in the Treaty which would stipulate that its provisions can be relied upon by individuals before national courts, in the *Van Gend&Loos* judgment the ECJ ruled on the Article 30 TFEU (ex Article 12 EC) could be invoked and relied upon before national courts by individuals under specific conditions. What emerged is that a provision of the Treaty is capable of producing direct effect if it is clear and unconditional²⁵², it enshrines a negative obligation (obligation to refrain from certain actions), it does not depend on national implementation and contains no reservations in relation to the Member States.²⁵³ In case *Federatie Nederlandse Vakbeweging* the Court ascertained that a Treaty provision is sufficiently precise to be applied by the court where the obligation which it imposes is set out in unambiguous terms.²⁵⁴ Put crudely, in a situation when a party relies on a Treaty provision which is clear, sufficiently precise and intends to create rights and duties, a national judge is obliged to apply that provision and safeguard the rights flowing from it.

This brief analysis answers one question but raises another one. The Treaty is formally addressed to the Member States and consequently the foregoing considerations concern situations when a person relies on a Treaty provision in a dispute against public authorities, in so-called vertical situations. It remains however debatable whether a national court is expected to ensure direct effect of a Treaty article in a dispute between two individuals, that is to say in horizontal situations. In case *Defrenne II* the Court ruled that a Treaty provision may provide

²⁵² In case 28/67 *Molkerei-Zentrale Westfalen v. Hauptzollamt Paderborn* [1968] ECR 143, p.152. the Court concluded that a provision is unconditional where it is not subject, in its implementation or effects, to the taking of any measure either by the institutions of the Union or by the Member States. In a nutshell, the provision must not leave any leeway to the Member States and no additional legal acts are necessary.

²⁵³ In the course of time, the ECJ gradually loosened the above-mentioned criteria by ruling that some of the Treaty provisions which require additional executive instrument (positive obligations) are also capable of producing direct effect, see cases: 57/65 *Alfons Lütticke GmbH v. Hauptzollamt Sarrelouis* [1965] ECR 210 and 2/74 *Jean Reyners v. Belgian State* [1974] ECR 631, para.32.

²⁵⁴ Case 71/85 *Netherlands v. Federatie Nederlandse Vakbeweging* [1986] ECR 3855, para.20.

direct rights and duties also with regard to disputes between two individuals.²⁵⁵ Similar decisions were taken in cases *Bosman*, *Angonese* and *Courage*, to name just a few.²⁵⁶ The Treaty is yet drafted in a general language and regulates a wide range of issues. Consequently, from the practical point of view, every time an individual wishes to rely on a Treaty provision a national judge will have to undertake a test examining whether the article in question meets the conditions of direct effect as provided by the ECJ.²⁵⁷ In such situations, the case-law of the ECJ comes to the aid for a great deal of Treaty articles has already been scrutinized by the Court as to their ability to produce direct effect.²⁵⁸

5.2. Limited obligation to secure direct effect of international agreements

International agreements concluded by the EU constitute an integral part of Union's law²⁵⁹ and occupy place between primary and secondary EU law.²⁶⁰ Traditionally, international

²⁵⁵ Case 43/75 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455, para.39.

²⁵⁶ Case C-415/95 *Union royale belge des sociétés de football association and others v. Bosman and others* [1995] ECR 4291 where the Court ruled that Article 45 TFEU (ex 39 EC) has a horizontal direct effect, case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA* [2000] ECR 4139, paras.34-35 where the Court held that Article 54 TFEU (ex 48 EC) applies to private parties as well; case C-453/99 *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others* [2001] ECR 6297, paras.23-25 where the Court has held that Articles 102 TFEU (ex 82 EC) produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard. See also case 36/74 *B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1405, paras.17-19 concerning article 45 TFEU.

²⁵⁷ Such test may go much beyond a simple assessment of examining whether the provision is clear and unconditional and may also involve the evaluation of various factors, for instance economic factors, see case 27/77 *Firma Fink-Frucht GmbH v. Hauptzollamt München-Landsbergerstrasse* [1978] ECR 223, p.232.

²⁵⁸ See for instance cases: C-390/98 *H.J. Banks & Co. Ltd v. The Coal Authority* [2001] ECR I-6117, paras.53 and 67 where the Court ruled that Art.93(3) of the EC Treaty (now Art.108 (3) TFEU) has no direct effect; case 126/86 *Fernando Roberto Giménez Zaera v. Institut Nacional de la Seguridad Social and Tesorería General de la Seguridad Social* [1987] ECR 3697, paras.10-11 where the Court ruled out direct effect of Art.2 of the TEU (now Art.3 of the TEU); case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-143, para.61 where the Court ruled that Art.43 EC (now Art.49 TFEU) is capable of conferring rights on a private undertaking; case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* [2007] ECR I -11767, para.97, where Art.49 EC (now Art.56 TFEU) was held to have direct effect. Check also Schermers&Waelbroeck (2001), pp.183-185, who list Treaty articles having and not having direct effect at that point in time.

²⁵⁹ See case 181/73 *R. & V. Haegeman v. Belgian State* [1974] ECR 00499.

²⁶⁰ See case C-61/94 *Commission of the European Communities v. Federal Republic of Germany* [1996] ECR I-03989, para.52. It should yet not be forgotten that the system of Treaties does not, in fact, address the issue of place of international law within EU law and the issue is a very complex one. See also Lavranos (2010), p.122.

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agreements and treaties bind only the states and organizations that are party to them. The ECJ has however held that under certain circumstances international agreements can also produce direct effect in relation to individuals. Similarly to other sources of EU law, provisions of international agreements must be sufficiently precise, clear and unconditional to be directly effective.²⁶¹ In the *International Fruit* case, the Court established that in order for provisions of international agreement to be directly effective, the spirit, the general scheme and the terms of the agreement must be considered by the national court.²⁶² Consequently, the Court found that the relevant provision of the GATT agreement which was in question was not directly effective.²⁶³ In the *Kupferberg* case the Court ruled that the issue of direct effect of an agreement should be decided on the grounds of the text, the framework and the purpose of the agreement.²⁶⁴ In its subsequent jurisprudence the Court repeatedly denied direct effect of the provisions of GATT, WTO and TRIPs agreements²⁶⁵ but recognized direct effect of the provisions of the EEA agreement²⁶⁶ and the Association Agreements.²⁶⁷ Interestingly, the Court held that not only the provisions of association agreements but also provisions of the acts of bodies created for purposes of that associations can be directly effective.²⁶⁸ It can be concluded from the foregoing that the Court applied the conditions for direct effect to international agreements more rigorously than in case of other sources of law whereby only

²⁶¹ See case 12/86 *Meryem Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, para.14.

²⁶² Case 21-24/72 *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit* [1972] ECR 1219, para.20.

²⁶³ The Court concluded that the agreement is characterized by great flexibility of its provisions, the possibility of derogation, suspension and withdrawal from the agreement and for that reason it is not capable of being directly effective. See paragraphs 20-27 of the judgment.

²⁶⁴ Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A* [1982] ECR 3641, paras.20-26. In this judgment the Court found the provisions of the agreement directly effective.

²⁶⁵ See for instance cases: 9/73 *Carl Schlüter v. Hauptzollamt Lörrach* [1973] ECR 1135, C-469/93 *Amministrazione delle Finanze dello Stato v. Chiquita Italia SpA* [1995] ECR I-4553; C-149/96 *Portuguese Republic v. Council of the European Union* [1999] ECR I-8395; T-30/99 *Bocchi Food Trade International GmbH v. Commission of the European Communities* [2001] ECR II-943; joined cases C-300/98 and 392/98 *Parfums Christian Dior SA v. Tuk Consultancy BV and Assco Gerüste GmbH v. Wilhelm Layher GmbH & Co. KG* [2000] ECR I-11307. See also Eeckhout, *A panorama of two decades of EU external relations law* [in] Arnulf et al (2008), pp.323-337 and Jackson, *Direct effect of Treaties in the US and the EU, the case of the WTO: some perceptions and proposal* [in] Arnulf et al (2008), pp.361- 382 who argues that the refusal to grant direct effect to GATT and WTO Treaties is the “major conundrum for this jurisprudence”, p.377.

²⁶⁶ See case 115/94 *Opel Austria GmbH v. Council of the European Union* [1997] ECR II-39.

²⁶⁷ See for instance case C-268/99 *Aldona Malgorzata Jany et al v. Staatssecretaris van Justitie* [2001] ECR I-8615, para.28 or C-18/90 *Office national de l'emploi v. Bahia Kziber* [1991] ECR I-199, para.23.

²⁶⁸ Case 262/96 *Sema Sürül v. Bundesanstalt für Arbeit* [1999] ECR I-2685, para.74.

under very specific circumstances national courts may be expected to ensure direct effect of international agreements concluded by the Union.²⁶⁹

5.3. Ensuring direct effect of EU regulations and decisions

In accordance with Article 288 TFEU an EU regulation is binding in its entirety and directly applicable in all Member States. Similarly, a decision is binding in its entirety upon those to whom it is addressed. The way this issue is addressed in Article 288 TFEU does not leave much room for doubt. Neither regulations nor decisions require transposition into national law, they immediately become part of national legal regime and are directly applicable. It follows that those provisions of regulations which create rights and obligations for individuals and are clear, unconditional and relevant to the situation of a litigant, may be directly relied upon individuals in their national courts which will be under the obligation to interpret the provisions enshrined in those measures and to enforce them in both vertical and horizontal situations.²⁷⁰ Likewise, EU decisions, which are measures of individual character binding only upon those to whom they are addressed, are directly effective. The ECJ in the *Grad* case observed that, even though the effects of decisions are not equivalent to those of regulations, they both may produce the same (direct) effect.²⁷¹

In principle, regulations are directly effective in both vertical and horizontal situations. However, in order for a regulation to be directly effective in a dispute between two individuals it must precisely define what the rights and obligations of the individuals are.²⁷² Furthermore, some regulations require an adaption of special measures necessary for their application.²⁷³

²⁶⁹ See Douglas-Scott (2002), p.287.

²⁷⁰ In the *Politi* case the Court explicitly confirmed that EU regulations have direct effect, see case 43/71 *Politi s.a.s. v. Ministry for Finance of the Italian Republic* [1972] ECR 1039, para.9.

²⁷¹ Case 9/70 *Franz Grad v. Finanzamt Traunstein* [1970] ECR 825, para.5.

²⁷² Case C-108/01 *Consorzio del Prosciutto di Parma, Salumificio S. Rita SpA v. Asda Stores Ltd, Hygrade Foods Ltd* [2003] ECR I-5121, paras.87-99.

²⁷³ In case *Monte Arcosu* the ECJ held that even though the provisions of regulations generally have immediate effect in the national legal systems, they may not be relied upon before a national court if the legislator of a Member State has not adopted the provisions necessary for their implementation in the national legal system, see case C-403/98 *Azienda Agricola Monte Arcosu Srl v. Regione Autonoma della Sardegna et al.* [2001] ECR I-103, paras.25-29. The regulation provided that Member States should, for the purposes of the regulation, define

5.4. Securing direct effect of EU directives

The position of EU directives and their enforceability by national courts is somewhat different and more complex if compared to that of the Treaty provisions and EU regulations or decisions. An EU directive is addressed to the Member States which are obliged to attain the required result of it whereas the manner of achieving those results remain at the country's discretions. From the foregoing observations it can be concluded that directives are intended to produce different effects than Treaty provisions, regulations or decisions, especially in horizontal situations. Provided that a directive is correctly implemented, its legal effects with regard to individuals are derived from national implementation measures and not from the directive itself.²⁷⁴ It must however be reiterated that directives are well-known from being implemented incorrectly or belatedly, what can have profound implications for the legal position of individuals. The issue of the nature of directives and the implications thereof has occupied the central position in the debate on the direct effect of directives in vertical and horizontal situations. It is therefore necessary to examine the broad case-law on the subject matter.

In its landmark and far-reaching case *Van Duyn* the ECJ explicitly held that directives are capable of having direct effect and individuals may not be prevented from relying on the provisions of a directive before national courts.²⁷⁵ However, the ECJ went on to acknowledge that in every such case the national court ought to examine whether the nature, general scheme and wording of the provision of the directive in question is capable of producing direct effect and referred to the obligation that a provision must be sufficiently clear, precise and exact to be applied directly by a national judge. In the *Ratti* case, which concerned questions with regard to two directives one of which was not implemented on time, the Court once again held

what is meant by the expression "farmer practicing farming as his main occupation". Italian legislator did not fulfill that obligation and in consequence individuals could not rely on the regulation.

²⁷⁴ Cases: 102/79 *Commission of the European Communities v. Kingdom of Belgium* [1980] ECR 147, para.12 and 8/81 *Ursula Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 53, para.19.

²⁷⁵ Put crudely, the ECJ observed that directives are binding whereby they are able to be relied upon. Case 41/74 *Yvonne van Duyn v. Home Office* [1974] ECR 1337, para.12.

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that directives are capable of producing direct effect.²⁷⁶ The Court invoked the issue of a failure of a Member State to implement directives on time as the ground for an individual to invoke provisions of directives in actions before national courts. Importantly, the Court ruled that, provided that the date for implementation has not passed, there is no failure by a Member State and individuals are not able to directly rely on the provisions of a directive.²⁷⁷ However, in *Inter-Environnement* and *Adeneler* cases the Court took a somewhat different stand by observing that already during the transposition period the Member States must refrain from any measures that could seriously compromise the results prescribed by the directive.²⁷⁸ This obligation to refrain from taking such measures applies also to national courts.²⁷⁹ Additionally, in case *Marks&Spencer*, the Court observed that the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive.²⁸⁰ For that reason, individuals are entitled to rely on the unconditional and sufficiently precise provisions of a directive in every case when the full application of the directive is not secured in practice, i.e. not only where the directive has not been implemented in due time or has been implemented incorrectly, but also in situations when national authorities do not apply the implementing provisions in such a way as to achieve the result sought by the directive at stake.²⁸¹ Leaving aside the afore-mentioned and exceptional situations, it can be summarized that national judges are expected to enforce direct effective provisions of a directive in situations when a Member State implements it incorrectly or it does not implement it by the

²⁷⁶ Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1629, paras.19-23. Furthermore, it was held that a Member State which has not implemented the directive in the prescribed period may not rely on its own failure to perform the obligations imposed by the directives. The Member States are thus estopped from relying on their own failure to transpose the directive the provisions of which confer some right on individuals. By means of this judgment the Court established the so-called 'estoppel' doctrine.

²⁷⁷ Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1629, paras.43-44.

²⁷⁸ Case 129/96 *Inter-Environnement Wallonie ASBL v. Région wallonne* [1997] ECR I-7411, para.45 and case *Konstantinos Adeneler et al v. Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057, para.122.

²⁷⁹ The Court based this obligation on the principle of loyal cooperation read in conjunction with Art.288 TFEU.

²⁸⁰ Case 62/00 *Marks & Spencer plc v. Commissioners of Customs & Excise* [2002] ECR I-6325, para.27.

²⁸¹ With respect to the *Marks&Spencer* ruling, it should be observed that in practice it is nearly impossible that implementing (administrative) decisions issued for the purpose of enforcement of the directive in question would be incompatible with national legislation correctly implementing directive. It does not however change the fact that the Court accepted to some extent the possibility for an individual to rely on the provisions of a directive even if it has been properly implemented. See Jans et al (2007), p.89.

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prescribed period and the provisions of a directive are clear, sufficiently precise and unconditional.²⁸²

The approach taken by the ECJ is rather straightforward but it is readily apparent that there are many other aspects attached to the issue of enforcement of EU directives which may give rise to some doubts on part of national judges. First of all, this concerns the issue of vertical and horizontal situations. In the case *Becker*, the Court ruled that the provisions of a directive may be relied on by individuals against state authorities. It did not thus mention situations when a directive is relied upon in litigations against private individuals.²⁸³ It was only after several years that the Court clarified that direct effect of directives takes place only against public authorities, that is to say exclusively in vertical disputes.²⁸⁴ The issue has become one of the most controversial, debated and criticized aspects of EU law.²⁸⁵ Recently the Court was again invited to revise its case on law on the issue of horizontal direct effect in case *Pfeiffer*.²⁸⁶ Despite the call from the AG Colomer to reconsider (the exclusion) of horizontal direct effect, the Court again proved adamant and did not change its standing with regard to the subject matter.²⁸⁷ It may thus be concluded that the issue of horizontal direct

²⁸² This reasoning was constantly repeated by the Court in various rulings. See for instance cases: 8/81 *Ursula Becker v. Finanzamt Muenster-Innenstadt* [1982] ECR 53 or 103/88 *Fratelli Costanzo v. Comune di Milano* [1989] ECR 1839. In case *Comitato Difesa* the Court held that the conditions of sufficient precision and unconditionally with regard to directives must meet the same requirements as in case of the Treaty provisions, see case C-236/92 *Comitato di Coordinamento per la Difesa della Cava and others v. Regione Lombardia and others* [1994] ECR I-483, paras.9-10. Additionally, in case *Karella* the Court stressed that derogations from the provisions in question which are included in directives do not rule out unconditional character of those provisions, see joined cases C-19/90 and C-20/90 *Marina Karella and Nicolas Karellas v. Minister for Industry, Energy and Technology and Organismos Anasykrotiseos Epicheiriseon AE* [1991] ECR I-02691, paras.20-22

²⁸³ See Case 8/81 *Ursula Becker*, para.25.

²⁸⁴ Case 152/84 *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, para.48.

²⁸⁵ The judgment in case 152/84 *Marshall* met with much criticism, also among the members of the Court themselves. It has been argued that apparent incoherence occurs when the issue of horizontal direct effect of directives is compared to that of the Treaty provisions which are also addressed to the Member States only. It should be recalled that the Court confirmed the possibility of the Treaty provisions to be directly effective in *Defrenne II* case. The issue of horizontal direct of directives effect returned to the Court again and again ever since, without much success though. See for instance joined cases 372-374/85 *Ministère Public v. Oscar Traen and others* [1987] ECR 2141, para.24-26; case 80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* [1987] ECR 3969, para.9; case 91/92 *Paola Faccini Dori v. Recreb Srl.* [1994] ECR I-3325, paras.19-22.

²⁸⁶ Joined cases C-397/01 to C-403/01 *Bernhard Pfeiffer et al v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835, paras.103-109.

²⁸⁷ Opinion of AG Ruiz-Jarabo Colomer delivered on 27 April 2004 in case C-403/01 *Bernhard Pfeiffer et al v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*.

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effect is a closed one and the possibility that the Court will relax his attitude to the subject matter is nonexistent.²⁸⁸ Yet, the fact the Court explicitly ruled out the possibility of horizontal direct effect of directives does not mean that individuals are entirely deprived of enforcing their rights flowing from directives against other individuals. The Court attempted to remedy that situation through circumventing its own jurisprudence to some extent by identifying the boundaries of the state in a rather broad manner, ruling on the obligation of national courts to interpret national law in the light of directives, giving direct effect to general principles of EU law and establishing the principle of state liability in damages.

In the aforementioned *Marshall* case, the Court ruled out the possibility of horizontal direct effect but at the same time it concluded that the plaintiff was capable of relying on the provisions of the invoked by her directive against the respondent – the Health Authority – for the respondent was in fact a public body.²⁸⁹ It follows that that even the public bodies that do not participate in the process of transposition are responsible for the application of the provisions of directives.²⁹⁰ Even though the foregoing does not induce much controversy, it becomes somewhat more complicated if seen in the light of the notion of a public authority and its boundaries which the Court established in the *Foster* case.²⁹¹ Subsequently, the ECJ concluded that individuals may rely on the provisions of directives against all organs of the

²⁸⁸ However, a line of case-law in so-called 'incidental horizontal effect' implies that in some horizontal situations provisions of unimplemented directives may exceptionally be relied upon before national courts if they do not impose legal obligations on persons. This concept enshrined in for instance case C-194/94 *CIA Security International SA v. Signalson SA and Secutitel SPRL* [1996] ECR I-2201 or case C-441/93 *Panagis Pafitis and others v. Trapeza Kentrikis Ellados A.E. and others* [1996] ECR I-1347 is however too complex, inconsistent and ambiguous to be expounded here in more detail, for more on incidental effect of directives check Betlem (2002), pp.409-413.

²⁸⁹ See case 152/84 *Marshall*, para.50.

²⁹⁰ See Craig&De Burca (2005), pp.208-209.

²⁹¹ Case 188/89 *A.Foster et al v. British Gas plc* [1990] ECR I-3313. The subject matter in that case concerned horizontal direct effect against a nationalized enterprise: British Gas Corporation. In its judgment the Court defined a public body by listing three cumulative conditions which must be fulfilled in order for a body to be an emanation of the state. First of all, the legal form of the body does not affect its position. Secondly, it must be a body that provides a public service which is controlled by the State. Eventually, its powers go beyond usual powers resulting from relations between individuals. It is readily apparent that the definition provided in the *Foster* case does leave many questions open. It remains unknown what kind of a control the State should have over the body and what "special powers" mean. It may be argued that this definition provide for a very broad interpretation of a public body which covers a wide range of organizations and bodies. In case *Kampelmann* the conditions for a body to be regarded as an organ of the State previously listed as cumulative, have become non-cumulative in character, see joined cases C-253/96 to C-258/96 *Helmut Kampelmann and Others v. Landschaftsverband Westfalen-Lippe, Stadtwerke Witten GmbH v. Andreas Schade and Klaus Haseley v. Stadtwerke Altena GmbH* [1997] ECR I-06907.

public administration, including decentralized authorities such as municipalities²⁹² and public corporations which are responsible for restructuring national undertakings.²⁹³

The foregoing discussion demonstrates that the issue of direct effect of EU directives bears many practical and intricate implications for national judges. Firstly, it must be concluded that national judges are obliged to protect the rights of individuals stemming from directives. They are expected to enforce provisions of directives if they are either incorrectly implemented or not implemented by the prescribed period and are clear, sufficiently precise and unconditional. A judge ought to consider whether the dispute has a vertical character which may involve the necessity of conducting the *Foster* test. Provided that provisions of a directive in question are incapable of producing direct effect, a judge will have to resort to other mechanisms available for the decentralized enforcement of EU law which will be subject of further considerations in the later part of this chapter. Seen in the light of the foregoing synopsis, one may argue that multitude aspects of direct effect of EU directives which in addition comprises many inconsistencies provides for a situation when crystal clear answers are scarce and situations when a judge has to deal with EU directives may involve additional burden, ambiguity and the necessity to consult the case-law of the Court.²⁹⁴

5.5. The obligation to ensure direct effect of general principles of EU law?

In two more recent, far-reaching and controversial and therefore hotly debated rulings *Mangold* and *Küçükdeveci* the ECJ added a new twist to the principle of direct effect and supremacy whereby it broadened the set of obligations which are put on national judges.²⁹⁵ In the former case it ruled that it is the task of the national court to set aside national provisions

²⁹² Case 103/88 *Fratelli Costanzo SpA v. Comune di Milano* [1989] ECR 1839, para. 31. Corroborated in joined cases C-253/96 to C-258/96 *Helmut Kampelmann and Others v. Landschaftsverband Westfalen-Lippe, Stadtwerke Witten GmbH v. Andreas Schade and Klaus Haseley v. Stadtwerke Altena GmbH* [1997] ECR I-06907, para.46.

²⁹³ Joined case C-19/90 and 20/90 *Marina Karella and Nicolas Karellas v. Minister for Industry, Energy and Technology and Organismos Anasygkrotiseos Epicheiriseon AE* [1991] ECR I-2691.

²⁹⁴ Prechal puts forward that as matter of fact, the entire system of decentralized enforcement of directives has in fact become unfeasible for national judges, see Prechal (1994), p.11.

²⁹⁵ Both judgments evoked firm discussion across the EU, for a general overview see De Mol (2010), pp.293-308. See also Wiesbrock (2010), pp.539-550 and Muir (2010).

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which conflict with EU law in a horizontal dispute, even if the period prescribed for transposition of the directive in questions has not expired yet, in order to ensure the full effectiveness of the general principle of non-discrimination on grounds of age.²⁹⁶ In the latter one it held that the full effectiveness of the principle of non-discrimination on grounds of age means that the national court, faced with a national provision falling within the scope of European Union law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, must decline to apply that provision.²⁹⁷ In a nutshell, a national court is obliged to disapply a national rule which is contrary to the general principle of non-discrimination on grounds of age also in horizontal situations when the national provisions may not be interpreted in line with the directive.²⁹⁸ It is yet necessary to observe that general principles of EU law gain direct horizontal effect only in situations when they evidently collide with national law which falls within the scope of EU law.²⁹⁹ However, at this point another significant observation follows, i.e. the Court refers to the principle of non-discrimination on grounds of age as to the general principle of Community law whereas it is debatable whether the concerned principle indeed occupies such a place in the EU legal order.³⁰⁰ As claimed by De Mol, the Court gives effect to “an *unwritten, court-*

²⁹⁶ See case C-144/04 *Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981. In the *Mangold* case Arbeitsgericht München referred a question concerning interpretation of the Framework Agreement on fixed-term contracts and art. 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The respective national labour court wished to know whether a German statutory provision concerning exempting employees older than 52 years from limitations to conclude fixed-term contracts was compatible with EU law. Importantly, the period for the implementation of Directive 2000/78/EC had not expired both at the moment of the dispute and the moment of handing down the judgment by the ECJ. For a comprehensive overview see Schmidt (2005), pp.505-524.

²⁹⁷ In case *Küçükdeveci* the German labour court asked the ECJ whether a provision of the German Civil Code concerning the periods of notice on dismissal which are to be met by employers which were increased gradually with the length of service but did not take into account the period of service before reaching the age of 25 were in compliance with EU law and more precisely with Directive 2000/78 or the general principle of non-discrimination on grounds of age. The national court also asked whether a general principle of EU law may be applied directly in a horizontal dispute implying setting aside the incompatible national provision.

²⁹⁸ See case C-555/07 *Seda Küçükdeveci v. Swedex GmbH & Co. KG* [2010] ECR I-365.

²⁹⁹ See Lenaerts&Gutiérrez-Fons (2010), p.1642. See also Hesselink (2011), p.449 who argues that yet it is not clear what exactly is meant by a case which falls within the scope of EU law. What is more, the author argues that recently the ECJ refers more frequently to general principles of civil law, it is yet not clear whether those would also be assigned direct (horizontal) effect.

³⁰⁰ In the *Mangold* judgment, para.74 the Court refers to the constitutional traditions which are common to the Member States and various international instruments which constitute, in the opinion of the Court, basis to regard the principle of non-discrimination on grounds of age as a general principle of Community law. It might

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made fundamental right.”³⁰¹ This in turn triggers various inquiries as to the implications of such a finding for the national courts since, first, there is a number of sources of general principles of EU law (and EU fundamental rights), and, second, it might imply that any principle allegedly derived from the “constitutional traditions common to the Member States” which is given expression in an EU measure could be granted a status of a general principle of EU law which national courts would have to protect, also in horizontal disputes. Thus, the national judges would be expected to identify (unwritten) general principles of EU law and give effect to them.³⁰² As a matter of fact, the Court does not discuss the issue of direct effect in neither of the judgments and instead it focuses on the principle of effectiveness and primacy of EU law³⁰³ and yet from the reading of both judgments it follows that provisions of an EU directive which express general principles of European Union law are to be given full direct effect, even in horizontal situations. Once the concerned rule applies, the effects of it could be far reaching but it should be emphasized that the effects of *Küçükdeveci* could only take place under extraordinary circumstances, that’s is to say the alleged principle is enshrined in the secondary legislation in question the sole purpose of which is to give effect to that principle (to give it expression).³⁰⁴ Undoubtedly, *Küçükdeveci* case has blurred the boundaries of the notion of direct effect, left many questions unanswered and endangers the principle of legal certainty.³⁰⁵ It remains to be seen whether the new doctrine will be enhanced and possibly broadened in the future but it should be underscored that potentially it might carry significant implications for the functioning of national civil courts.

be argued that the presented by the Court evidence which elevates the principle to the status of general principle of EU law is not sufficient and as matter of fact is not correct, see for instance Schmidt (2005), p.519.

³⁰¹ From De Mol (2011), p.301.

³⁰² From Muir (2010), p.19

³⁰³ Ibid, p.15.

³⁰⁴ Ibid, p.19.

³⁰⁵ From Wiesbrock (2010), pp.544 and 549.

6. The obligation to interpret national law in harmony with EU law

The principle of harmonious interpretation, also called indirect effect or consistent, sincere or conforming interpretation³⁰⁶, imposes on national courts the obligation to interpret national law in conformity with EU law. In a nutshell, the principle expects from national judges to construe national legislation as much as possible in harmony with EU law. Originally this obligation concerned interpretation of national law in harmony with EU directives. In the course of time the Court has however extended the scope of conforming interpretation to other sources of EU law, i.e. Treaty provisions³⁰⁷ and EU recommendations.³⁰⁸ In the present context only the aspect of EU directives is discussed since it is of the most practical relevance for national judges. As the principle is one of the most essential tools which are at disposal of national judges it is necessary to consider the rationale standing behind it and the practical implications of the doctrine for national courts.

As it was illustrated in the foregoing considerations an individual may come across a situation when she would not be able to enforce her rights stemming from an EU directive for the provisions of that directive are not capable of producing direct effect. In order to partly remedy such an eventuality, the ECJ established the doctrine of the interpretation of national law in conformity with EU directives. Thus, the principle of harmonious interpretation can be seen as an extension of the direct effect principle in relation to EU directives which have either not been implemented correctly or have not been implemented at all and are not directly

³⁰⁶ Other terms used for the consistent interpretation doctrine are *inter alia*: concurring/concurrent interpretation, interpretation in the light of a Community/EU provision, benevolent interpretation, purposive interpretation or interpretative obligation. See: Prechal (2006), p.181 and Wissink (2001), p.11.

³⁰⁷ See cases 157/86 *Mary Murphy and others v. An Bord Telecom Eireann* [1988] ECR 673, para.11; joined cases C-270/97 and C-271/97 *Deutsche Post AG v. Elisabeth Sievers and Brunhilde Schrage* [2000] ECR I-929, paras.62-64. In both cases the Court rules that national courts are obliged to interpret national law in the light of article Art.143 TFEU (ex 119 EC). The doctrine of harmonious interpretation was extended to the interpretation of framework decisions adopted in the III pillar. In case C-105/03 *Maria Pupino* [2005] ECR I-5285, paras 43-47 the Court held that that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national courts had to interpret national law as far as possible in the light of the wording and purpose of the framework decision. For more check for instance Ward (2007), pp.21-25.

³⁰⁸ See case C-322/88 *Salvatore Grimaldi v. Fonds des maladies professionnelles* [1989] ECR I-4407, paras.18-19 where the Court held that, even though recommendations are not binding, national courts are must take them into consideration in disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or EU law.

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effective. In that sense, it remains a second available to an individual solution in situations when she cannot directly rely on a directive.³⁰⁹

The principle has its roots in the *Von Colson* case in which the EU directive which the plaintiffs wished to rely on against a state employer was not implemented correctly but for its lack of sufficient precision it was not capable of producing direct effect. In its judgment the ECJ ruled that national courts are under the obligation to interpret and apply national law implementing a directive in conformity with that directive.³¹⁰ In the case *Marleasing* the Court, first, reaffirmed the position it had taken in *Von Colson* that domestic courts must as far as possible interpret national law in the light of the directive in order to achieve the result prescribed by the directive and went on to conclude that this obligation is binding on courts also in the disputes such as those in the main proceeding, that is to say in disputes taking place between individuals.³¹¹ Additionally, the Court made clear that the obligation of harmonious interpretation takes place also with regard to national provisions the introduction of which was not related to the process of the implementation of the directive.³¹² In the *Pfeiffer* case the Court went even further and pointed out that the obligation for national law to be interpreted in conformity with EU law is inherent in the system of the Treaty.³¹³ Furthermore, the Court established that domestic courts are required to consider national law “as a whole” in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive.³¹⁴ In its more recent case-law, the ECJ has broadened the obligations stemming from the principle of consistent interpretation even further by ruling that during the

³⁰⁹ See Reich et al (2003), p.50.

³¹⁰ Case 14/83 *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891, para. 26 The Court based this obligation of national courts on the principle of loyal cooperation and on the binding nature of article 288 TFEU.

³¹¹ Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] ECR I-495, paras.8-9 and 13. The Court addressed the issue of consistent interpretation in horizontal situations when the directive was not implemented at all.

³¹² Case C-106/89 *Marleasing*, para.9.

³¹³ Joined cases C-397/01 to C-403/01 *Bernhard Pfeiffer et al v. Deutsches Rotes Kreuz, kreisverband Waldshut eV* [2004] ECR I-8835, para.114.

³¹⁴ Joined cases C-397/01 to C-403/01 35 *Pfeiffer*, para.115.

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transposition period national courts are obliged to refrain from interpreting domestic provisions in a way that could compromise the results prescribed by the directive.³¹⁵

National courts are obliged to interpret national provisions in conformity with directives “in so far as it is given discretion to do so under national law”.³¹⁶ Although it may be argued that the leeway left to national courts was limited by the Court it still remains debatable how it should be defined and what implications this notion carries for national judges.³¹⁷ From *Pfeiffer* it could be inferred that the notion implies that national judges are bound to apply all possible interpretative methods allowed under national law.³¹⁸ In the *Adeneler* case, in turn, the Court concluded that the obligation cannot serve as the basis for an interpretation of national law *contra legem*.³¹⁹ At this point one may however argue that the prohibition of *contra legem* interpretation has in fact a very similar meaning to the obligation of *so far as possible* interpretation.³²⁰ With regard to the foregoing considerations, one very intricate point arises. It namely always depends on a judge how he interprets the *contra legem* principle. In strict cases it might even mean that any interpretation which strays away from the literal ambit of the provision becomes a *contra legem* interpretation.³²¹ All in all, this obligation clearly leaves a considerable margin of appreciation to the judge.

Furthermore, when interpreting the national rules in conformity with EU law, the national courts must make sure that they do not interpret the rules in the way that would be in conflict with fundamental rights protected by the EU legal order or with general principles of EU law, such as the principle of proportionality³²² and that the obligation on a national court to interpret national law in the light of EU law is limited by general principles of law such as

³¹⁵ Case C-212/04 *Konstantinos Adeneler and others v. Ellinikos Organismos Galaktos (ELOG)* [2006], paras.120-124. For more on this case see Betlem (2007), pp.112-116.

³¹⁶ Case 14/83 *Von Colson*, para.28. In the joined cases C-397/01 to C-403/01 *Pfeiffer* the ECJ uses the term “to as far as possible extent”, see para.113.

³¹⁷ See Prechal (1994), p.229.

³¹⁸ Joined cases C-397/01 to C-403/01 *Pfeiffer*, para.116.

³¹⁹ Case C-212/04 *Adeneler*, para.110. Also case C-105/03 *Maria Pupino*, para.47 from which it follows that the principle does require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.

³²⁰ See Wissink (2001), pp.202-204.

³²¹ See Chalmers (1997), p.190.

³²² See for instance cases: C-101/01 *Bodil Lindqvist* [2003] ECR I-12971, para.24 and case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, para.28.

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for instance legal certainty and non-retroactivity.³²³ It is also necessary to acknowledge that the ECJ emphatically restricted the boundaries of indirect effect in relation to penal liability. In the case *Kolpinghuis* the Court held that a directive cannot have the effect of determining or deteriorating the liability in penal law of individuals who have acted in contravention of the provisions of a directive.³²⁴

Recapitulating the issue of harmonious interpretation several practical implications for national judges in relation to the principle can be specified. First of all, in a situation when a directive is incorrectly or belatedly implemented and its provisions are not directly effective or the dispute takes place between two private parties, national judges are obliged to interpret the provisions of national law in the light of the directive in question, that is to say they are obliged to give effect to it by means of interpretation. Provisions of national law must be given a meaning so as to conform to the directive and to achieve an outcome consistent with the objective pursued by the directive. With regard to the national law that is to be interpreted it does not matter whether they predate or postdate the directive. The judge may be required to consistently interpret other national laws that may be necessary to achieve results prescribed by the directive. In fact, the judge is obliged to look into the entire body of national law and interpret in a way so as to achieve the prescribed outcomes. Another aspect is related to the obligation to employ all possible interpretative methods allowed under national law. Eventually, it can be observed that the obligation to construe national law in conformity with a directive is limited by the notion of *contra legem* interpretation, general principles of law such as legal certainty and non-retroactivity and the prohibition of imposing criminal liability. Seen in the light of the foregoing, it may be argued that the limits of harmonious interpretation are very broadly, if not too abstractly, defined.

³²³ Case C-212/04 *Adeneler*, para.110 and case C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU* [2008] ECR I-127, para.70

³²⁴ Case 80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* [1987] ECR 3969, paras.13-14. See also case C-168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR 4075, para.42. Nevertheless, it should also be emphasized that in the opinion of AG Jacobs, the thesis expressed by the Court in *Arcaro* and *Kolpinghuis* pertains only to cases with criminal liability context and the limitations on the obligation of harmonious interpretation cannot be expanded to cases where civil (non-criminal) liability is at stake. See the opinion of AG Jacobs in case C-456/98 *Centrosteeel Srl v. Adipol GmbH* delivered on 16 March 2000.

7. The obligation to ensuring equivalence and effectiveness of EU law versus the national procedural autonomy

7.1. The principle of national procedural autonomy

The above-discussed mechanisms which the Court provided national judges with do not function in a vacuum but within the entire national systems of procedures and remedies.³²⁵ Apart from several exceptional legal acts³²⁶, EU law does not provide for any set of procedures and remedies that could be utilized in order to enforce EU law provisions. In situations when EU law does not regulate how its law should be enforced, it is the task of the Member States to point out the courts that have jurisdiction in the field and the judicial procedures that should be utilized in the litigation process.³²⁷ This national competence is referred to as the principle of national procedural autonomy and implicates that national courts must enforce EU law in accordance with national procedures and available remedies.³²⁸ In the past the Court ruled that the EEC Treaty was not intended to create new remedies in the national courts to ensure the observance of EU law which would be different from those already laid down by national law.³²⁹ Put differently, the operation of EU provisions is determined by the national procedural setting to a far extent.³³⁰

³²⁵ From Prechal (1994), p.148.

³²⁶ See for instance: Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex OJ L 014/6; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests OJ L 166/51.

³²⁷ Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para.5. It has been argued elsewhere that the rudimentary elements of the national procedural autonomy doctrine can be seen in the case 34/67 *Firma Gebrüder Lück v. Hauptzollamt Köln-Rheinau* [1968] ECR 359. Also other judgments: 45/76 *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 02043, para. 13; 68/79 *Hans Just I/S v. Danish Ministry for Fiscal Affairs* [1980] ECR 00501, para.20; C-312/93 *Peterbroeck, van Campenhout&Cie SCS v. Belgian States* [1995] ECR I-04599, para.12; joined cases C-279/96, C-280/96 and C-281/96 *Ansaldo Energia SpA v. Amministrazione delle Finanze dello Stato, Amministrazione delle Finanze dello Stato v. Marine Insurance Consultants Srl and GMB Srl and Others v. Amministrazione delle Finanze dello Stato* [1998] ECR I-5025, para.27.

³²⁸ At this point it is important to bear in mind that the term 'procedural autonomy' does not appear as such in the texts of ECJ cases, see Kakouris (1997), p.1389. Van Gerven claims that the term procedural autonomy should be replaced by the term national procedural competence, see Van Gerven (2000), p.502.

³²⁹ See case 158/80 *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v. Hauptzollamt Kiel* [1981] ECR 1805, para.6 of the summary.

³³⁰ See Prechal (1997), p.3.

Be that as it may, the Court has imposed on national courts two conditions with regard to the procedural autonomy. Those two limitations underpinning the autonomy of national administration of justice are mostly referred to as the principles of effectiveness (practical possibility) and equivalence. Both, effectiveness and equivalence are rooted in the principle of loyalty and although they are distinct from each other they should be read in a cumulative way.³³¹ The latter principle imposes on national courts the obligation to ensure that national procedural rules are not less favourable than those governing the application of domestic law.³³² The former one prohibits enforcement of national rules that can impair the efficacy of EU law. Both principles may bear distinct implications for national courts.

7.2. Securing non-discriminatory treatment of claims based on EU law

The principle of equivalence as such should not give rise to much controversy and problems for national courts since it prohibits, in rather straightforward words, discriminatory actions with regard to claims based on EU law. Thus, national courts have to treat claims based on EU law in the same manner as similar claims based on national law and every type of action provided by national law must also be available for purposes of claims arising on the basis of directly effective provisions of EU law under the same procedural conditions.³³³ Put differently, the fact that EU law is involved in a dispute may not be used as a distinguishing factor in the dispute at stake. From *Pasquini* it can be inferred that the principle of equivalence must be seen in the light of principle of non-discrimination/equal treatment which is one of fundamental principles of EU law.³³⁴ The ECJ has taken a rather unambiguous position

³³¹ Delicostopoulos (2003), p.601.

³³² See for instance Becker (2007), p.1043. It is clearly stated in the case-law that it is for the national court to consider whether national procedural rules fulfill the requirement of equivalence, see for instance case C-261/95 *Rosalba Palmisani v. Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I-4025, para.33

³³³ Case 158/80 *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v. Hauptzollamt Kiel* [1981] ECR 1805, para 6 of the summary.

³³⁴ Case C-34/02 *Sante Pasquini v. Istituto Nazionale della Previdenza Sociale (INPS)* [2003] ECR I-6515, paras.57 and 59. Despite its rather plain nature, somewhat more attention was given to the principle of equivalence with regard to cases concerning national rules on time-limits. In case *Spac* the ECJ pointed out that the principle of equivalence implies that procedural rules apply without distinction to actions with regard to infringements of EU law and to those with regard to infringements of national law. It follows that EU law does not prohibit the laying down of special detailed rules governing claims and legal proceedings to challenge the

towards the principle of equivalence and the task to assess whether a national procedural rule does meet the requirement of equivalence should not pose many problems to a national judge.³³⁵ The practice shows that principle of equivalence will be most likely relevant in cases regarding direct discrimination.³³⁶

7.3. Ensuring effectiveness of EU law

The issue of effectiveness of EU law occurs to be more complicated if juxtaposed to that of the equivalence. Also, it is frequently seen as an equivalent of the principle of effective judicial protection. In a nutshell, the principle of effectiveness prohibits national judges to enforce national rules that can impair the efficacy of EU law. The complex nature of the principle of effectiveness is reflected in a very broad case-law of the ECJ which pertains to domestic rules regarding, *inter alia*, time-limits, *ex-officio* application of EU law, reparations or interim relief.

As it was ruled in *Rewe* the principle of effectiveness precludes national procedural rules that would render the application of EU law “impossible in practice”.³³⁷ In the *Van*

imposition of taxes provided that those rules apply equally to actions based on EU law as for those based on national law; see case C-260/96 *Ministero delle Finanze v. Spac SpA* [1998] ECR I-4997, paras.20-21. Also cases C-229/96 *Aprile v. Amministrazione delle Finanze dello Stato* [1998] ECR I-7141 or C-343/96 *Dilexport v. Amministrazione delle Finanze dello Stato* [1999] ECR I-579. In the case *Levez* the Court reaffirmed its reasoning from *Spac* and went on to state that if it has to be determined whether a procedural rule is less favourable than those governing similar domestic actions, the national court must take into account the role of that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts. Eventually, the Court concluded that EU law precludes national procedural rules which exist next to other alternative remedies available in similar situations if the latter are likely to be less favourable than those applicable to similar domestic claims, see case C-326/96 *B.S. Levez v. T.H. Jennings (Harlow Pools) Ltd.* [1998] ECR I-7835, paras.43, 44 and 53 and subsequently case C-78/98 *Preston v. Wolverhampton Healthcare NHS Trust* [2000] ECR I-3201, para.63. For more see Tridimas, *Enforcing Community rights in national courts: some recent development* [in] O’Keeffe&Bavasso (2000), pp.471-473.

³³⁵ See Jans et al (2007), p.47.

³³⁶ See for instance case C-122/96 *Stephen Austin Saldanha and MTS Securities Corporation v. Hiross Holding AG* [1997] ECR I-5325, para.14 and C-180/95 *Nils Draehmpaehl v. Urania Immobilienservice OHG* [1997] ECR I-2195, para.37. See also joined cases C-392/04 and C-422/04 *i-21 Germany GmbH, Arcor AG & Co. KG v. Bundesrepublik Deutschland* [2006] ECR I-8559, para.68 where the Court held that the national court did not apply the concept of manifest unlawfulness in a dispute regarding EU law in the same manner as it did with regard to a dispute concerning national law and therefore the principle of equivalence was not complied with.

³³⁷ Case 33-76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para.5. In its subsequent case-law, the Court employed the formula of “virtually impossible” and

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Schijndel case it was established that in each case where a national procedural provision renders application of EU law impossible or excessively difficult, the respective national court is obliged to analyze the problem by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole. Furthermore, the national court is ought to take into consideration the basic principles of the system of judicial protection, such as the rights of the defense, the principle of legal certainty and the proper conduct of procedure.³³⁸ Consequently, a national judge dealing with an obstructive domestic procedural rule that possibly undermines the effectiveness of EU law must examine the provision in question in the context and circumstances of the pending case and of the whole domestic judicial protection system.

Another dimension of the complex nature of the effectiveness principle, which should be seen in conjunction of the previously discussed principle of effective judicial protection, comes to light if its rather difficult relationship with the “no new remedies” principle is considered. Namely, in the early 1990’ the ECJ departed from the principle established in the *Rewe-Handelsgesellschaft* case for it was clear that lack of some remedies in national procedural rules would undermine the effectiveness of EU law. This phase, marked by such cases as *Factortame* or *Emmot*, can be perceived as a time of striking inroad of the ECJ into national procedures and remedies. Applying the principles of equivalence and effectiveness has led to various national procedural rules being declared incompatible with EU law by the ECJ.³³⁹ One can even speak of a progressive harmonization in the area of domestic procedures³⁴⁰ and some authors put forward the argument of the gradual arrival of European

“excessively difficult” see case *Amministrazione delle Finanze dello Stato v. SpA San Giorgio* [1983] ECR 3595, para.12. See also joined cases 205 to 215/82 *Deutsche Milchkontor GmbH and others v. Federal Republic of Germany* [1983] ECR 2633, para.22; case 240/87 *C. Deville v Administration des impost* [1988] ECR 3513, para.12; case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State* [1995] ECR I-4599, para.12; case C-261/95 *Rosalba Palmisani v. Istituto nazionale della previdenza sociale (INPS)*[1997] ECR I-4025, para.27.

³³⁸ Joined cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4075, para.19.

³³⁹ See cases: C-213/89 *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433; C-177/88 *Dekker v. Stichting voor Jong Volwassenen Plus* [1990] ECR I-3941; C-208/90 *Emmott v. Minister for Social Welfare* [1991] ECR I-4269; C-271/91 *Marshall v. Southampton and South West Hampshire Area Health Authority II* [1993] ECR I-4367.

³⁴⁰ See: Schermers&Waelbroeck (2001), p.199.

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procedural primacy.³⁴¹ However, at present, the manner in which the Court approaches the procedural autonomy issue is characterized by a rather balanced approach towards the problem.³⁴² The facts of the case, its special circumstances, the role of the remedy in the national procedural system and the principle of legal certainty will have to be taken into consideration by national court to assess whether the procedural rule poses a hindrance to the effectiveness of EU law.³⁴³

From the case-law pertaining to the national procedural autonomy and the established limits thereof it can be concluded that the ECJ's attitude towards the issue is a rather fuzzy one and it is difficult to draw clear-cut lines which could help to categorize national rules and procedures as compatible or incompatible with the principles of effectiveness. This is an axiomatic result of the fact that the Court in every case has to balance, on the one hand, the necessity of ensuring *effet utile* of EU law and the effective judicial protection of the rights individuals derive from EU law and, on the other hand, the principle of national procedural autonomy.³⁴⁴ On the part of national courts it may involve the necessity of carrying out a case-by-case detailed proportionality test in which the obligation to provide effective judicial protection and protect the rights flowing from EU law, the factual circumstances of the case and the role and aims of the procedure in domestic legal system will have to be balanced against each other.³⁴⁵ It has been pointed out elsewhere that the rules on national remedies are subject to further development and that the existent case-law is very open-ended, prone to reinterpretation and incoherent.³⁴⁶ In consequence crystal clear answers become scarce³⁴⁷ and

³⁴¹ Delicostopoulos (2003), p.613.

³⁴² Tridimas uses the term of "selective deference", see Tridimas, *Enforcing Community rights in national courts: some recent developments* [in] O'Keeffe&Bavasso (2000), p.479.

³⁴³ See Arnall (2006), p.333.

³⁴⁴ See Tridimas, *Enforcing Community rights in national courts: some recent developments* [in] O'Keeffe&Bavasso (2000), p. 479 and Jans&Marseille (2008), p.6.

³⁴⁵ From Craig&De Búrca (2008), p.322. See also a recent case *C-360/09 Pfeiderer AG v. Bundeskartellamt* [2011], para.31 in which the courts reaffirmed that "the weighing exercise can be conducted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case."

³⁴⁶ From Ward (2007), pp.193 and 198. The author also argues that there virtually is no end to cases pertaining to national procedural rules and that the ECJ will have to deal with the issue again and again.

³⁴⁷ McKendrick puts forward that the approach that the tests created by the ECJ are too obscure, too conceptual and induce unpredictable situations which in turn will in all its likelihood prevent individuals from invoking their Community rights. See McKendrick (2000), p.585.

the principle of legal certainty may be undermined.³⁴⁸ For it is beyond the scope of this work to examine the whole range of relevant cases touching upon the problem of the limits to the national procedural autonomy and effectiveness of EU law enforcement, only the issue of *ex officio* application of EU law, which is the most relevant in the framework of the empirical study, will be discussed in more detail in the subsequent section of this chapter.

7.4. Obligation to apply EU law of court's own motion

In most legal systems and especially in civil disputes the ability of the parties to raise a point of law in a proceeding is limited, i.e. when a point of law is not raised at the correct stage a party will not be able to do so in later stages of the proceeding. Similarly, the national procedural rules can limit the ability of a court to raise a point of law of its own motion. This rule, called a judicial passivity rule, requires the court to rule on basis of argument raised by the parties. In the light of the foregoing the obligation to *ex officio* raise points of EU law in a dispute is rather a complex one. The crucial question attached to the problem is whether national courts can, should or are obliged to raise and apply EU law in situation when the parties themselves do not raise points of that law.³⁴⁹ It occurs that the operationalization of the obligation will very much depend on the national procedural rules and the local principles of civil procedure.

In case *Verholen* the Court held that EU law does not prevent a national court from raising and applying points of EU law of its own motion.³⁵⁰ However, two other judgments of the ECJ are no longer that crystal clear. In the *Van Schijndel* case the plaintiffs invoked provisions of EU law only in the last stage of the litigation, that is before the Dutch Supreme Court. The Dutch procedure excludes invoking new arguments in the cassation stage of the litigation unless those new points are on pure points of law.³⁵¹ In *Van Schijndel* the Court was

³⁴⁸ Craig & De Búrca (2005), p.323; Ward (2007), p.198.

³⁴⁹ See Jans et al (2007), p.308.

³⁵⁰ Joined cases C-87/90, C-88/90 and C-89/90 *Verholen and others v. Sociale Verzekeringsbank Amsterdam* [1991] ECR I-3757, para.16.

³⁵¹ Joined cases C-430/93 and C-431/93 *Jeroen van Schijndel*, paras. 13, 15, 21 and 22. For the confirmation of the *Van Schijndel* ruling see joined cases C-222/05 to C-225/05 *J. van der Weerd and others v. Minister van Landbouw, Natuur en Voedselkwaliteit* [2007] ECR I-4233, para.41.

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asked whether EU law obliges national courts to raise points of EU law *ex officio*. The Court ruled that a requirement to raise a point of EU law of the court's own motion exists only to the extent that similar obligation exists under national law. In other words, the courts are not obliged to abandon their passive role and *ex officio* raise points of EU law if the same action is required in relation to national law. The Court went on to conclude that this kind of limitations are justified by the principle common for civil suits in which it is for the parties to take the initiative. In such cases, the court is capable of acting of its own motion only in exceptional circumstances, that is to say when public interest requires its intervention. In turn, in the *Peterbroeck* case the Court took a somewhat different approach. In that case the plaintiff was no longer allowed to raise a new plea based on EU law before the Cour d' Appel and the respective court did not have the competence to raise the issue of EU law of its own motion. In its judgment the Court precluded application of domestic procedural rules which prevent the national court from considering of its own motion whether a measure of domestic law is compatible with a provision of EU law when the latter provision has not been invoked by the litigant within a certain period.³⁵² Both cases, despite having many vivid analogies, delivered seemingly contradictory judgments. This apparent inconsistency can however be explained if one considers the circumstances of the *Peterbroeck* case. Brussels Cour d' Appel was namely the first and last instance court which had the possibility to refer a preliminary question to the ECJ. If such a court was prevented from raising an issue of EU law of its own motion then it would also be stopped from referring a preliminary question to the ECJ whereby it would seriously impede the effectiveness of EU law. In such circumstances it was necessary for the ECJ to set aside such a national procedural rule.

In *Eco-Swiss China Time* the Dutch Hoge Raad asked whether a national court was under the obligation to raise a point of EU competition law of its own motion. The Court ruled that articles 101 and 102 TFEU (ex Articles 81 and 82 EC) on competition are fundamental provisions of EU law, essential for the existence of the internal market and a matter of

³⁵² Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State* [1995] ECR I-4599, para.21.

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national public policy and therefore they must be automatically applied by domestic courts.³⁵³ A noteworthy aspect of the case is the fact that under Dutch law a violation of domestic competition law is not deemed a public policy matter. It can thus be argued that the Court went much beyond the *Van Schijndel* ruling. Hence, the judgment carries a number of important practical implications. It could be namely concluded that all fundamental provisions of the Treaty which are essential for the existence of the Union legal order and the internal market are matters of public policy and in consequence should be raised of the courts' own motion. It should be recognized that for instance the four basic freedoms of the internal market, the rules concerning competition or the principle of equal treatment of women and men are matters of EU public policy. However, the list of the principles which are fundamental for the existence of the Union is not clearly defined and the problem remains therefore an open one.

In the *Oceano Grupo* case, the Court established that the obligation to raise EU law points of the court's own motion would be a proper means of implementing the Directive on unfair terms in consumer contracts.³⁵⁴ In accordance with the judgment, national courts may *ex officio* determine if a term of a contract is unfair. Put differently, the courts do not have to wait until the parties to the dispute so desire.³⁵⁵ In case *Mostaza Claro*, the Court went further by stating that national courts are obliged to test whether a term of a contract is unfair.³⁵⁶ Such power to determine of its own motion whether a term is unfair is a necessary precondition of effective protection of customers. Eventually, in case *Pannon* the Court reaffirmed its stance and ruled that the national court it required to scrutinize of its own motion the unfairness of a

³⁵³ Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-3055, paras.36-37. The findings of the court were conformed in joined *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v. Fondiaria Sai SpA, Nicolò Tricarico v. Assitalia SpA* [2006] ECR I-6619, para.31.

³⁵⁴ Joined cases 240/98 to 244/98 *Océano Grupo Editorial SA v. Rocío Murciano Quintero and Salvat Editores SA v. José M. Sánchez Alcón Prades and others* [2000] ECR I-4941, para.29. See also case C-473/00 *Cofidis SA v. Jean-Louis Fredout* [2002] ECR I-10875.

³⁵⁵ See also case C-243/08 *Pannon GSM Zrt v. Erzsébet Sustikné Györfi* [2009] ECR 0000, para.25.

³⁵⁶ Case C-168/05 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421, para.38.

contractual term and if the latter is indeed found unfair, the national judge should not apply it, unless the consumer opposes the non-application.³⁵⁷

In concluding this brief analysis on the duty of national courts to raise issues of EU law it may be observed that the case-law on the subject matter is rather inconsistent and confusing. National courts must raise EU law points of their own motion if the public interest so demands and when a similar obligation exists with regard to national law. In addition to that, national courts are obliged to raise those points *ex officio* with regard to fundamental provisions of EU law, especially those which are essential for the existence of the internal market or are related to consumer protection.

8. The duty to dialogue and cooperate: the preliminary ruling procedure

8.1. The preliminary ruling procedure in a nutshell

From the previous sections it follows that national courts are obliged to apply and enforce EU law in their practice. In order to do that they are expected to resort to the mechanisms such as supremacy, direct effect or indirect effect which were established and left to their disposal by the ECJ. Yet, the foregoing neither implies that national courts are fully free in their decisions concerning EU law, nor does it mean that national courts are the last instance courts that interpret and judicate EU law. As a matter of fact, the fundamental constitutional principles and doctrines which are crucial for the existence of the Union, its legal structure and the internal market have been established through the judgments of the Court given on the requests of national courts that decided to send to Luxembourg their questions concerning EU law that had arisen in relation with cases pending before them.³⁵⁸ This competence of national

³⁵⁷ See C-243/08 *Pannon GSM Zrt. v. Erzsébet Sustikné Gyórfi* [2009] ECR I-4713. For the discussion on the obligation to raise points of EU law of court's own motion in consumer law disputes see Ebers (2010), pp.823-846.

³⁵⁸ See Slaughter (2000), p.1104. See also Timmermans (1996), p.113 and Tesauro, *Community law and national courts – an Italian perspective* [in] O'Keeffe&Bavasso (2000), p.391.

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courts to refer their inquiries pertaining to EU law to the ECJ follows from the procedure of preliminary ruling which is enshrined in the mentioned before Article 267 TFEU.³⁵⁹

In accordance with Article 267 TFEU the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation and validity of the Treaties and the validity and interpretation of acts of the EU institutions, bodies, offices or agencies.³⁶⁰ When a question concerning above mentioned areas arises before *any* national court or tribunal, a judge *may* request the ECJ to give a ruling thereon, if she considers it necessary to give a judgment. Furthermore, if such a question is raised before a final court or tribunal of last instance then that court or tribunal *is obliged* to bring the case to the ECJ. Importantly, in accordance with the ECJ, the term of the last instance court should be understood as including the highest courts, irrespective of their general or specialized competence, and all the courts against the decisions of which there exist no further remedy.³⁶¹ By and large, the preliminary ruling procedure engages national courts in a dialogue with the European Court of Justice which possesses the final authority with regard to interpretation of EU law.

³⁵⁹ At the moment of the empirical survey the preliminary ruling procedure was regulated separately for different pillars of the Union by Articles 234 EC (first pillar), 68 EC (visas, asylum and immigration policies) and 35 TEU (police and judicial cooperation in criminal matters). With regard to article 68(1) EC the competence to send a reference to the ECJ was limited to the last instance national courts. Furthermore, the second indent of article 68 prohibited the Court to judge on measures and decisions with regard to the maintenance of law and order and the safeguarding of internal security. Also, since March 2008 a so-called urgent preliminary ruling procedure in the area of freedom, security and justice existed. In turn, under the Third Pillar the jurisdiction of the ECJ was optional for it enabled all Member States to declare whether they accept or reject jurisdiction of the ECJ in the area of Police and Judicial Cooperation in Criminal Matters, see article 35 TEU. The article conferred jurisdiction on the Court of Justice to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under Title VI and on the validity and interpretation of the measures implementing them. Each Member State was supposed to make a declaration under Article 35(2) expressly accepting the jurisdiction of the court in that area. In accordance with the third paragraph of Article 35 a Member State was to decide whether only national courts or tribunals against whose decisions there is no judicial remedy under national law may request a preliminary ruling or whether any national court or tribunal might do so. Pursuant to article 35(1) TEU framework decisions and decisions and measures implementing PJCC conventions could be subject of judicial review by the ECJ. The Members could also determine whether all instance or only last instance courts could request preliminary references from the ECJ. There has been no competence for the ECJ to provide preliminary rulings in the area of the common foreign and security policy, neither under the previous nor the present system of the Treaties.

³⁶⁰ It is generally recognized that any EU measure may be subject of review by the ECJ, see case C-322/88 *Salvatore Grimaldi v. Fonds des maladies professionnelles* [1989] ECR 4407, para.8 which reads: "(...) Article 177 confers on the Court jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community without exception." In consequence, even non-binding EU measures fall under Article 267 TFEU.

³⁶¹ See case 6/64 *Costa v. ENEL*, part on the application of Article 177, see also case C-99/00 *Criminal proceedings against Lyckeskog* [2002] ECR I-4839.

In the ruling *Rheinmühlen-Düsseldorf* the Court held that the procedure is cardinal for the “preservation of the Community character of the law established by the Treaty. It aims at ensuring the coherence of Community law across all the Member States”.³⁶² In the course of years, the preliminary ruling procedure has proved to be one of the most pivotal and fundamental mechanism for the building the Union’s legal order and the entire legal system of the Union.³⁶³ The mechanism has become the main communication channel between the ECJ and national judges. It is “an index both of judicial cooperation between the Court of Justice and the national courts of the Member States and of the integration of Community law into national law”.³⁶⁴ The procedure enshrined in Article 267 is formulated in a very broad and rather vague terms. In practice, the relationships between the national courts and the ECJ are far more complicated and are going much beyond what is enshrined in the article. When analyzing the factual role of the ECJ one may immediately notice a gap between the formal role of the Court and national judiciaries as enshrined in the Treaty and their position in practice.³⁶⁵

8.2. Division of tasks in the preliminary ruling procedure

The preliminary ruling procedure can be put in motion exclusively by national courts; their willingness to employ the procedure is therefore of crucial importance for its operationalization. Also, it is left for the national court to apply provided by the ECJ interpretation to the factual case pending before it.³⁶⁶ Put differently, the authority to refer questions to the ECJ and, subsequently, to apply the provided judgment is exclusively vested with national judges and they are the guardians of the procedure. In that respect the proper

³⁶² Case 166-73 *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33, para.2.

³⁶³ It is claimed that Article 267 TFEU constitutes the most crucial procedural rule of the Treaty, see Tridimas&Tridimas (2004), p.127

³⁶⁴ From ECJ (1973), pp.16-17. See also Stone Sweet&Brunell (1998a), p.67. Stone Sweet formulates it in the following way: “As the ECJ’s doctrines of direct effect and supremacy gradually took hold, Article 234 EC, emerged as a kind of central nervous system for the enforcement of EC law and the coordination of the EC and the national legal order.” See Stone Sweet (2007), p.924.

³⁶⁵ See Starr-Deelen&Deelen (1996), p.81.

³⁶⁶ See for instance case 17/81 *Pabst and Richarz KG v. Hauptzollamt Oldenburg* [1982] ECR 1331, para.12.

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application of EU law relies on the acceptance of the judgment provided by the Court by a national judge. Such acceptance has however a broader meaning for it relates not only to the specific national dispute in which the question appeared and a concrete judge who referred the question. In accordance with the doctrine of binding precedent it relates to general acceptance of the respective judgment by all judges adjudicating in all Member States.³⁶⁷ *Cooperation* and *loyalty* are thus two key concepts underpinning the dialogue between the ECJ and the national courts. It may therefore be claimed that the willingness of national judges to utilize the procedure in a *sine qua non* for the evolution of European legal system.³⁶⁸ In that sense, the procedure carries serious traps for the entire legal system of the Union since it relies, to a large degree, on the good will of national courts to refer their questions and subsequently on their acceptance of the judgments delivered by the Court.³⁶⁹

Theoretically speaking, the division of tasks between the Court of Justice and national courts in the preliminary ruling procedure could be seen as based on distinction between interpretation of EU law (by the ECJ) and application thereof in national systems to the facts of the case (by domestic courts). Article 267 TFEU and 19 (3) b TEU are very clear on that point for they explicitly speak of interpretation as the task assigned to the ECJ.³⁷⁰ In that sense, the Court acts as an assistant, facilitator and a helping hand in situations when national judges deal with EU law and not as an appellate or last instance cassation court. The role of the ECJ in the procedure should therefore be rather seen as “a concerned godfather than as a sergeant-major”.³⁷¹ Accordingly, if a national judge has doubts as to the correct meaning of an

³⁶⁷ See case 28-30/62 *Da Costa en Schake NV, Jacob Meijer NV and Hoechst-Holland NV v. Nederlandse Belastingadministratie* [1963] ECR 31 and case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR I-03415. The issue of authority of rulings on validity of EU acts and their binding force on all national courts is not debatable for the ECJ explicitly rules on that issue, see case 66/80 *SpA International Chemical Corporation v. Amministrazione delle finanze dello Stato* [1981] ECR 1191, paras.9-18. However, the problem of authority of rulings on interpretation has been subject of controversy for decades. Through the decisions in the *Schaake* and *CILFIT* cases a system of precedent seemed to be well established but the ECJ has as a matter of fact never explicitly ruled on this issue. At present, the issue is regulated by article 104(3) of the Rules of Procedure of the Court of Justice which explicitly states that in cases of *acte clair* and *acte éclairé* the Court may issue a reasoned order in which the national judge is referred to a previous judgment.

³⁶⁸ From Chalmers (1997), p.174.

³⁶⁹ See Stefanou&Xanthaki (1997), pp.88-89 and 99 and Murray (2009), p.535.

³⁷⁰ See for instance case 13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn* [1962] ECR 45 where the Court rejected some questions put forward by a national court for those concerned application of EU law in a particular case.

³⁷¹ From Kapteyn et al (1998), p.525.

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EU primary or secondary provision that is of importance to the pending dispute she should refer a preliminary question to the Court which will, in turn, concern the proper interpretation thereof. In its judgment the Court will provide for an (abstract) interpretation of the meaning and scope of the provision in question. Subsequently, the national judge is expected to take over the interpretation and to resolve the domestic dispute in accordance with it.³⁷² It becomes apparent that the Court does not have any competence to interpret domestic law of the Member States.³⁷³

Be that as it may, it is questionable whether it is possible to draw a clear line between those two tasks. First of all, neither the Treaty nor any secondary source of EU law provide a definition of a notion of interpretation and the scope thereof in the context of EU law.³⁷⁴ Secondly, it is debatable whether it is possible to provide for an abstract interpretation of EU provisions without taking into consideration the factual circumstances and the context of a particular case.³⁷⁵ As Kapteyn puts it: “the process of thought leading to a judicial decision

³⁷² This division of labour between the ECJ and the national court was originally claimed by the ECJ in joined cases 28 to 32-62 *Da Costa en Schaake*.

³⁷³ In the light of the foregoing, the so-called *Dzodzi* line of cases introduces some controversy and confusion. In *Dzodzi* and subsequent case-law the ECJ established the principle that the Court is entitled to give preliminary rulings on issues with regard to EU provisions which have been rendered applicable either by domestic law or merely by virtue of terms in a contract, see joined cases C-297/88 and C-197/89 *Massam Dzodzi v. Belgian State* [1999] ECR I-3763, paras.32-43. See also cases C-231/89 *Gmurzynska-Bscher v. Oberfinanzdirektion Köln* [1990] ECR I-4003 and C-384/89 *Tomatis and Fulchiron* [1991] ECR I-127. Crudely speaking, the entire line of cases concerned a situation when the factual situation were outside the scope of the EU law (purely internal situation) but the interpretation of the provisions of that law were essential to resolve the dispute in the main proceeding. The Court pointed out that the necessity to ensure the uniformity of the effects of EU law in the Member States justifies the competence of the ECJ in such cases. In *Leur-Bloem* the Court established that it had jurisdiction to rule on points of EU law when the matter in question did not fall under EU law but was governed by national law. The national provisions were introduced into the domestic system in order to apply the same treatment to purely internal situations as to those regulated by the directive, see case C-28/95 *Leur-Bloem v. Inspecteur der Belastingen/Ondernemingen Amsterdam 2* [1997] ECR I-4161. Similarly in C-130/95 *Giloy v. Hauptzollamt Frankfurt am Main-Ost* [1997] ECR I-615. The *Dzodzi* line of cases is undoubtedly very controversial and therefore it should not come as a surprise that it had met with a strong criticism. It is especially astonishing if juxtaposed with the developed by the ECJ requirement to clearly define national legislative and factual circumstances of the case and the prohibition to refer hypothetical questions. For the whole line of jurisprudence and further discussion check Kaleda (2000); Lenaerts (2006), pp.225-229 and Arnull (2006), pp.107-114.

³⁷⁴ Kornobis-Romanowska (2007), p.101. The only exception to that rule is the Charter of Fundamental Rights of the European Union in the Title VII of which general provisions governing the interpretation and application of the Charter are provided.

³⁷⁵ See also the opinion of the AG Colomer in case C-1/99 *Kofisa Italia Srl v. Ministero delle Finanze and Servizio della Riscossione dei Tributi-San Paolo Riscossioni Genova Spa* [2001] ECR I-207. This can be seen in *Telemarsicabruzzo* case where the Court explicitly demanded that national courts specify in a clear manner the

cannot be readily separated into two independent parts: the interpretation of general rules and the subsequent application of the rules thus interpreted to the facts.”³⁷⁶ Moreover, the Court has frequently gone beyond its competences by pointing out in a rather unambiguous way what the national courts are expected to do in a particular case and how they should apply EU law.³⁷⁷ In such situations, the only task left to the national judge is to execute the ECJ’s ruling.³⁷⁸ Finally, the so-called CILFIT doctrine introduces further complexity into the issue of the division of the tasks between the courts.

8.3. CILFIT doctrine vis-à-vis judicial interpretation methods

From Article 267 TFEU it follows that lower national courts are attributed discretionary powers with regard to the preliminary reference procedure whereas the courts of last instance have no room in that regard. However, in its famous *CILFIT* judgment the Court established that a national court against whose decision there is no judicial remedy under national law, similarly to the court of first and second instance, is not always obliged to refer a preliminary question when interpretative doubts exist with regard to EU law and is able to establish its own interpretation of Union law.³⁷⁹ The Court listed three exceptions to the rule following from Article 267 TFEU. First of all, national courts are not obliged to refer a question with

factual and legal context in which the ruling is sought so as to enable the Court to provide the national court with a reply that is useful for the dispute before it but also because it is often difficult or even impossible to interpret a rule *in abstracto*; see joined cases 320-322/90 *Telemarsicabruzzo SpA v. Circostel* [1993] ECR I-393, para.5.

³⁷⁶ See Kapteyn (2008), p.485.

³⁷⁷ See Alter (1998), pp.126-127. A good example of blurring the dividing line between the interpretation and application is case C-144/04 *Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981. It is sufficient to juxtapose the questions referred by the national court and the answers provided by the ECJ to notice that in fact the ECJ judged on national law and its incompatibility with EU law. See also case C-338/95 *Wiener S.I. GmbH v. Hauptzollamt Emmerich* [1997] ECR I-6495 which illustrates how detailed interpretations of EU law provisions provided by the ECJ can be and case C-435/05 *International Transport Workers’ Federation and others v. Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779, paras.85-90 to see how the Court provides detailed guidance in order to enable help the court to give judgment in particular case. Likewise, judgments concerning consumer protection tend to be very detailed and technical in nature which implies that the only tasks left to the national courts is to apply the ruling to the dispute at stake, see for instance cases C-229/04 *Crailsheimer Volksbank eG v. Klaus Conrads and others* [2005] ECR I-9293 and C-264/02 *Cofinoga Mérignac SA v. Sylvain Sachithanathan* [2004] ECR I-2176.

³⁷⁸ See also Perju (2009), pp.352-353.

³⁷⁹ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415.

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regard to the interpretation of EU law if the answer to the question cannot affect the outcome of the case, that is to say the answers to the question is irrelevant.³⁸⁰ Secondly, a national court is not obliged to refer a question if the Court has already dealt with a comparable or similar question in the past, irrespective of the nature of the proceeding that gave rise to the reference (so-called *acte éclairé* doctrine).³⁸¹ Put differently, if a clear precedent exists on an interpretation of a particular EU provisions, then the court may pass over the preliminary reference procedure.³⁸² Thirdly, if the correct application of EU law is sufficiently obvious and clear that it leaves no room for doubt how the question should be resolved then the national court can refrain from referring a question and establish its own interpretation of the provision in question (so-called *acte clair* doctrine).³⁸³ Importantly, when a question referred by a national court fulfills the conditions of *acte clair* or *acte éclairé* doctrine then the ECJ may, at any time of the proceedings, issue a reasoned order in which it will refer to its previous judgment and case-law.³⁸⁴

However, the ECJ warned the national courts against relying on the *acte clair* doctrine too easily and listed certain conditions which should be fulfilled in order for a national court to be allowed to pass over the preliminary ruling. First, the Court pointed out that the matter must be obvious for the national court concerned, national courts of other Member States and the ECJ. Interpretation of the EU law provision should also involve a comparison of different language versions thereof.³⁸⁵ Provided that two or more versions are different, a judge should

³⁸⁰ Case 283/81 *CILFIT*, para.10.

³⁸¹ Case 283/81 *CILFIT*, paras.14-15. This rule was however established as early as in 1963 in case 28 to 30-62 *Da Costa en Schaake*.

³⁸² The issue of authority of rulings on validity of EU acts and their binding force on all national courts is not debatable for the ECJ explicitly rules on that issue, see case 66/80 *SpA International Chemical Corporation v. Amministrazione delle finanze dello Stato* [1981] ECR 1191, paras. 9-18. However, the problem of authority of rulings on interpretation has been subject of controversy for decades. Through the decisions in the *Schaake* and *CILFIT* cases a system of precedent seemed to be well established but the ECJ has as a matter of fact never explicitly ruled on this issue. At present, the issue is regulated by article 104(3) of the Rules of Procedure of the Court of Justice which explicitly states that in cases of *acte clair* and *acte éclairé* the Court may issue a reasoned order in which the national judge is referred to a previous judgment. For more see: Anderson (1995), pp.307-315 and Craig&De Burca (2005), pp.439-452.

³⁸³ Case 283/81 *CILFIT*, para.16.

³⁸⁴ Article 104 (3) of the Rules of Procedure of the Court of Justice.

³⁸⁵ This point was reaffirmed by the Court in case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paras.25 and 28. In case C-99/00 *Kenny Roland Lyckeskog v. Åklagarkammaren i Uddevalla* [2002] ECR I-4839 the AG Tizzano stated that in his opinion that

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interpret the provision in accordance with all except for those that are different from the rest.³⁸⁶ However, in case of excessive divergences between different language versions, the provision at stake should be interpreted by reference to the aim and general scheme of the measure of which it forms part.³⁸⁷ The judge should also bear in mind that legal concepts and terminology can have different meanings in different Member States and in Union law. Finally, particular EU law provisions should be seen in the light and context of the whole legal order of the EU.³⁸⁸ In the light of the foregoing one may conclude that from the theoretical point of view the CILFIT criteria are very complex, strict and not possible to be met.³⁸⁹ For that reason they have been quite strongly criticized by academics and AGs.³⁹⁰ But yet, there are abundant examples from national judiciary which illustrate how the national courts adopted a somewhat liberal attitude to the *acte clair* doctrine and (ab)used it in order to avoid sending preliminary questions to the ECJ.³⁹¹

With everything considered, the most important message for the national judge flowing from *CILFIT* is the fact that she can interpret Union law on her own if it is clear how

“(…)comparison of the various language versions should be regarded as a perfectly normal method of interpretation in the case of any legislation drafted in several languages, be it national (in multilingual States), Community or international legislation.” At this point it should be borne in mind that in accordance with statutory and case-law all official languages in the Union are equally authentic. In the process of interpretation of EU law all language versions should therefore be juxtaposed to each other. At present there are 23 official languages in the EU. The official languages of the European Union are stipulated in the amended EEC Council Regulation No 1 determining the languages to be used by the European Economic Community OJ 17 1958, pp.385–386. The Official Journal of the EU is also published in 23 languages. See also: Van Calster (1997), pp.363-395; Doczekalska (2006), pp.14-21; Fryzlewicz (2008), pp.9-57; Arnall (2006), pp.608-611 and Itzcovich (2009), pp.550-552.

³⁸⁶ See joined cases C-283/94, C-291/94 and C-292/94 *Denkavit International BV, VITIC Amsterdam BV and Voormeer BV v. Bundesamt für Finanzen* [1996] ECR I-5063, para.25.

³⁸⁷ Case 30-77 *Régina v. Pierre Bouchereau* [1977] ECR 1999, para.14. See also cases : 9/79 *Marianne Wörsdorfer, née Koschniske, v. Raad van Arbeid* [1979] ECR 2717, para.6; case 100/84 *Commission v. United Kingdom* [1985] ECR 1169, para.17; case C-152/01 *Kyocera Electronics Europe GmbH v. Hauptzollamt Krefeld* [2003] ECR I-13821, para.33 and case T-80/97 *Starway v. Council* [2000] ECR II-3099, para.81

³⁸⁸ Case 283/81 *CILFIT*, paras.18-20.

³⁸⁹ Check for more Arnall (2006), p.123.

³⁹⁰ See: Broberg (2008), pp.1383-1397 and Bobek (2008a), p.13. For an opposite opinion check Van Harten, *The Application of Community Precedent and Acte Clair by the Hoge Raad* [in] Obradovic&Lavranos (2007), pp.237-262. See also: the opinion of the AG in case C-339/95 *Wiener* [1997] ECR I-6495, the opinion of AG Tizzano in case C-99/00 *Lyckeskog* [2002] ECR I-4839 and the opinion of the AG Colomer in case C-461/03 *Gaston Schul* [2005] ECR I-10513. The last argues that the CILFIT doctrine should be adapted to the demand of the times.

³⁹¹ Especially the French courts were quite active in that respect, see Jarvis (1998), pp.422-425. See also Arnall (1989), pp.622-639 and Itzcovic (2009), p.548.

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the provisions at issue should be interpreted. Yet, she ought to keep in mind that EU law and the methods of its interpretation have their peculiar features which may differ from the interpretation methods practiced by national judges with regard to national law.³⁹² These differences in methodology applied by the ECJ and national judges can, arguably, lead to problems in judicial application of EU law on the national level.³⁹³ Traditionally, close textual reading of legal provisions (textual or literal interpretation) is the main methodological tool employed by civil law judges. In contrast, in ECJ's methodology the comparative, systemic but foremost teleological, also called purposive, interpretation occupy an important place.³⁹⁴ The foregoing is not intended to imply that the traditional textual interpretation is not employed by the ECJ.³⁹⁵ On the contrary, if a provision is written down in a clear and straightforward manner which does not provide any room for doubt the Court will most likely follow the literal meaning of that provision.³⁹⁶ The Court does not however limit itself to this way of legal reasoning and it departs from this method on a quite frequent basis.³⁹⁷ By doing so, the Court will apply systematic or teleological method and will interpret respective

³⁹² On different methods of interpretation see Hesselink (2011), pp.452-459.

³⁹³ See Golub (2004), p.16 in which the author argues that the differences in judicial interpretative methods applied by national judges and the ECJ may have impact on the relationship between the courts. See also Slynn (1993), pp.240-241. On the contrary, it may be argued that the methods applied by the Court are in fact the same as those applied by the national judges for the ECJ judges were educated in the national systems so the methods they apply cannot differ from those applied in their Member States.

³⁹⁴ According to the case-law, in the process of interpretation of a particular law, the Court takes into account "not only the wording but also the context in which it occurs and the objects of the rules of which it is part", see case 292/82 *Firma E. Merck v. Hauptzollamt Hamburg-Jonas* [1983] ECR 3781, para.12 or case C-223/98 *Adidas AG* [1998] ECR I-7081, para.23. The issue of the legal reasoning of the ECJ is undoubtedly a fascinating one and occupies a prominent place in academic writing, for more check for instance: Bengoetxea (1993) in which the author provides for a broad overview of the Court's interpretative criteria, ways of legal reasoning and European jurisprudence in general; see also Itzcovich (2009); Lasser (2003); Maduro (2007); Pollicino (2004), Dehousse (1998), p.125.

³⁹⁵ Other names for textual interpretation are: semiotic, linguistic or literal. See also Bengoetxea (1993), pp.233-240 and Schermers&Waelbroeck (2001), p.11.

³⁹⁶ One of the biggest merits of textual approach is the fact that it is a transparent method of interpretation for it is in its entirety based on publicly available legal text, see Primus (2009), p.164. In case 14/81 *Alpha Steel Ltd v. Commission of the European Communities* [1982] ECR 749, paras.32-33, the Court held that going against explicit words of the Treaty would amount to its revision and could not be accepted. And yet there are examples of the Court explicitly ruling against the words of the Treaty to be found, see for instance cases 22-70 *Commission of the European Communities v. Council of the European Communities (ERTA)* [1971] ECR 263; 294/83 *Parti écologiste "Les Verts" v. European Parliament* [2986] ECR 1339; 314/85 *Foto-Frost* [1987] ECR 4199; C-62/88 *Hellenic Republic v. Council of the European Communities (Chernobyl I)* [1990] ECR I-1527.

³⁹⁷ See for instance case C-369/89 *Piageme and others v. BVBA Peeters* [1991] ECR I-2971, paras.14-15 in which the Court claims that close textual reading of the provision is not satisfactory for it does not take the aim of the measure into consideration.

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provisions very broadly or fill in the existing lacunas. By applying the systematic interpretation, the Court will examine the position of the disputed measure in the entire legal system.³⁹⁸ In turn, in case of the teleological method, the purpose, aim, objectives or efficacy of a particular measure will be taken into account. Put differently, when interpreting an EU provision the Court will look at the *telos* of the Union.³⁹⁹ The meta-purpose of such an exercise will be to ultimately arrive at the solution which will assure the full effectiveness of EU law.⁴⁰⁰ The engagement in a teleological interpretation technique allowed the ECJ to, on the one hand, fill the gaps existent in the Treaty and, on the other hand, to broaden the scope, circumvent or even re-write those Treaty provisions which were unclear and open to various manners of interpretation.⁴⁰¹ In the process of teleological interpretation of EU acts and its provisions the Court will refer to, for instance, the general purpose and aim of the specific provisions or the measure as such⁴⁰² or broader aims of the Union⁴⁰³, i.e. one of the basic freedoms underpinning the internal market or even the process of integration as such.⁴⁰⁴ It should therefore be recognized that the purposive method is a very dynamic and flexible one and serves a purpose of advancing the evolution of the Union. Most importantly for the present considerations is the fact that national judges in the process of interpreting and applying EU laws in the disputes pending before them should, similarly to the ECJ, bear in mind the place of the interpreted provision in the system of the Treaties and the objectives and purpose thereof.

³⁹⁸ See 281/81 *CILFIT*, para.20 in which the Court stated that “Every provision of Community law must be placed in its context and interpreted in the light of the provisions of EC law as a whole regard being had to the objectives thereof and to its state of evolution.”

³⁹⁹ See Pollicino (2004), p.289.

⁴⁰⁰ This method of interpretation led the Court to establish the principles underpinning the existence of the EU such as for instance supremacy and direct effect. On the importance of teleological interpretation for EU legal order and the differences in the legal reasoning of the AGs and the Court see Maduro (2007).

⁴⁰¹ See Pollicino (2004), pp.292-295.

⁴⁰² This can be referred to as a “micro-teleological approach” which aims at ensuring the purpose of a specific article, see Lasser (2004), p.289.

⁴⁰³ This can be referred to as a “macro-teleological approach”, *ibid.*

⁴⁰⁴ See for instance case 22-70 *Commission of the European Communities v. Council of the European Communities (ERTA)* [1971] ECR 263, paras.72-74 or C-168/00 *Simone Leitner v. TUI Deutschland GmbH & Co. KG* [2002] ECR I-2631, paras.19-24.

8.4. The prohibition to rule on the validity of EU measures

If a national judge deals with a question of validity of European provisions she is under the obligation to refer a question to the ECJ, regardless of the position of the court in the national judicial order. This rule is not as such enshrined in Article 267 TFEU but it was established in the *Foto-Frost* case stating that national courts are not eligible to declare an EU legal act null and void for this competence is strictly reserved to the ECJ.⁴⁰⁵ This implicates that in any situation when a national judge is having doubts as to the validity of a Union's act, she will be obliged to refer a preliminary question to the Court. In subsequent cases the ECJ established that the rule holds even if a national judge is dealing with a question of validity of Union's measure and the ECJ in its earlier ruling declared a similar measure invalid.⁴⁰⁶ However, the Court established that in some exceptional situations, for instance when a national court has serious doubts as to the validity of an EU act on which a national provision is based, it may suspend application of that national measure or grant an interim relief with regard to it. Subsequently, the national judge is obliged to refer the question of validity of the EU act in question to the Court of Justice.⁴⁰⁷ Should the Court find that the contested measure must be deemed invalid, it declares it void.⁴⁰⁸ The national court which referred the question must set aside the measure in the dispute in which the question occurred and all other cases in which the measure constitutes a basis for the judgment.⁴⁰⁹

⁴⁰⁵ See case 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Os* [1987] ECR 4199, para.15. The Court claimed that the possibility of a national court to rule on the invalidity of an EU act would be incompatible with the necessity of uniformity and coherence of the system of judicial protection instituted by the Treaty, see *Foto-Frost v. Hauptzollamt Lübeck-Os* [1987] ECR 4199, paras.15-16.

⁴⁰⁶ See case C-461/03 *Gaston Schul Douane-expediteur BV v. Minister van Landbouw, Natuur en Voedselkwaliteit* [2005] ECR I-10513, paras.20-25.

⁴⁰⁷ Joined cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn* [1991] ECR I-415, paras.20-33.

⁴⁰⁸ This however does not amount to declaring the measure invalid for it is for the institutions of the Community to amend or annul the measure. See case 16-65, *Firma G. Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 877, p.886.

⁴⁰⁹ From the above going discussion it may be concluded that the procedure of preliminary ruling on validity of secondary EU measures constitutes an indirect way of gaining access to the European Court for individuals and should be seen in the light of the annulment procedure as enshrined in article 263, para. 4 TFEU or as, as a matter of fact, an alternative to it. In joined cases 133 to 136/85 *Walter Rau Lebensmittelwerke and others v. Bundesanstalt für landwirtschaftliche Marktordnung* [1987] ECR 2289, para.12 the Court held that action under article 263 against a decision adopted by a Community institution does not preclude an action before a national

Leaving aside the issue of possible problems attached to pleading invalidity of EU measure before the national court⁴¹⁰, it can be observed that a national judge plays a significant role in ensuring indirect access for individuals to the validity review by the ECJ. Article 267 TFEU, as interpreted in accordance with the *Foto-Frost* and in view of the restrictions of article 263(4) TFEU, constitutes as a matter of fact the only way for individuals to contest the validity of an EU act of general application. Nevertheless, the most tangled aspect of that role boils again down to the discretionary powers or, to be more specific, the willingness of a judge to engage with the procedure. A national court is namely always free to dismiss a claim of invalidity put forward by a party as unfounded.

8.5. Formal requirements of the preliminary ruling procedure

In order for a preliminary question(s) to be admitted by the Court various technical and procedural requirements must be met by the referring national court. In accordance with Article 267 TFEU any national court or tribunal of a Member State may refer a question to the ECJ. It is yet the ECJ that decides whether the referring body may be classified as a court or

court against a national measure adopted in order to implement that decision on the ground that the decision was unlawful. A private party can namely challenge the validity of a measure implementing EU law into national law before a national court which, in turn, would be under the obligation to refer the issue to the Luxembourg Court and would indirectly facilitate the access. Also in situation when national implementing measures are lacking, as it is in case of regulations, a validity action before a national court may be launched. See for instance joined cases C-27/00 and C-122/00 *The Queen v. Secretary of State for the Environment, Transport and the Regions ex parte Omega Air Ltd and Omega Air Ltd and others v. Irish Aviation Authority* [2002] ECR I-2569. This approach to the validity review was in fact favoured by the ECJ under the former Treaty regime. The Court held that if a person does not meet the conditions for admissibility under then Art.230(4) EC, he shall turn to the national court and plead the illegality of a Union act before a national judge who in accordance with the *Foto-Frost* rule has no competence to declare EU measures invalid, see case C-50/00 P, *Unión de Pequeños Agricultores* [2002] ECR I-6677, paras.40-41.

⁴¹⁰ For those check for instance the opinion of AG Jacobs delivered in case C-50/00 P, *Unión de Pequeños Agricultores* [2002] ECR I-6677. The AG put forwards that the national procedural rules, the discretion enjoyed by national court and even its willingness to employ the procedure may effectively hamper the possibility to indirectly challenge the validity of EU acts. Moreover, national proceedings may bear various disadvantages for individual applicants such as extra costs or delays. See also Ward (2007), pp. 349-365

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tribunal.⁴¹¹ A national court may refer a preliminary question regardless of its specialization, be it a commercial, labour, criminal administrative or civil law court.⁴¹²

The national court is expected to refer a question to the Court of Justice about the interpretation or validity of a provision of EU law in accordance with national procedural rules. It is only the national court which must assume the responsibility for the subsequent judgment and to assess, in the light of the circumstances of each case, both the necessity for a preliminary ruling and the relevance of the questions they refer to the Court.⁴¹³ Neither the parties to the proceeding nor the public bodies can coerce the national court into referring a question⁴¹⁴ since it is solely for the national court and not for the parties to a dispute to decide about referring the question to the Court.⁴¹⁵ In accordance with the aforementioned *Rheinmühlen* case national courts are entitled to utilize the procedure of their own motion and national procedural laws cannot deprive or hinder the right of national court to use it.⁴¹⁶ The

⁴¹¹ In order to determine whether a body is a court or a tribunal the so-called *Vaassen* criteria are applicable. In accordance with those criteria a body can be recognized as a court or tribunal if it applies rules of law and is established by law, is permanent and independent, its jurisdiction is compulsory and its procedure *inter partes*. See case 61-65 *G. Vaassen-Göbbels (a widow) v. Management of the Beambtenfonds voor het Mijnbedrijf* [1996] ECR 261, para.273. See also cases: C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH* [1997] ECR I-4961, para.23; C-24/92 *Pierre Corbiau v. Administration des Contributions* [1993] ECR I-1277, para.15, C-134/97 *Victoria Film A/S* [1998] ECR I-7023, para.14; C-195/98 *Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst v. Republik Österreich* [2000] ECR I-10497, para.25; C-516/99 *Walter Schmid* [2002] ECR I-4573, para.34. Several cases indicate that the ECJ is not willing to depart from the above-mentioned criteria. In case *Syfait* the ECJ found that the reference was inadmissible for the Greek Competition Commission (Epitropi Antagonismou) did not meet the condition of judicial independence. See case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v. GlaxoSmithKline plc and others* [2005] ECR I-4609, paras.30-38

⁴¹² However, administrative bodies are not entitled to request preliminary rulings; see cases: 65/77 *Jean Razanatsimba* [1977] ECR 2229, para.5 and 138/80 *Jules Bor* [1980] ECR 1975, para.4. The same rule pertains to arbitration tribunals regardless the fact that very often they fulfill most of the requirements, see case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* [1982] ECR 1095, paras.10-16.

⁴¹³ See for instance case C-369/89 *Piageme* [1991] ECR I-2971, para.10 and joined cases C-422/93, C-423/93 and C-424/93 *Teresa Zabala Erasun, Elvira Encabo Terrazos and Francisco Casquero Carrillo v. Instituto Nacional de Empleo* [1995] ECR I-1567, para.14. According to the case-law, the ECJ does not have the competence to criticize the reasons for the reference, see case 126/80 *Salonia v. Poidomani and Giglio* [1981] ECR 1563, para.6.

⁴¹⁴ See case 283/81 *CILFIT*, para.9.

⁴¹⁵ See case 44-65 *Hessische Knappschaft v. Maison Singer and sons* [1965] ECR 965, page 970 and joined cases C-322, 333, 335/95 *Eurico Italia Srl, Viazzo Srl and F & P SpA v. Ente Nazionale Risi* [1994] ECR I-711, para.17.

⁴¹⁶ Case 166-73 *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33, para.5 See also case 93/78 *Lothar Mattheus v. Doego Fruchtimport und Tiefkühlkost eG* [1979] ECR 2203, para.6.

national judge decides on the content of the questions and determines at which stage of the main proceedings the questions shall be sent.⁴¹⁷ All references must, in principle, follow the same procedure which consists of written and oral part.⁴¹⁸

While referring a question the judge must keep in mind that a dispute in which the question arise must still be pending before a national court. The ruling that the Court provides is supposed to enable the national court to give a judgment. It is therefore axiomatic that *post ante* references cannot be considered and the ECJ is not eligible to consider a reference if the dispute before the national court had been terminated before sending the question.⁴¹⁹ For the same reason hypothetical questions are not allowed.⁴²⁰ Similarly, the ECJ will very likely reject a reference in a case in which a genuine dispute (true litigation) is absent.⁴²¹ National courts may not send questions which are irrelevant or unconnected to the main dispute⁴²², lack precisions⁴²³, are too general⁴²⁴, fall exclusively under national law⁴²⁵ or are not of a judicial nature⁴²⁶. The absence of factual and legal context may be a reason for rejection of a reference.⁴²⁷ However, in this context it is noteworthy that in accordance with article 104(5) of

⁴¹⁷ See case 14/86 *Pretore di Salò v. Persons unknown* [1987] ECR 2545, paras.11-12.

⁴¹⁸ Article 20 of the Protocol on the Statute of the Court of Justice. The Court may decide that the oral part is not necessary for the proceedings. The only exception to that rule concerns situations in which the judge intends to make use of the accelerated or urgent preliminary possibility.

⁴¹⁹ See case 338/85 *Fratelli Pardini SpA v. Ministero del Commercio con l'Estero and Banca Toscana (Lucca branch)* [1988] ECR 2041, para.12.

⁴²⁰ Case C-83/91 *Wienand Meilicke v. ADV/ORGA F. A. Meyer AG* [1992] ECR I-4871, para.25 or case C-315/02 *Anneliese Lenz and Finanzlandesdirektion für Tirol* [2004] ECR I-7063, para.52

⁴²¹ Case 104/79 *Pasquale Foglia v. Mariella Novello* [1980] ECR 745, para.11. The line of jurisprudence with regard to genuine disputes is rather uneven and ambiguous and for that reason has been strongly criticized. In fact *Foglia* was the only case in which the ECJ decided that it had no jurisdiction for the fact that the dispute was of a fictitious nature. See cases: 46/80 *SpA Vinal v. SpA Orbat* [1981] ECR 77; 261/81 *Walter Rau Lebensmittelwerke v. De Smedt PvbA* [1982] ECR 3961; C-105/94 *Celestinin v. Saar-Sektellerei Faber* [1997] ECR I-6257. For more discussion on the matter check O'Keeffe (1998), pp.509-536; Schermers&Waelbroeck (2001), pp.247-249 and Bebr (1982), pp.421-441.

⁴²² Case 54/72 *Fonderie Officine Riunite FOR v. Vereinigte Kammgarn-Spinnereien VKS* [1973] ECR 193.

⁴²³ Case 52/76 *Luigi Benedetti v. Munari F.lli s.a.s.* [1977] ECR 163, paras.20-22.

⁴²⁴ Case 14/86 *Pretore di Salò v. Persons unknown* [1987] ECR 2545, para.16. However, in many cases, the Court will try to infer the necessary elements of the case which will allow to establish the precise meaning of the question sent by a national court. See for instance case 10/71 *Ministère public luxembourgeois v. Madeleine Muller, Veuve J.P. Hein and others* [1971] ECR 729, paras.4-11.

⁴²⁵ See order of the Court in case 105/79 *Preliminary ruling by the acting Judge at the Tribunal d'Instance Hayange* [1979] ECR 2257.

⁴²⁶ Case 93/78 *Lothar Mattheus v. Doego Fruchtimport und Tiefkühlkost eG* [1978] ECR 2210, para.8.

⁴²⁷ See joined cases 320-322/90 *Telemarsicabruzzo SpA v. Circostel* [1993] ECR I-393. The ruling has been confirmed on several occasions. See for instance C-386/92 *Monin Automobiles – Maison du Deux-Roues* [1993]

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the Rules of Procedure of the Court of Justice, the Court may ask the national court to clarify some points encompassed in the reference in the later stage of the proceeding.⁴²⁸

The national judge is expected to send her decision making the reference which contains the questions to the Registrar of the Court by a written application which must include the applicant's name and permanent address, the description of the signatory, the name of the party/parties against whom the application is made, the subject matter of the dispute, the form of order sought and a brief statement of the pleas in law on which the application is based.⁴²⁹ Additionally, article 104 of the Rules of Procedure of the Court of Justice states that the reference for a preliminary ruling shall contain the subject matter of the main proceedings, the essential arguments of the parties in the main proceedings, a succinct presentation of the reasoning in the reference and the case-law and the provisions of the EU and domestic law relied on.⁴³⁰ As it has emerged from the previous passages, the national court is expected to provide the statement of reasons and a clear factual and legal background of the case, that is to say the facts, points of law which are applicable, statement of the reasons which led the national court to refer a question and the summary of the arguments of the parties. If those conditions are not met the reference may be deemed inadmissible. During the period of reference, the national court is expected to stay the relevant national proceeding.⁴³¹ The decision to stay the proceedings must be taken in accordance with national procedure. Once taken, the Court will send its judgment to the national court which referred the question. For the case-law with regard to the conditions which a reference must fulfill in order to be admissible is rather abundant, the Court has provided the national courts with an Information Note on references from national courts for a preliminary ruling.⁴³²

ECR I-2049, para.6; C-378/93 *La Pyramide Sarl* [1994] ECR I-3999, para.14. In case C-316/93 *Vaneetveld v. le Foyer* [1994] ECR I-763, para.13 the Court revealed a more flexible approach towards the issue.

⁴²⁸ Rules of Procedure of the Court of Justice of 19 June 1991 with amendments, art.104(5).

⁴²⁹ Article 21 of the Protocol on the Statute of the Court of Justice.

⁴³⁰ Rules of Procedure of the Court of Justice of 19 June 1991 with amendments, art.104(1).

⁴³¹ See Information note on references by national courts for preliminary rulings, para.25.

⁴³² The note is not a binding instrument and was designed for information purposes only. By and large, the document is a concise and simplified guideline on the preliminary ruling procedure, the role of the Court within it, the form of the reference, the stage at which it should be sent and the effects of the reference on the national proceedings.

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It seems axiomatic that the preliminary ruling is binding on the national court that requested it.⁴³³ Once the judgment is handed down, the national court which requested it must apply the provided interpretation of EU law to the case pending before it. It is generally recognized that the judgment hold by the ECJ have retroactive effect, that is to say the national court is expected to apply it *ex tunc*. Only in very exceptional cases the Court will limit the temporal effects of its judgment.⁴³⁴ The ruling ought to be given retroactive effect in accordance with national procedural and material law.⁴³⁵

One of the most troublesome aspects of the preliminary reference procedure is its average duration and the backlog the ECJ faces. The growth in the number of references sent to the ECJ year by year is striking.⁴³⁶ In the early years of the Court's existence the procedure would last a few months only.⁴³⁷ The average duration of the proceedings, to date was 17.1 months as against 16.8 months in 2008, 19.3 months in 2007, 19.8 months in 2006 and 20.4 months in 2005.⁴³⁸ Admittedly, the shortening of the procedure duration should be seen as a very favourable development. Also, the Rules of Procedure of the Court foresee a possibility of an expedited procedure in cases with exceptional urgency which is, however, employed very exceptionally.⁴³⁹ One can yet still argue that the time the Court needs to give a

⁴³³ Case 29-68 *Milch-, Fett- und Eierkontor GmbH v. Hauptzollamt Saarbrücken* [1969] ECR 165, para.3 and 52-76 *Luigi Benedetti v. Munari F.lli s.a.s* [1977] ECR 163, para.26.

⁴³⁴ See case 43-75 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455, para.75.

⁴³⁵ This implies that national courts are not under obligation to set aside judgments of other national courts which have already entered into force; see joined cases 66, 127 and 128/79 *Amministrazione delle Finanze v. Srl Meridionale Industria Salumi, Fratelli Vasanelli and Fratelli Ultrocchi* [1980] ECR 1237, paras.9-10 and case 61/79 *Amministrazione delle finanze dello Stato v. Denkavit italiana Srl* [1980] ECR 1205, paras.16-18.

⁴³⁶ For the average yearly growth in the number of references check ECJ (2008), pp.97-100.

⁴³⁷ Most of the preliminary references would take maximum one month in the early years of the ECJ's existence. See Schermers&Waelbroeck (2001), p.303.

⁴³⁸ ECJ (2010), p.94. Check also a data base on preliminary references by Stone Sweet&Brunell (1998a) and Stone Sweet&Brunell (2000), pp.117-127 and Tridimas&Tridimas (2004), pp.127-131. All the articles illustrate, *inter alia*, the number of references from particular Member States and the nature of those references.

⁴³⁹ See art. 104a of the Rules of Procedure of the Court of Justice. Also references in the areas covered by Title V of Part Three TFEU may be considered in accordance with the accelerated procedure, see art.104b. The last paragraph of Art. 267 TFEU provides also for a special urgent proceeding with regard to a person in custody. The application for the expedited procedure should be made by the national court seeking the preliminary ruling, the proceeding takes approximately 2 months on average. It should be emphasized that this special procedure is employed by the Court sporadically in cases concerning, *inter alia*, parental responsibility, see for instance case C-296/10 *Bianca Purrucker v. Guillermo Vallés Pérez* [2010] ECR n.y.r. In 2011 there were 11 applications for the accelerated procedure but only 4 of them were granted, see ECJ (2011), p. 99.

preliminary ruling cannot be considered satisfactory and may, arguably, discourage national judges from utilizing it.⁴⁴⁰

Lastly, the ECJ has often been criticized for the obsolete and rigid style of its judgments⁴⁴¹ which may pose problems to national judges or dishearten them from utilizing the procedure.⁴⁴²

9. Potential consequences of non-compliance: the infringement action and state liability in damages for breaches of EU law

The final section of the present chapter examines the issue of potential consequences of non-compliance of national judges with the expectations which are put on them by means of EU law. The issue is embedded in, on the one hand, the infringement action under Articles 258-260 TFEU for failure to fulfill the obligations following from EU law by a Member State and, on the other hand, the principle of state liability in damages for breaches of EU law by the Member States. Although both issues very much differ in nature, they are yet very much intertwined and they underscore foregoing obligations and expectations which are put on the national judiciary by means of EU law. In that respect, the principle of state liability is, on the one hand, an obligation put on national judges by EU law to grant damages to individuals whose rights stemming from EU law are infringed and, on the other hand, a potential consequence of breach of EU law expectations on part of national judges.

The infringement action following from Article 258 TFEU is one of the most essential mechanisms at the disposal of the European Commission that ensures compliance behaviour on part of the Member States, and therefore also its judiciary⁴⁴³, when they fail to fulfill their

⁴⁴⁰ See Prechal et al (2005), pp.25-26; Alter (2009), p.151 and Twigg-Flesner (2008), p.131. To see how problematic the lengthy procedure can be for a particular case see for instance case C-298/87 *Proceedings for compulsory reconstruction against Smanor SA* [1988] ECR 4489, by the time the ECJ passed its judgment, the applicant in the main proceeding before the national court had already been bankrupt.

⁴⁴¹ Lasser provides for an exquisite and terse analysis of the style of the decisions of the Court of Justice and observes that they are brief, ultra magisterial, deeply logical and deductive and self-assuring whereby they leave no much room for any doubt, see Lasser (2004), pp.104 -112.

⁴⁴² See for instance Weiler (2001), p.219.

⁴⁴³ The notion of a Member State covers all constitutionally independent bodies and agencies of the state which are seen as public authorities, see case 77/69 *Commission v. Belgium* [1970] ECR 237, para.15.

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obligations under the Treaty.⁴⁴⁴ In that sense, a failure of a (supreme) national court to comply with EU law potentially forms the basis for an enforcement action.⁴⁴⁵ It follows from the case-law that a non-application of the judgment of the Court is seen as a non-fulfillment of the obligations under the Treaty and the breach thereof. Consequently, it may result in the infringement action against the State or incur state liability in damages.⁴⁴⁶ Yet, possibility of an infringement action against a Member State for a judicial error which would be in breach of EU law remains rather theoretical. A recent case *Commission v. Spain* is the first and so far the only infringement case against a national judicial decision of the highest national court (*Tribunal Supremo*) in which it was concluded that the national judicial decision indeed violated EU law.⁴⁴⁷ This enforcement mechanism remains a very exceptional one and in the case of courts which do not adjudicate as courts of last instance is in fact not applicable since it might be argued that a national remedy in form of an appeal to a higher national court would still be available to the concerned individual.⁴⁴⁸

The foregoing issue is very much linked to the aspect of Member States' liability for breaches of EU law. In fact, the system of the Treaties does not provide for a remedy that could be utilized by an individual in situations when her rights which she derives from EU law are infringed by Member States and she is suffering damage as a direct consequence of that infringement. It was only in the landmark case *Francovich* that the ECJ explicitly established

⁴⁴⁴ On the purpose and the functioning of the procedure see Craig&De Búrca (2008), pp.429-459.

⁴⁴⁵ The Court has been clear on that point in case C-129/00 *Commission v. Italy* [2003] ECR I-14637. However, it follows that a simple judicial mistake of the court of last instance, in this case the Italian Supreme Court, would not suffice to hold the Member State liable, see para.33 of the judgement.

⁴⁴⁶ See case 199/82 *San Giorgio* [1983] ECR 3595 and 104/89 *Commission of the European Communities v. Italian Republic* [1988] ECR I-579 in which the ECJ held that particular rules of Italian tax law are incompatible with Community law. The Italian courts consequently neglected the ruling of the ECJ. As a result the ECJ held that the Italian state breached the Treaty, case C-129/00 *Commission of the European Communities v. Italian Republic* [2003] ECR I-4637, para.41. See also Usher (1996), pp.106-110. Be that as it may, there are several examples of national courts' disobedience where the referring courts refused to accept the judgment of the ECJ, see for instance judgment in case 145/79 *SA Roquette Frères v. French State - Customs Administration* [1980] ECR 2917, for more check Anderson (1995), pp.303-307.

⁴⁴⁷ See case C-154/08 *Commission v. Spain* [2009] ECR n.y.r. In accordance with the background of the case the Spanish Supreme Court should have referred a preliminary question to the ECJ but had not done so before handing down its ruling concerning VAT tax collected by Spanish Registrars (*egistradores de la propiedad*). For more details and possible implications of the respective judgment see López Escudero (2011), pp.227-242

⁴⁴⁸ See López Escudero (2011), pp.240-241 for the conditions for an infringement procedure for judicial decisions in breach of EU law and the reasons of the unwillingness on part of the Commission to bring the infringement actions in respect to mistakes of the national judiciaries, pp.235-236.

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the principle of state liability for breaches of EU law as a fundamental principle of EU law.⁴⁴⁹ The ECJ reconfirmed that *effet utile* of EU law would be undermined and the protection of the individuals' rights would be weakened if individuals were incapable of obtaining redress in situations when their rights are infringed by a breach of EU law for which a Member State can be held responsible. This consideration brought the Court to the conclusion that the principle that Member States can be held responsible for loss and damage caused to individuals as a result of a breach of EU law is inherent in the system of the Treaty.⁴⁵⁰ Eventually, the Court held that the loss suffered by the individuals should be decided by a national court in accordance with domestic rules on liability provided that those rules are not less favorable than those relating to similar domestic claims.⁴⁵¹ With everything considered, the principle of state liability imposes on national judges the obligation to award compensation to individuals who suffer damage as a result of an infringement of their rights stemming from EU law. The principle should be perceived as a corollary of and supplementary to the principles of supremacy and direct since the obligation to observe the principle of supremacy implies the necessity to repair the damage which resulted from the application of the national legislation which was in breach of EU law.⁴⁵²

The *Francovich* case was only the first step in a string of case-law on state liability and it raised as many questions as it answered.⁴⁵³ In joined cases *Brasserie du Pêcheur and*

⁴⁴⁹ Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v. Italian Republic* [1991] ECR I-5357. In *Francovich* a group of Italian workers whose employers became insolvent and unable to meet its redundancy payments sued the Italian government for non-compliance with a directive which required from the Member States to set up guarantee funds to remedy this type of situations. The ECJ found that the respective provisions of the directive were not sufficient to enable individuals to rely on those provisions against the Italian government before the national court, see para.26.

⁴⁵⁰ Joined cases C-6/90 and C-9/90 *Francovich*, para.35. Additionally, the Court put forward the principle of loyal cooperation as a further basis for the state liability principle. Having established the state liability principle, the ECJ conditioned the right to reparation. It stated that the directive upon which an individual wishes to rely must entail the grant of rights to individuals, it should be possible to identify the content of those rights and a casual link between the breach and the loss and damage suffered must exist, see paras.38 and 40.

⁴⁵¹ See section 7.2 of the present chapter.

⁴⁵² See the opinion of AG Léger in case C-5/94 *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553, paras.69-70 and 104 and joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029, para.22.

⁴⁵³ The questions which appeared concerned types of EU acts and kinds of breaches in relation to which a state may incur liability. Moreover, it was unclear which public authorities can incur state liability. The literature with

Factortame the Court was given a chance to significantly elaborate on some of the points of *Francovich* and to provide national courts with a number of practical hints with regard to the conditions under which state liability would be incurred.⁴⁵⁴ The ECJ held that the principle of state liability is not the last resort tool applied in situations when there is no other way for an individual to obtain redress, that is to say it is a complementary remedy.⁴⁵⁵ Also, there is no need to first establish that a Member state breached EU law. Subsequently, the Court went on to draw a parallel between Member State liability and non-contractual liability enshrined in Article 340 TFEU by holding that the conditions in both situations are the same.⁴⁵⁶ It follows from the ruling that the Court's judgments in *Brasserie* and *Francovich* seemed to differentiate between a (simple) breach of EU law and a sufficiently serious breach. The situation changed after the *Dillenkofer* case where the ECJ held that, although the condition of a sufficiently serious breach was not as such mentioned in *Francovich*, it was yet evident from the facts and circumstances of the case that a serious breach had taken place.⁴⁵⁷ Hence, the condition of a serious breach would be applicable in every case where state liability is in

relation to the *Francovich* ruling and its consequences is very broad Craig (1993), pp.595-621; Emiliou (1996), pp.399-411; Steiner (1993), pp.3-22.

⁴⁵⁴ As opposed to *Francovich*, which concerned state liability for non-transposition of a directive, in *Brasserie* it was dealt with infringement of a directly effective Treaty provision by the Member State's legislative act, see joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur*.

⁴⁵⁵ Initial case-law seemed to confirm that state liability in damages could be only used as a last resort remedy, following cases imply, however, that the ECJ changed its attitude towards the issue. See for instance joined cases C-397/98 and C-410/98 *Metallgesellschaft Ltd and Others v. Commissioners of Inland Revenue, H.M. Attorney General* [2001] ECR I-1727. To learn more see Jans et al (2007), p.327 and Arnulf (2006), pp.319-326.

⁴⁵⁶ Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*, para.29. It should be noted that in this context Art.340 TFEU did not constitute the legal basis of the claim.

⁴⁵⁷ Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v. Bundesrepublik Deutschland* [1996], ECR I-4845, paras.23 and 26. Another noteworthy aspect of *Dillenkofer* is the fact that the Court distinguished two situations when sufficiently serious breach takes place. The Court argued that when a Member State has a wide discretion in the exercise of its powers a manifest and grave transgression of the limits of that discretion would constitute a serious breach. In turn, when the margin of discretion left to the Member state is very limited or does not exist at all then the mere infringement of EU law would suffice to create a sufficiently serious breach. *Erich Dillenkofer*, para.25. See also case C-5/94 *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553, para.28. In relation to that issue it seems necessary to mention the case *Bergaderm* in which the Court found that the general or individual nature of a measure taken by an institution is not a decisive criterion to establish the limits of the discretion left to the institution in question, see case 352/98 P *Laboratoires Pharmaceutiques Bergaderm SA et al v. Commission* [2000] ECR I-5291, para.46.

question.⁴⁵⁸ Eventually, a judge who finds that the state can render liability for an infringement of Union's law is expected to award reparation to the individual in accordance with domestic rules. Such reparation must be directly proportional to the loss or damage sustained in order to ensure effective legal protection.⁴⁵⁹

Most importantly in the context of the present study, a Member State may incur liability irrespective of the organ of the state whose act breached EU law and the obligation to make good damage cannot depend on national rules with regard to the division of powers between constitutional authorities.⁴⁶⁰ The case-law clearly indicates that apart from the act of the legislature and the executive, the Member State may be held liable also for the acts of the national judiciary. Failure of a court of last instance to request a preliminary ruling concerning a problem of interpretation of EU law can lead to an infringement procedure commenced by the Commission or a state liability action for damages launched by an individual.⁴⁶¹ It follows from the judgment that individuals relying on EU law must have the possibility of obtaining redress in the national courts for the damage resulting from the infringement of those rights owing to a decision of a court adjudicating in last instance.⁴⁶² In that sense, the ECJ established a system of verification of the way national judges adjudicating in the last instance cooperate by means of the preliminary ruling procedure and a compliance mechanism which would potentially secure the involvement of national courts in the mechanism.⁴⁶³

⁴⁵⁸ In the *British Telecom* case the Court ruled that a breach of Union law in a form of incorrect implementation of a directive may also constitute a basis to claim damages, see Case 392-93 *The Queen v. H. M. Treasury, ex parte British Telecommunications plc* [1996] ECR I-1631, para.40.

⁴⁵⁹ Damages which do not include loss of profit by individuals is precluded by EU law, see case *Brasserie*, paras.82 and 90. For the overview of the consequences of state liability principle for the national judiciary see Fierstra, *The significance of the Francovich jurisprudence for the national courts* [in] Jansen et al (1997), p.117.

⁴⁶⁰ Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*, paras.32 and 33.

⁴⁶¹ See case C-224/01 *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10329. In case of questions concerning the validity of EU law courts of all instances are obliged to resort of the preliminary ruling mechanism. Consequently, the infringement procedure could also be started against a decision of a lower instance court, see section 8.4 of the present chapter.

⁴⁶² Case C-224/01 *Köbler*, paras.36-40. See also C-173/03 *Traghetti del Mediterraneo SpA v. Italy* [2006] ECR I-5177. The ECJ repeated the conditions established in the foregoing cases which must be met in order to render the state liable for a judicial decision and held that the specific nature of the judicial function must be taken into account in order to assess whether the State can be held liable for its judicial action.

⁴⁶³ See Fontanelli&Martinico (2010), p.362.

Importantly though, it is for the national legal order to designate courts which will have the competence to rule on state liability for an infringement of EU law by a decision of a national court adjudicating at last instance.⁴⁶⁴ The foregoing naturally induces various questions as to the practical shape and operationalization of such a system as it might imply that the highest/last instance courts themselves would have to decide upon granting damages with regard to their own decisions which are alleged to be incompatible with EU law. Arguably, depending on the procedural particularities of national legal system, one may also imagine a situation when lower courts would have to decide on state liability in damages for judicial pronouncements of their highest appeal/supreme courts.⁴⁶⁵ Also, the conditions governing state liability for judicial errors are very strict.⁴⁶⁶ Therefore, one might claim that the enforcement system through the state liability in damages principle is also rather a weak one. By and large, the infringement procedure and state liability in damages mechanisms which are not only very restrained in scope (to the courts of last instance) but also very exceptional in application.

10. Preliminary conclusions

This chapter examined and explored the shape of the role national courts play in the application and enforcement of EU law from the normative point of view. The discussion presented the whole range of obligations which are put on national judges by means of EU law. Those new obligations are at the same time new competences as they give national judges powers which are traditionally not foreseen by national law. Both, the new competences and responsibilities should be seen as different sides of the same coin which

⁴⁶⁴ Case C-224/01 *Köbler*, para.46.

⁴⁶⁵ See Zingales (2010), p.433.

⁴⁶⁶ In several judgments the Court held that the exclusion of state liability, or the limitation of state liability to cases of intentional fault or manifest negligence, is contrary to EU law. See for instance case C-173/03 *Traghetti del Mediterraneo SpA v. Italy* [2006] ECR I-5177 or a recent case C-379/10 *Commission v. Italy* [2011] ECR n.y.r. In the former one, the European Commission maintained that the Italian rules on damages caused by judiciary and the civil liability of judges is at variance with EU rules concerning the liability of Member States for breaches of EU law by one of their courts adjudicating at last instance. The Italian rules excluded the possibility of state liability with regard to the interpretation of law and the assessment of facts or evidence. For a critical view on the principle of state liability for judicial mistakes in breach of EU law, see Zingales (2010).

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complement one common system of judicial protection in the European Union. The national judge is expected to utilize the discussed tools to eventually arrive at the meta-values (though vague and elusive) of the EU legal order, its effectiveness and uniformity thereof. By and large, national judges are expected to treat EU law as their own national law and they must constantly be aware that when they apply national law also EU law may be relevant for the dispute at stake.

With respect to various obligations EU law imposes on national judges, there are three overriding points which emerge. First of all, EU law faces judges with a different kind of challenges. A national court has become a place of interaction between national and EU law and a national judge has become a main protector of the rights individuals derive from the latter which has to fit national and EU law together by means of new mechanisms and tools which have been set at his disposal by *acquis communautaire*. It is sensible to assume that this role expects from a national judge a good knowledge of EU law and the way that law operates in a multilevel legal order. Seen from this perspective, the knowledge of EU law and the means of its judicial enforcement seem axiomatic pre-conditions of any successful fulfillment of the new role which national judges are ought to play.⁴⁶⁷ Secondly, this new role expects from a judge to abandon its traditional, often passive, role and actively contribute to the development of EU legal order. It anticipates a kind of loyalty, trust, commitment and engagement with the law of the Union on the part of national judges. It expects that a judge consult and resort to EU law which should be seen as an integral part of the national legal order. As AG Maduro put it forward, national judges must “reason and justify their decisions in the context of a coherent and integrated European legal order.”⁴⁶⁸ The practical connotations of the foregoing for national judges may arguably involve various obstacles which are related to, *inter alia*, aspects of local judicial culture, the methodology and the interpretation methods employed by national judges in their daily practice and the organization of the judiciary. Third, the new role attached to EU law rests upon the goodwill of national judges to collaborate and contribute to the common European Union project. By

⁴⁶⁷ Prechal et al refer to the necessity of good knowledge of EU law among national judges as the most fundamental problem of “generation zero”, see Prechal et al (2005), p.48.

⁴⁶⁸ Maduro (2007), p.13.

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and large, the fulfillment of the obligations stemming from EU law is premised on several expectations which evidently go beyond the legal sphere.

Chapter 3

Legal and Judiciary System in Poland

1. Introduction

Having discussed the set of obligations that are put on national judges by means of EU law it is necessary to illustrate the shape and main features of the Polish legal and judiciary system. Such an exercise is essential to understand the entire legal context of judicial functioning and to infer to what extent the national constitutional, institutional, procedural and operational frameworks enable the national judge to meet the discussed obligations and expectations and thereby to fulfil the role which is put on them by EU law. This chapter also serves the purpose of a general reference point into the Polish legal system.⁴⁶⁹ The present chapter traces, in the first place, the main features of the national legal system and the organization of the judiciary system with a special focus on the civil jurisdiction. In addition, several aspects of the national legal culture and the characteristics of the Polish judicial community such as for instance the system of legal education, judicial training and nomination and the career track are analyzed.⁴⁷⁰ Next to that, the problem of accommodation of the tools of application of European Union law in the national sources of law, that is to say the adaptation of the national system to *acquis communautaire* expectations law is examined. For that purpose also the aspect of reception of the EU legal order by the Polish Supreme Court and the Constitutional Tribunal is assessed. The following analysis is kept at a certain level of generalization and particular attention is given to those aspects of the legal system which, at least from a theoretical point of view, might bear on the functioning of

⁴⁶⁹ Literature in English touching upon the organizational and functional aspects of the Polish legal system is very scarce. In that sense, the present chapter provides a concise and comprehensive guide into the issue.

⁴⁷⁰ The term “judicial community” is borrowed from Bell (2006), p.13. In accordance with the author “that community sets standards for judicial activity and inducts new judges into their role.”

civil judges as EU judges or might potentially jeopardize the proper functioning of national courts in their EU capacity.⁴⁷¹

2. Organization of the judiciary system

2.1. General overview

In accordance with the Polish Constitution the courts and tribunals constitute a separate power, are independent of other branches of power and pronounce their judgments in the name of the Republic.⁴⁷² The Code of Civil Procedure states that the judiciary consists of the Supreme Court (*Sąd Najwyższy*), ordinary courts of common jurisdiction (*sąd powszechny*)⁴⁷³ and special courts. The Constitution specifies administrative courts and military courts as special courts and stipulates that extraordinary courts may be established only during a time of war.⁴⁷⁴ In accordance with Art.177 of the Constitution the common courts implement the administration of justice concerning all matters except for those statutorily reserved to other courts.

The Polish judicial order is by no means homogeneous, i.e. it does function in one constitutional framework but it consists of distinct branches and each is quite distinct from the other. The ordinary courts comprising of, basically speaking, civil and criminal chambers are organized in three tiers and are headed by the Supreme Court which also perform control over the military courts. The organization of common courts is regulated in the Law on Common Courts Organisation (hereinafter CCO).⁴⁷⁵ The administrative jurisdiction includes sixteen provincial administrative courts (*wojewódzki sąd administracyjny*) which exercise control over the performance of public administration and are supervised by the Supreme Administrative Court (*Naczelny Sąd Administracyjny*). The Constitutional Tribunal (*Trybunał Konstytucyjny*)

⁴⁷¹ The analysis is focused on the present state of affairs and the historical developments of the particular aspects of the system are only brought up when necessary to understand the functioning of the system at present.

⁴⁷² See Articles 173 and 174 of the Constitution of the Republic of Poland.

⁴⁷³ They are interchangeably called common or ordinary courts or courts of common jurisdiction.

⁴⁷⁴ See Article 175 of the Constitution.

⁴⁷⁵ Law on Common Courts Organisation of 27 of July 2001, J L No.98, item 1070 with later amendments.

performs control of the conformity of law to the Constitution.⁴⁷⁶ The State Tribunal (*Trybunał Stanu*) rules on the constitutional liability of highest officers of state. Both the Constitutional Tribunal and the State Tribunal constitute a separate branch of judicial power by remaining outside the system of courts.⁴⁷⁷ The following flowchart outlines the architecture of the Polish judiciary system.

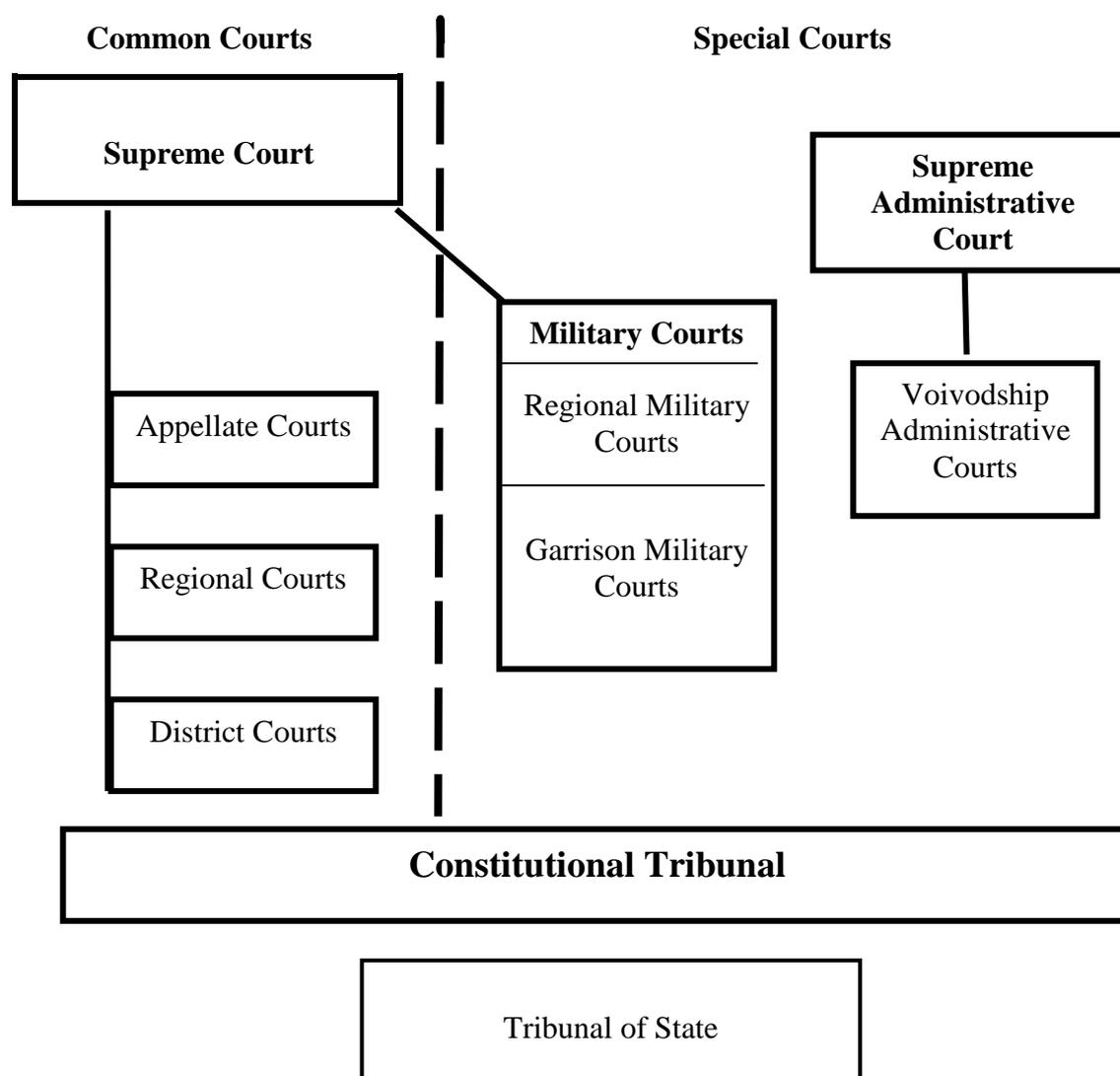


Chart 1

⁴⁷⁶ See Art.188 of the Constitution.

⁴⁷⁷ In that sense, the architecture of the Polish judiciary, based on the system of specialization and comprising of three supreme courts, quite much resembles that of the French Republic. For an exquisite analysis of, *inter alia*, the French judicial system see Lasser (2009), pp.29-56.

The Ministry of Justice is responsible for supervising courts' administrative activities. The Minister of Justice also acts as a disposer of budget allocated to common courts.⁴⁷⁸ The tasks within the scope of authority over the administrative activity of common courts directly related to the administration of justice are performed by judges delegated to the Ministry of Justice.⁴⁷⁹ Furthermore, the Minister of Justice issues, by regulation, internal common courts regulations that specify internal organisation and order of functioning of courts, the order of acts in courts, the order of performance of official duties and performance of tasks by judges holding managerial positions, the course of administrative acts in matters within the competence of courts, acceptable systems and hours of the performance of official duties and particular terms and conditions with respect to providing access to premises to participants of proceedings, witnesses and other persons who stay in courts.⁴⁸⁰ All the foregoing tasks are executed upon consultation with the National Council of the Judiciary and they may not in any way interfere with the independence of judges.⁴⁸¹

⁴⁷⁸ See art.177 para 1 of CCO.

⁴⁷⁹ See art.9 of CCO. The CCO specifies all the tasks of the Ministry with regard to it which include, inter alia, establishing and liquidating courts and determining seats and areas of jurisdiction thereof, delegating to one regional court the authority to hear cases within the scope of labour law and commercial law from the area of jurisdiction of another court circuit, delegating to one regional court the authority to hear cases related to the compliance of vetting statements with the actual state of affairs from the area of jurisdiction of another regional court within the same area of appellate jurisdiction, entrusting one of the district courts with keeping records for two or more of such courts, entrusting one of the district courts (commercial courts) with keeping the National Court Register for the area of jurisdiction of two or more such courts or for part of their area of jurisdiction. If the Minister of Justice finds irregularity in court proceedings efficiency, he/she may make a written comment on the irregularity and request the removal of results of such irregularity. See art.37 para 4 of the CCO. Duties exercised for the purpose of supervision over the administrative activity of courts comprise: the inspection of a court or some of its organisational units, verifying the course and efficiency of proceedings in particular cases, vetting in a court, inspection of the activity of the secretariat in a court, see art.38 para 1 of CCO. The first three tasks may be performed exclusively by judges, see Serafin&Szmulik (2007), p.19.

⁴⁸⁰ See art.41 para 1 of CCO. The issuance of mentioned regulations the principles of efficiency, principles of reason, principles of economical and fast acting, as well as the need to ensure reliable performance of tasks courts are entrusted with should be taken into consideration. Para 2 of the same article stipulates that "the Minister of Justice specifies, by regulation, detailed acts of courts with respect to matters within the scope of international civil and criminal proceedings in international relations, including: certifying documents to be used abroad, procedure of performance of acts related to persons using immunity and diplomacy and consular privileges as well as acts involving participation of such persons, acts related to appearance before courts, procedure for determining nationality, detailed procedure for applying for legal assistance and provision of such assistance to courts and other bodies of foreign countries and detailed procedure for applying for handing over of wanted or convicted persons as well as other forms of cooperation in criminal matters."

⁴⁸¹ See art.39 of CCO which reads: "Duties within the scope of supervision over the administrative activity of courts shall not violate the scope in which judges are independent." See also Serafin&Szmulik (2007), p.18. Yet the

2.2. Common courts of ordinary jurisdiction

In accordance with Art.177 of the Constitution the common courts shall implement the administration of justice concerning all matters except for those statutorily reserved to other courts. The organization of common courts is regulated by the CCO. The rules governing the jurisdiction of common courts are set out in articles 10 - 20 of the CCO and in articles 16 - 18 and 27 - 37 of the Code of Civil Procedure. In accordance with art.1 para 1 of CCO, the system of common courts consist of district courts, regional courts and appellate courts.

District courts (*sąd rejonowy* – SR) are exclusively first instance courts. Until the 1st of January 2010 also so-called municipal courts (*sąd grodzki*) existed which constituted special chambers of district courts.⁴⁸² District courts are created for one or more municipalities but in larger cities more than one district court may exist.⁴⁸³ There are 321 district courts in Poland which are located in larger towns and cities.⁴⁸⁴ They handle all cases, except cases which are reserved for regional courts.⁴⁸⁵ A standard district court in a mid-range city has for instance two civil law divisions, three criminal divisions, two family law divisions, one labour and social security law division, four commercial law divisions and six municipal divisions for minor civil

far going administrative supervision exercised by the Ministry of Justice may trigger some concerns with respect to the independence of the judiciary as the Ministry of Justice may interfere with adjudication.

⁴⁸² Municipal courts were created in 2001 and replaced the boards judging petty offences. A municipal court could be established or liquidated by means of a regulation of the Ministry of Justice as chambers in district courts or non-local chambers of district courts which were created out of the residence of a district court. Municipal courts used to hear cases concerning minor offences, cases related to fiscal petty offence and fiscal offence, except cases subject to hearing in the course of ordinary proceedings, offences prosecuted on private accusation, cases related to offence subject to hearing in expedited proceedings, other offences which are heard in accordance with the simplified procedure, civil cases subject to hearing in simplified proceedings, with the exclusion of cases heard in accordance with the European order for payment procedure and related to court deposits and forfeiture of objects, see art.13 para.2 of CCO. By the end of 2008 there were 325 municipal courts. The processes of liquidation thereof commenced in 2008. Forty of them were abolished by 1st of January 2009 and 117 by 1st of July 2009. 1227 judges were adjudicating in municipal courts. The cases heard by municipal courts were transferred to civil and criminal chambers of district courts and the employees were transferred to an appropriate court.

⁴⁸³ See art.10 para 1 of CCO.

⁴⁸⁴ Data as of February 2011 provided by the Ministry of Justice in response to an individual inquiry by the author, document BM-VI-061-123/11/1, in possession of the author. For the whole list of district courts see the website of the Ministry of Justice at: <http://bip.ms.gov.pl/pl/rejstry-i-ewidencje/lista-sadow-powszechnych/search.html?Cat3=3> (last accessed 20 February 2011).

⁴⁸⁵ See art.16 of the Code of Civil Procedure.

and criminal cases.⁴⁸⁶ Not all district courts have commercial divisions since those are created in larger towns/cities only.⁴⁸⁷

Regional courts (*sąd okręgowy* - SO) operate as both first and second instance courts as they may hear appeals from district courts. Regional courts are created for minimum two district courts and there are 45 regional courts in Poland located in all major cities.⁴⁸⁸ Importantly, in certain cases regional courts are the courts of last instance against decisions of which there is no further remedy since there is no ultimate appeal allowed.⁴⁸⁹ They may also hear cases which are passed on by district courts due to interpretative doubts or legal issues that have arisen in a proceeding.⁴⁹⁰ Regional courts handle civil law cases, criminal law cases, commercial cases and labour and social security cases.⁴⁹¹ A case is classified as either a district or regional case on the basis of the value of the subject matter in litigation, that is to say high value claims which exceeds PLN 75 thousand in civil cases and PLN 100 thousand in commercial cases⁴⁹² are heard in regional courts which then act as courts of first instance.⁴⁹³

⁴⁸⁶ Example from the District Court in Lublin, see <http://lublin.sr.gov.pl/56> (last accessed 14 October 2009)

⁴⁸⁷ A president of the district court and, if appointed, the financial manager of the district court constitute the administrative organs of the court., see art.21 para 1 p.1 and 4 of CCO. The president of the court manages and represents the court (with the exception of duties falling within the competence of the of the financial manager of the court), performs duties within the scope of court administration, performs other duties stipulated in the act and in separate provisions, is the professional superior of judges of a given court, appoints and dismisses judges, upon required consultations. See art.22 para 1, p.1-5 of CCO. The president and the vice president of a district court are appointed for a four-year term of office, for two subsequent terms of office at the most, see art.26 para 2. The distribution of duties in the district court is determined by the president of the regional court in the court circuit, see art.22 para 1a of CCO

⁴⁸⁸ For the list of regional courts see the website of the Ministry of Justice, <http://bip.ms.gov.pl/pl/rejstry-i-ewidencje/lista-sadow-powszechnych/> (last accessed 11 January 2011).

⁴⁸⁹ See section 2.3 of the present chapter concerning the competences of the Supreme Court.

⁴⁹⁰ See art.18 para 1 of the Code of Civil Procedure.

⁴⁹¹ For instance the Regional Court in Warsaw has 25 divisions: 10 civil divisions functioning as first and second instance courts for civil law cases and family law cases, 5 divisions dealing with criminal law cases, 4 labour and social security divisions, 4 commercial law courts, 1 Community Trade Marks and Industrial Design protection division, 1 division for competition law and consumer protection.

⁴⁹² See art.17(4) of the Code of Civil Procedure. PLN 75 000 and 100 000 equal EUR 16 751 and 22 334 respectively in accordance with the currency exchange rate of the National Bank of Poland of 2 December 2011.

⁴⁹³ The president of the regional court, the board of the regional court and the director of the regional court constitute the administrative organs of the court, see art.21 para 1 p.2 and 4 of CCO. The president and the vice president of a court of appeal and a regional court are appointed for a six-year term of office, and may not, directly upon the lapse of the term, be reappointed for the performance of the same function, see art.26 para 1. The tasks performed by the president of the regional court are similar to those of a president of the district court. In addition, he/she performs court administrative duties with respect to district courts within the area of jurisdiction of the regional court and exercises supervision over the activity of such courts, see art. 22 para 3 of CCO

Appellate courts (*sąd apelacyjny* - SA) are exclusively appeal courts hearing appeals from regional courts.⁴⁹⁴ There are 11 courts of appeal located in major cities. A court of appeal can uphold the appealed decision, amend the appealed decision or revoke the decision and resend the case for re-examination to the court of first instance. Courts of appeal handle civil law cases, criminal law cases, and labour and social security cases.⁴⁹⁵ Appeal courts are created for at least two regional courts. An appeal court together with all subjected district and regional courts constitute a judicial unit.⁴⁹⁶

Cases in the area of private law may be classified as civil, family, commercial⁴⁹⁷, employment, social security or land registry cases which consequently will be heard by the following chambers (divisions) of common courts:

- civil chambers (*wydział cywilny*) which deal with civil law litigations that do not fall under competences of labour, social security and commercial divisions. Civil chamber hear disputes concerning property rights and relating to rights in real estate, inheritance and succession law. Furthermore they decide in cases related to law of obligations such as contracts and most of consumer protection disputes, contractual liability and damages, also state liability in damages. Also non-patrimonial claims such as intellectual property and copy rights, press and media law may be heard by civil chambers. Civil divisions at regional courts may also hear family law cases and civil divisions at appellate courts hear also commercial law cases. It is important to bear in mind that even though consumer cases fall under the competence of ordinary

⁴⁹⁴ The term 'appellate court' is therefore somewhat confusing since also regional courts function as appeal courts from the judgments of district courts.

⁴⁹⁵ See article 18 para 1 of CCO. For instance, the Court of Appeals in Warsaw has two civil divisions that handle civil, family and commercial (company) law cases, one criminal law division and one division for labour and social security cases.

⁴⁹⁶ See note 114 for the list of judicial units. The president of the court, the board of the court of appeal and the director of the court of appeal constitute the administrative organs of an appellate court, see art. 21 para 1 p.3 and 4 of CCO. The tasks performed by the president of the appellate court are similar to those performed by district and regional courts presidents. In addition, the president of the court of appeal exercises supervision over the administrative activity of regional courts within the area of jurisdiction of the court of appeal. In justified circumstances or at the request of the president of the regional court, the president of the court of appeal may also undertake acts within the scope of supervision over the activity of district courts within the area of appellate jurisdiction, see art. 22 para 4 of CCO.

⁴⁹⁷ The classification of a dispute as a civil or commercial case is quite ambiguous. For that reason competence disputes between various divisions of courts may occasionally arise.

civil divisions, consumers may also opt for alternative dispute resolution provided by the network of consumer courts of arbitration.⁴⁹⁸

- family and minors divisions (*wydział rodzinny i nieletnich*) handle family⁴⁹⁹ and custody law cases, cases with regard to juvenile delinquency and cases regarding persons addicted to alcohol and narcotic drugs undergoing special medical treatment.
- commercial (company) divisions (*wydział gospodarczy*) which hear cases related to commercial law. A civil law case is recognized as a commercial law case if three cumulative conditions are fulfilled: (1) it must be a case concerning civil relationship (2) between entrepreneurs (3) relating to the business activity performed by them.⁵⁰⁰

However, also other cases, such as for instance cases against entrepreneurs with regard to discontinuation of breaching of environmental law and restoration of environment to the original state are also classified as commercial disputes.⁵⁰¹ Put bluntly, commercial cases disputes will relate to companies relations and commercial companies, government corporations relationships or insolvency law. Cases in commercial divisions are heard in accordance with a special procedure that is slightly

⁴⁹⁸ Consumer courts of arbitration exist at Voivodship Inspectorates of the Trade Inspection. There are 16 consumer courts of arbitration with 15 branch offices. The decisions of the consumer courts, as well as settlements reached in them, are equally binding as the judgments of common courts of law, provided that a common court has confirmed their enforceability. However, the decision to use arbitration must be made by both of the parties to the dispute. Consumer courts of arbitration may only hear consumer-to-business disputes resulting from contracts of sales and provision of services, and only as regards property rights. The consumer courts of arbitration at the Voivodship Inspectorates of the Trade Inspection can decide cases where the value of the object in dispute does not exceed PLN 10 thousand. Only the Consumer Court in Warsaw can hear cases regardless of the value of the object in dispute. Consumers can also resort to mediation offered by the Voivodship Inspectorates of the Trade Inspection. In matters related to the provision of telecommunication services (for example consumer disputes with telephony operators) or postal services, the case may be filed to the consumer court of arbitration also by the President of the Office of Electronic Communication. Consumer disputes with banks (such as financial claims arising from non-performance or undue performance of banking services) may, in turn, be solved with the support of the Banking Ombudsman, an institution operating at the Polish Bank Association. Disputes with insurance companies, pension fund managing companies, the Insurance Guarantee Fund and the Polish Motor Insurers' Bureau can be decided by the Court of Arbitration at the Insurance Ombudsman. In disputes with fuel gas and energy suppliers, consumers may seek the help of the specialized ombudsman institution set up by the Energy Regulatory Office. Arbitration courts are much quicker (average 2 months) and cheaper and operate in accordance with a simplified procedure. See http://www.uokik.gov.pl/help_and_advice.php (last accessed 2 January 2012).

⁴⁹⁹ Those include *inter alia* marriage relations, separations, alimony, kinship or fatherhood affiliation.

⁵⁰⁰ See Act on adjudication of courts in commercial matters of 24 May 1989, J.L. No 33, item 175 with later amendments, art.2 (1) and art.479 (1) para.1 of the Code of Civil Procedure.

⁵⁰¹ See Act on adjudication of courts in commercial matters, art.2(2).

different from the ordinary civil procedure.⁵⁰² In addition to the foregoing it is necessary to observe that the Court for Protection of Competition and Consumers functioning as a first instance court for competition law cases, antitrust cases and collective consumer interests protection cases⁵⁰³ and the Community Trade Marks and Design Rights Court operate at Warsaw Regional Court.⁵⁰⁴ The latter court hears cases involving infringement of EU trade marks, threats to infringe designs or statements to the effect that designs and trade marks have not been infringed, annulment of an EU design right, revocation or annulment of a trade mark and the consequences of infringing trade marks.⁵⁰⁵

- labour chambers and/or social security chambers (*wydział pracy i ubezpieczeń społecznych*) which may operate jointly or as separate chambers handle civil law cases with regards to employment relations, vindication of claims (damages) in relation to groundless dismissals. Social security divisions handle cases concerning social security, old-age and disability pensions, cases with regard to benefits under the responsibility of the national Social Insurance Institution (ZUS). Similarly to commercial chambers, they operate in accordance with a special procedure.⁵⁰⁶

⁵⁰² See art. 479 of the Code of Civil Procedure. For an extensive overview of the jurisdiction and functioning of commercial divisions see Bodnar&Ejchart (2009).

⁵⁰³ A breach of collective consumer interests takes place when the detrimental effects of an unlawful practice employed by an enterprise affect an unlimited number of people, i.e. potentially anybody can be harmed. In cases of abusive contract terms anybody who could possibly be harmed by such contract, the President of the Office of Competition and Consumer Protection, NGOs concerned with consumer protections and local consumer ombudsman can bring an action against an entrepreneur. See Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, O.J. L 095, p.0029. The procedure at this court is regulated in accordance with special regulation and has some administrative procedure features since antitrust, competition and in sometimes collective consumer interests protection cases are in first instance handled by the Office of Competition and Consumer Protection which is a central agency of state administration. See the website of the Office <http://www.uokik.gov.pl/home.php> (last accessed 20 January 2011). See art. 479 (28-33) para 1 of the Code of Civil Procedure for the jurisdiction of the Protection of Competition and Consumers Court.

⁵⁰⁴ Sąd Ochrony Konkurencji i Konsumentów and Sąd Wspólnotowych Znaków Towarowych i Wzorów Przemysłowych respectively. See art.16 para 5 of CCO.

⁵⁰⁵ The Community Trade Marks and Design Rights Court was established on basis of EU regulations. See Council Regulation (EC) No 6/2002 of 12 December 2001 on community designs, O.J. No L3 of 5 January 2002, p.1 art.80-81 and Council Regulation (EC) No 1891/2006 of 18 December 2006 amending Regulations (EC) No 6/2002 and (EC) No 40/94 to give effect to the accession of the European Community to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs, O.J No L386 of 29 December 2006, p.14

⁵⁰⁶ See art.459-477 of the Code of Civil Procedure.

- land registry divisions decide upon land register records and other civil proceedings involving the land register.

From the theoretical point of view the functioning of the Polish judiciary is based on the principle of collegiality.⁵⁰⁷ However, in practice the impact of the principle is limited to second instance courts since civil law cases in first instance courts are heard by a single judge.⁵⁰⁸ Only labour law and family law cases⁵⁰⁹ are examined by a panel which comprises of a professional judge and two lay judges (*ławnik*)⁵¹⁰ which are representatives of the community selected in secret voting by councils of municipalities within the jurisdiction of regional and district courts.⁵¹¹ Importantly, even if a first instance court seats in a panel, all orders given outside the hearing are issued by the professional judge.⁵¹² In that sense, the functioning of lay judges is limited to specific fields and only to the courts of first instance and they do not constitute part of the judiciary. Appeals are always heard by chambers composed of three professional judges.⁵¹³

2.3. Supreme Court

Within the above outlined judicial architecture, the Polish Supreme Court (hereinafter PSC), which is located in the capital, is the court of last resort of appeal against judgments of the lower courts of common jurisdiction. In accordance with Art.183 of the Constitution the Supreme Court exercises supervision over common and military courts regarding their judgments. The Act on the Supreme Court is more precise for it establishes that the Court performs the tasks of

⁵⁰⁷ See Jodłowski et al (2009), p.125.

⁵⁰⁸ See art. 47 para 1 of the Code of Civil Procedure.

⁵⁰⁹ For a detailed list of cases which are heard by a panel composed of a professional judge and 2 lay judges see art. 47 para 2 of the Code of Civil Procedure.

⁵¹⁰ See art.4 para 1 of CCO which states that “Citizens participate in administering justice by acting as lay judges in hearing of cases before courts of lower instances, unless acts provide otherwise and para 2 which reads: “When resolving a case lay judges are vested with the same rights as judges.”

⁵¹¹ See art. 160 para 1 of CCO. See the following articles for the procedure of selection.

⁵¹² Lay judges may not preside over the cases. They are supposed to offer advice to the professional judges which would rest on their life and work experience, see Jodłowski et al (2009), p.126. The practice shows that the participation of lay judges in proceedings is in many instances of a purely formal character since they do not possess the necessary legal knowledge.

⁵¹³ See art.367 para 3 of the Code of Civil Procedure. This does also apply to the composition of cassation chambers at the Supreme Court, unless the Court adopts judicial resolutions but does not apply to small claims decisions which will be heard by a single judge also in appeal. Improper composition of a panel may give rise to finding the proceedings invalid, see art.379 para 4 of the Code of Civil Procedure.

administration of justice by means of exercising supervision over the common and the military courts' judicial decisions, in order to assure their compliance with the law and to ensure their uniformity.⁵¹⁴ In order to perform this task, the Supreme Court is issuing ultimate appeals (cassation)⁵¹⁵ and other means of appeal, adopts resolutions and decides upon other matters provided for by statutory law. In addition to that the Supreme Court may express opinions about draft statutes and other normative acts of law, which are to constitute the bases for the decision-making and the functioning of the courts.⁵¹⁶ However, the PSC does not function as a supreme court for the entire judiciary system since it does not exercise any powers with regard to administrative courts which are headed by the Supreme Administrative Court.⁵¹⁷

The PSC exercises supervision over the common and martial courts, in respect of judgments arising from these courts. In that sense, the Court examines whether the judicial decisions of ordinary and military courts are compliant with the law. Its purpose is not to rule on

⁵¹⁴ See Act on the Supreme Court of 23 November 2002, J.L. No 240, item 2052, art.1 which states that the Supreme Court performs: 1.administration of justice by means of: exercising supervision over the common and the military courts' judicial decisions, in order to safeguard their compliance with law and to ensure their uniformity; to do this, the Supreme Court shall take cognisance of ultimate appeals (cassation) and of other means of appeal, adopting resolutions resolving legal issues, resolving other matters provided for by statutory law, 2. examination of protests concerning the elections and determination of the validity of the elections to the Sejm, the Senate, the election of the President of the Republic, and the validity of the national or the constitutional referendum; examination of protests concerning the elections to the European Parliament, 3. expression of opinions about draft statutes and other normative acts of law, which are to constitute the bases for the decision-making and the functioning of the courts, as well as about other acts of law which the Supreme Court shall think fit; 4. performance of other acts provided for by law. On the role of the Supreme Court see Wróbel W. (2008), pp.75-87.

⁵¹⁵ A cassation case may be brought to the Supreme Court only in specific cases which are regulated in articles 398.1 - 398.21 of the Code of Civil Procedure. Those cases are limited to the areas of: employment, social security, commercial and company, protection of fair competition, contracts abusive clauses, energy, telecommunication, post, railway transport markets regulation, non-litigious proceedings and international civil proceedings. However, even in those areas further conditions exist which limit the possibility of bringing a case to the Supreme Court, those relate mainly to the value of an object which is the subject of the proceeding. Cases which would not qualify for cassation are those which concern less than 50000 PLN for cases regarding property rights, less than 75 000 PLN in commercial cases and less than 10 000 PLN in employment and social security cases with exception of those cases which concern the problem of suspension of old-age pension or disability pension and the social insurance obligation., see art.398 (2), para.1. Cassation is also not possible in cases concerning divorces, separation, alimony, residential and lease rent and infringement of possession, penalties for breach of order, work references and claims attached to them, allowances and their equivalents and finally cases which were heard in a simplified procedure, see art.398 (2), para 2 of the Code of Civil Procedure. By and large, the forgoing implies that in some instances the regional courts will be courts of last instance against decisions of which there is no possibility of a further review by another court.

⁵¹⁶ See Act on the Supreme Court, art. 1.

⁵¹⁷ The Supreme Court consists of first president, four vice-presidents of the Court and approximately 80 judges and is organized into four chambers: criminal, civil, labor and social insurance, and military one. For more see Serafin&Szmulik (2007), pp.60-81.

the merits of the cases, but to state whether the law has been correctly interpreted and applied on the basis of the facts already definitively assessed in the decisions referred to it (ruling on points of law). After a case is heard and the decision is given by the Supreme Court, the case will be sent back to the second instance court which will have to hear it again and judge it in the light of the decision of the Supreme Court.⁵¹⁸ The Court also passes resolutions to clarify specific legal provisions and to resolve disputable questions in specific cases. Controversial legal issues may be referred to the Court by appellate courts on the basis of art. 390 para 1 of the Code of Civil Procedure. As it has previously been mentioned, if the Court, while considering a cassation or other case, has doubts as to how the law should be interpreted it can decide to stay the proceeding and refer a question(s) to the seven judges chamber.⁵¹⁹ Likewise, if there are discrepancies between the decisions of the common courts, military courts or the Supreme Court, the First President of the SC may request the Court in a bench of seven justices, or in another required composition to pass a resolution.⁵²⁰ If such a chamber is indeed of the opinion that the issue in question requires clarification it may further refer the issue to two or more other chambers or the full court which may decide to pronounce a resolution.⁵²¹ Upon their adoption, the resolutions of the entire Supreme Court bench, of a joint bench of chambers or of a bench of entire chamber become legal principles, i.e. they gain binding precedential value for all courts.⁵²² In such a capacity, the Supreme Court will function as an *agent of normative change*.⁵²³ The Court frequently explains to national lower courts the intricacies of some legal issues, provides them with the information how to proceed in particular situations. In that sense, the Supreme Court may perform some activities of didactical nature.⁵²⁴ Judgments of the Supreme Court (excluding resolutions) are not binding on all lower national courts though. A judgment binds only the court which the case originates from. Taking all the foregoing into

⁵¹⁸ The function the Polish Supreme Court fulfils resembles thus the *Cour de Cassation* of the French Republic. See Piasecki (2007), pp.181-189.

⁵¹⁹ See art. 59 of the Act on the Supreme Court.

⁵²⁰ See art. 60 of the Act on the Supreme Court. Such a request may also be lodged by the Spokesman for Citizens' Rights and the Public Prosecutor General or, within his/her competence, by the Chairperson of the Polish Financial Supervision Authority and the Spokesman for the Insured, see para. 2 of the article.

⁵²¹ See art. 61, para.1 of the Act on the Supreme Court.

⁵²² See art.61, para. 6 of the Act on the Supreme Court.

⁵²³ From Guiraudon (2000), p.1107.

⁵²⁴ See Wróbel W. (2008), p.81.

consideration it may be concluded that all the functions performed by the Supreme Court aim at ensuring that *corpus iuris* is interpreted and applied by common and military courts in a uniform and proper manner throughout the entire state.⁵²⁵

2.4. Constitutional Tribunal

Common courts do not have the competence to review the compliance of national primary or secondary legislation with the Constitution since this form of control is reserved to the Constitutional Tribunal (CT).⁵²⁶ The primary function of the Constitutional Tribunal is the control of hierarchical conformity of legal norms, i.e. adjudicating on the conformity of the legal norms of lower rank to those considered superior (especially the Constitution) and eliminating the norms inconsistent with the system of law in force. The exclusive point of reference for such adjudication is the law (Constitution). More specifically, the Constitutional Tribunal adjudicates with regard to the following matters: the conformity of statutes and international agreements to the Constitution, the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute, the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes, disputes over the powers of central constitutional bodies and on the conformity to the Constitution of the purposes or activities of political parties, complaints of citizens concerning constitutional infringements (so called constitutional complaints).⁵²⁷ With everything considered, the role performed by the CT can be referred to as a negative legislator as it eliminates the provisions of unconstitutional statutes from the system of law. Judgments of the Constitutional Tribunal are made by a majority of votes, are of universally binding application and are final.⁵²⁸ Any national court, also first instance courts, may refer a legal

⁵²⁵ See Piasecki (2005), p.124.

⁵²⁶ The Constitutional Tribunal was established in 1982 and became operational in 1986. Its role was enhanced after 1989.

⁵²⁷ Everyone whose constitutional freedoms or rights have been infringed has the right to appeal to the Constitutional Tribunal for a judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution. Art.79 of the Constitution.

⁵²⁸ Art. 190 (1) and (5) of the Constitution.

question as to the compatibility of a normative act with the constitution, ratified international agreements and statutes. Such a question will take a form of decision on the basis of article 354 of the Code of Civil Procedure which will be followed by another decision suspending the procedure.⁵²⁹

2.5. Other courts and tribunals

Administrative courts constitute a separate court system which deals with adjudication concerning the problems of legality of decisions taken by administrative bodies with law, i.e. they settle cases between legal persons or private citizens and administrative bodies. There are 11 Voivodship Administrative Courts and one Supreme Administrative Court in Warsaw. Administrative courts decide upon complains against decisions and orders of administrative authorities, executive orders which complete administrative procedures, orders concerning execution proceedings and other acts and activities performed by public administration including written interpretations of tax law provided in individual cases. Next to that, they give judgments on the conformity with statutory law of the resolutions of organs of local authorities and normative acts of territorial organs of government administration.⁵³⁰ Due to the highly

⁵²⁹ The referred question must fulfill material and procedural requirements in order to be found admissible. See art.32 of the Act on the Constitutional Tribunal of 1 August 1997, J.L. No 102 item 643 with later amendments which stipulates that the application must include: identification of the organ which enacted the normative act in question; a precise identification of the normative act, or a part thereof, called in question, formulation of the claim alleging the non-conformity of the normative act called in question to the Constitution, ratified international agreement or statutes, reasons for the claim containing indication of supporting evidence. The application submitted by the organ or organisation specified in Art.191, para.1, subparas.3-5 of the Constitution shall also include reference to the provision of law or by-laws, indicating that the statute or another normative act called in question concerns issues within their scope of activities. The question of law shall also indicate the scope within which an answer to the question may influence settlement of the case in relation to which the question has been asked and, additionally, it shall indicate the organ before which the proceedings are pending as well as the designation of the case.

⁵³⁰ Further scope of functions and activities of the administrative courts is regulated the Act on Proceedings before Administrative Courts of 30 August 2002, J.L. No 153, item 1270, with later amendments and Administrative Proceedings Code of 14 June 1960, J.L. No 30, item 168, consolidated text of 9 October 2000, J.L. No 98, item 1071 with subsequent amendments. WSAs revoke, annul or uphold the appealed administrative act but they cannot issue any new administrative decision that would affect individual's rights and obligations.

harmonized by EU law field of jurisdiction, administrative courts are confronted with EU law related issues on a daily basis.⁵³¹

Military courts constitute a distinct system which comprises of military garrison courts (*wojskowy sąd garnizonowy*) and regional military courts (*wojskowy sąd okręgowy*) that exercise administration of justice in criminal cases and all other cases which are stipulated in separate statutes in the Polish Armed Forces.⁵³² Military courts handle cases involving crimes committed by soldiers and military employees.⁵³³ The Tribunal of State located in Warsaw has the competence to rule on the violations of the Constitution or of a statute by high national officials.⁵³⁴ Also deputies to Sejm and Senators are constitutionally accountable to the Tribunal of State to extent specified the Constitution.⁵³⁵

3. Features of the judicial community

The features of any judicial community comprise several distinct aspects which are of institutional and constitutional but foremost structural and operational nature. In that sense, it is necessary not only to touch upon the statutory role a judge is supposed to fulfil but also the character of legal education, judicial recruitment and career.⁵³⁶ The subsequent analysis will address the particular aspects of the Polish judicial community in order to visualize what it means to be a judge of a common court of ordinary jurisdiction in Poland. Apart from sketching an outline of the operational context, it will also be looked into the possible EU relevance thereof.

⁵³¹ See Miąsik (2008), p.373, see also Jaremba (2011).

⁵³² The Military Chamber of the Supreme Court in Warsaw is the appellate and last instance court for military courts.

⁵³³ See Act on the military courts regime of 21 August 1997, J.L. No 117, item. 753. For more on military courts see Serafin&Szmulik (2007), pp.54-59. Crimes which fall under jurisdiction of military courts are regulated in Criminal Code and the procedure before military courts is regulated in criminal procedure.

⁵³⁴ Such as: the President of the Republic, the Prime Minister and members of the Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Chamber of Control, members of the National Council of Radio Broadcasting and Television, persons to whom the Prime Minister has granted powers of management over a ministry, and the Commander-in-Chief of the Armed Forces, see Art.199 p.1 of the Constitution.

⁵³⁵ See Art.199 (2) of the Constitution.

⁵³⁶ See Bell (2006), pp.13-43.

3.1. The constitutional rights and obligations of a judge

Judges (*sędzia*), next to public attorneys (*prokurator*), advocates (*adwokat*), legal advisors (*radca prawny*)⁵³⁷, notaries (*notariusz*) and bailiffs (*komornik*), belong to the licensed legal professions which may be performed only by persons holding a Master of Laws degree. In accordance with Art.178 p.1 of the Constitution judges, within the exercise of their office, are independent and subject only to the Constitution and statutes and pronounce their judgments in the name of the Republic of Poland.⁵³⁸ The independence of judges and courts is safeguarded by the National Council of the Judiciary which reacts to any attack on the constitutional principle of judicial independence by publicly criticizing any interference of the government posing threats to independence of judges.⁵³⁹ In that sense, the Council is pivotal for the functioning of the judiciary.⁵⁴⁰

⁵³⁷ The Polish legal system distinguishes between the position of an advocate and a legal advisor but in fact the competences of both are quite similar. In accordance with art.6 of Act on legal advisors of 6 July 1982, J.L. No 123, item 1059 with later amendments a legal advisor renders legal assistance and more precisely gives legal advice, draws up legal opinions, drafts legal acts and appears before courts and public offices. Art. 4 of Law on the Bar of 26 May 1982 J.L No 123 item 1058 with later amendments lists exactly the same tasks for advocates. A legal advisor, in contrast to an advocate may not represent a plaintiff in family, custody and some criminal cases. Moreover, an advocate, in contrast to a legal advisor, may not be employed by a company and may perform its tasks only as a member of a lawyer's chamber.

⁵³⁸ Art.174 of the Constitution and art. 42 para 1 of CCO.

⁵³⁹ See Act on the National Council of the Judiciary of 20 December 1989, J.L. No 73, item 435 with later amendments, see the website of the Council: <http://www.krs.pl/main2.php?node=history&grp=hist&lng=2> (last accessed on 12 January 2011). The Constitution stipulates in Art.186 that the Council is responsible for safeguarding the independence of both courts and judges. Current organisational structure, scope of activities and work procedure of the Council are regulated in the Act of 27 July 2001 on the National Council of the Judiciary, J.L No 11, item 67. The Council is composed of 25 members, for the composition see Art.187 of the Constitution and the website of the Council: Similarly to the majority of other European countries, the composition of the Council is mixed, whereas judges constitute the majority.

⁵⁴⁰ The most important powers of the Council are: adopting resolutions regarding applications to the Constitutional Tribunal to examine compliance with the Constitution of the Republic of Poland of normative acts within the scope concerning independence of courts and judges, considering and evaluating candidates for holding a judicial post and presenting to the President applications for appointment of judges of the Supreme Court and the Supreme Administrative Court, common courts, voivodship administrative courts and military courts. Furthermore, the Council applies to the Disciplinary Commissioner with requests for initiating disciplinary proceedings with respect to judges and issues appeals against judgments of disciplinary courts of lower instance, considers applications for retirement of judges, express consent to continue to hold the post by judges who have attained 65 years of age, considers applications of retired judges to return to judicial post, appoints the Disciplinary Commissioner of common courts, express opinion on appointment and dismissal of presidents and deputy presidents of common courts and military courts, carries out inspections of the court or vetting of the work of a judge, whose individual case is subject to consideration by the Council. See art.2 of the Act on the National Council of the Judiciary.

Judges are appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary and are not removable.⁵⁴¹ The foregoing implies that in practice judges are appointed until their retirement, unless they decide to relinquish the judicial position. A judge may not belong to a political party, a trade union or perform any public activities which would be incompatible with the principles of independence of the courts and judges.⁵⁴² Recall of a judge from office, suspension from office, transfer to another bench or position against her will, may only occur by virtue of a court judgment and only in instances prescribed in statute.⁵⁴³ In accordance with Art.178(1) of the Constitution, judges are to be provided with appropriate work conditions and granted remuneration consistent with the dignity of their office and the scope of their duties.⁵⁴⁴ A judge is expected to act in compliance with the judicial oath and should, when on and off service, guard the authority of her post and avoid everything that could discredit the authority of a judge or weaken the confidence in her independence.⁵⁴⁵

3.2. Legal education and the position of EU law therein

The system of legal studies in Poland rests on a uniform 5 years long, that is to say a minimum of 10 semesters, university programme which eventually leads to obtaining a master of laws

⁵⁴¹ Art.179 and 180 of the Constitution and art. 55 para 1 of CCO. When appointing a judge for the post, the President of the Republic of Poland indicates the place of service (the seat) of a judge.

⁵⁴² Art.178 (3) of the Constitution. A judge may not be held accountable and deprived of liberty for criminal offences unless a prior consent granted by a court specified by statute is given, see Art.181 of the Constitution.

⁵⁴³ See Art.180 (2) of the Constitution.

⁵⁴⁴ In accordance with the available statistical data, the Polish judge of the lowest level earns half of what her French counterpart earns and nearly three times less than her German counterpart. Only Slovakian, Romanian, Latvian and Bulgarian judges have lower salaries than Polish judges. The average yearly salary of the lowest level judge in Poland is EUR 12,6 thousand (EUR 1050 euro monthly), whereas it is EUR 108,1 thousands in Ireland, EUR 77,3 thousands in Denmark, EUR 61,3 thousands in the Netherlands and EUR 35,5 thousand in Germany. See Siemaszko et al (2006), p.24. An average monthly gross salary in Poland was approximately EUR 774 and 816 in 2008 and 2009 respectively, see CSO (2010), p.172. The base for calculation of the basic remuneration of a judge in a given calendar year rests on an average remuneration from the second quarter of the previous year announced by the Head of the Central Statistical Office in the Official Gazette of the Republic of Poland. The remuneration of judges of courts of the same competence may differ depending on the seniority and functions performed. The basic remuneration of a judge is determined in rates, the amount of which is established by applying the multipliers of the base for the basic remuneration. Next to the basic remuneration, a judge is entitled to receive a functional supplement due to performance of her function, for more details see art. 91 of CCO.

⁵⁴⁵ Art. 82 para 1 and 2 of CCO.

degree.⁵⁴⁶ Legal studies curriculum comprises of elementary, and therefore also obligatory, courses such as, *inter alia*, general introduction to jurisprudence, constitutional law, criminal law, administrative law, civil law, civil and criminal procedure and legal logics. Next to that, so-called dedicated courses are taught which include: legal theory and philosophy, doctrine of law and politics, labour and social security law, financial law, international public law, public economic law, history of Polish law, Roman law and commercial law. EU law constitutes part of the dedicated courses it plays rather a limited role during legal studies and the respective courses had become part of university legal curriculum only at the beginning of the new millennium. Nonetheless, at present a basic EU law course constitutes a necessary and obligatory part of legal curriculum.⁵⁴⁷ Yet, such an elementary course in EU law, which will predominantly pertain to the aspects of institutional law of the European Union, remains the only obligatory EU law course.⁵⁴⁸ It depends very much on the student and her preferences and availability of other EU law courses at the respective university whether he/she broadens her knowledge in the respective domain. Several universities offer a very comprehensive choice

⁵⁴⁶ With a minimum of teaching hours accounting to 2400 and minimum of 300 ECTS points. Students can read law at either 16 public universities or various private universities which are spread across the country.

⁵⁴⁷ Warsaw University curriculum provides for a compulsory course on EU institutional and material law during the third year of legal studies and various facultative courses on institutional and material EU law including courses in English (usosweb.wpia.uw.edu.pl/kontroler.php?_action=actionx:katalog2/przedmioty/szukajPrzedmiotu), similarly Wrocław University (prawo.uni.wroc.pl/upload/File/1_SSP_2008_2009.pdf). EU material law is an obligatory course during the final year of legal studies at Gdansk University (<http://prawo.univ.gda.pl/index.php?id=1&p=179>). The Nicolaus Copernicus University in Toruń provides for a compulsory course in EU institutional law during the third year and EU material law in the fifth year of legal studies (www.law.uni.torun.pl/#33). Łódź University provides for a compulsory introductory course to the law of the EU during the second year of legal studies (www.wpia.uni.lodz.pl/students/programy/2010-2011/Prawo.xls). The Silesian University provides for a compulsory course on European institutions during the second year of legal studies (www.wpia.us.edu.pl/sites/wia.us.edu.pl/files/pr-st.pdf). The Jagiellonian University in Cracow provides for multifarious EU law courses but only EU institutional law constitutes part of basics and obligatory courses and may be followed as of the third year of the studies, other EU courses are optional, see <http://www.law.uj.edu.pl/files/file/prawo/stacjonarne/harmonogramy/harmwykl.pdf>. The European College of Law and Administration in Warsaw (private educational institution) provides for a compulsory course in institutional EU law in the third year and material EU law in the fourth year (http://www.ewspa.edu.pl/doc_pdf/Program_prawo_dz_200910.htm).

⁵⁴⁸ In accordance with the guidelines established by the Ministry of Science and Higher Education, EU law courses during legal studies are expected to provide the student with the knowledge of EU institutional law. In that regard, the problem of the place of EU law in other legal fields such as national and international public law should be touched upon. In addition, the students are supposed to understand the notions of EU and European Communities, the primary and secondary sources of EU law, the decision-making process in the European Union, the processes of enforcement of EU law and the problem of cooperation of Member States and the EU institutions in the process of making and enforcing EU law. See the guidelines: http://www.bip.nauka.gov.pl/_gAllery/24/02/2402/85_prawo.pdf (last accessed 10 December 2010).

between miscellaneous EU courses, others will be much more limited in that respect.⁵⁴⁹ In that sense, the accessibility and quality of EU law courses may differ considerably between different university centres. Importantly, in accordance with the ministerial guidelines the national and EU law are treated as separate branches of law. As it is argued by various authors, the uniform system of legal education is obsolete and outdated⁵⁵⁰ and rests on methodology which, put crudely, accounts to “positivism and abstraction”⁵⁵¹ and rest on passive and ontological approach to the law.⁵⁵²

3.3. Judicial recruitment, training and nomination

Master graduates in law in Poland and persons who obtained a master degree in law abroad which is officially recognized in Poland and which have Polish citizenship are enabled to pursue their career in the judiciary. The system of admission to the judiciary and judge’s training period was considerably reformed in 2009. In the former system, the judicial training period took three years and was decentralized, that is to say each judicial district was responsible for organizing and supervising the training on the territory of the judicial circuit. The potential candidates were obliged to obtain a Master of Laws degree and to pass an entry examination to be admitted to the training. The 3 years long training included seminars focused on different fields of law (at least one day a week). EU law constituted one of the subjects of seminars but it was evidently attached a somewhat limited significance.⁵⁵³ In addition to the theoretical

⁵⁴⁹ See for instance the Faculty of Law of the Warsaw University which provides for miscellaneous courses in EU material law, to be found on the website of the University http://www2.wpia.uw.edu.pl/151,Plan_zajec.html (last accessed 11 January 2011) and similarly the Jagiellonian University which provides for an broad offer of EU law courses, also in English at: <http://www.law.uj.edu.pl/files/file/prawo/stacjonarne/harmonogramy/harmwykl.pdf> (last accessed 15 June 2011).

⁵⁵⁰ It is not possible to first obtain a bachelor and only afterward a master degree. In that sense, the system is frequently criticized for being obsolete and outdated, see for instance Stępień (2010), pp.12-17. For the unified standards applicable to legal studies see the document of the Ministry of Science and Higher Education, to be found at: http://www.bip.nauka.gov.pl/_gAllery/24/02/2402/85_prawo.pdf (last accessed 10 December 2010).

⁵⁵¹ See Mańko (2005), p.529, the author claims names the system of teaching (private) law “simplistic and parochial”, p.530.

⁵⁵² Stępień (2010), pp.12-17 and Wysocki (2010), p.39.

⁵⁵³ See art.18 of the Regulation of the Minister of Justice of 5 September 2002 O.J 154, p. 1283 with regard to the judicial and public prosecution training which in point 6 lists European law (it is not specified what is meant by the word European) next to constitutional and institutional law and the system of organization of justice, all together

training, a candidate was expected to gain practical experience within different chambers of courts at different levels. The training period was completed by a final judicial exam which comprised of a written and subsequently an oral part, provided that the candidate was successful in the written part.⁵⁵⁴ If successful in both parts and provided that there were open positions, the candidate could be nominated an assistant judge (*asesor sądowy*) or a court referendary (*referendarz sądowy*).⁵⁵⁵ An assistant judge could perform some judicial activities. Every assistant judge was looked after by a full judge adjudicating in a court of second instance (so-called consultant judge). After 3 years of serving on a position as an assistant judge or 5 years as a court referendary or 6 years as an assistant to a judge and provided that a candidate is minimum 29-years-old, she can be nominated a judge in a district court.⁵⁵⁶ It is also possible that established academics are appointed to the judge positions.⁵⁵⁷ Furthermore, the judiciary is open to the representatives of the bar such as attorneys and counsels provided that they have worked in their profession for a particular period of time.⁵⁵⁸ The instances of transition from other legal professions to judiciary are however very rare.⁵⁵⁹ The President of the Republic of Poland, at the request of the National Council of the Judiciary, appoints for the position of a district court judge, within a month from the date of sending such request.⁵⁶⁰ When appointing a judge for the post, the President of the Republic of Poland indicates the place of service of a judge. The change of the place of service of a judge may be made without the change of the post

not less than 50 teaching hours in total. To compare, civil law and civil procedure would occupy a minimum of 260 teaching hours and commercial law on its own a minimum of 100 teaching hours.

⁵⁵⁴ Unsuccessful candidates are allowed to re-take the exam only once.

⁵⁵⁵ An assistant judge could be charged with judicial tasks for a definite period of maximum 4 years. Those assistants who were not charged with judicial tasks were authorized to perform the tasks of a judicial *référéndaire*.

⁵⁵⁶ Furthermore, she must be a Polish citizen and enjoy full civil and full public rights, must be is a person of integrity, has the ability to perform duties of a judge as regards health condition, see art.61 para 1 of CCO.

⁵⁵⁷ Professors and senior doctor lectures (*doktor habilitowany*) in law at the Polish universities, in the Polish Academy of Science or other research institutes may be nominated judges in common courts for no more than half working time in accordance with art.62 of CCO.

⁵⁵⁸ Which is a minimum of 3 years for a position of a district judge, 6 years for a position of a regional court judge and 8 years for a position of an appellate court judge. See articles 61, para 2, point 4, article 63, para 2, point 1 and art.64, para 2, point 1 of CCO.

⁵⁵⁹ There were 24, 40, 58, 58 transitions from judicial positions to other legal professions in 2006, 2007, 2008 and 2009 respectively whereas there were 0 transitions from other judicial professions to judiciary in 2006, 2007 and 2008 and 10 transitions in 2009, six thereof were advocates and 4 legal advisers. Data from gained from the Ministry of Justice in response to private application to provide public information, documents in possession of the author.

⁵⁶⁰ Art.55 para 1 of CCO.

in cases and under procedure provided for in Art.75 CCO.⁵⁶¹ Since the number of open judiciary positions is limited, only the best candidates could be offered a job in the judiciary. What is more, a candidate could not choose her preferred specialization and had to agree on any open position.⁵⁶²

The present system of training and preparing the candidates is centralized and supervised by the National School of Judiciary and Public Prosecution which operates under the auspices of the Ministry of Justice.⁵⁶³ The candidates are obliged to pass an examination to be admitted to the general training period (*aplikacja ogólna*). EU law (in general) and the history of legal integration constitute an obligatory part of the examination. In the multiply choice entry tests of 2009 and 2010 only 2 questions out of 150 touched upon the problem of EU law and they boiled down to very general aspects of EU institutional law.⁵⁶⁴ The general post-graduate training lasts 12 months.⁵⁶⁵ A person who has successfully completed the general training may apply to continue training on the judge's (*aplikacja sędziowska*) or prosecutor's (*aplikacja prokuratorska*) scheme. The judicial training takes 54 months. During the first 30 months the applicants are expected to follow courses organized by the National School of Judiciary and Public Prosecution which take place in Cracow.⁵⁶⁶ In accordance with guidelines established by the School, EU law constitutes an integral though limited part of the courses and special focus is put on the cross-border judicial cooperation within the European Union, case-law of the Court of Justice in specific areas and the preliminary ruling mechanism.⁵⁶⁷ Subsequent to each courses

⁵⁶¹ Art.55 para 3 of CCO.

⁵⁶² More on the former mechanism of admittance to the judiciary and judicial nominations see Piasecki (2005), pp.203-213.

⁵⁶³ On the 1st September 2006 the Polish National School of Judiciary and Public Prosecution commenced its operation under the supervision of the Ministry of Justice. It was established on the basis of the Act of 1st July 2005, amended by the Act of 23rd January 2009 on the Polish National School of the Judiciary and Public Prosecution, O.J. 26, p.157.

⁵⁶⁴ The tests are available on-line, see http://www.kssip.gov.pl/info/nabor_2010 (last accessed 25 October 2010).

⁵⁶⁵ See art.25, para.1 of the Act on the Polish National School of the Judiciary and Public Prosecution.

⁵⁶⁶ The applicants follow courses at the premises of the National School of the Judiciary and Public Prosecution in Cracow for five days a week for not longer than 3 weeks in one time, but in principle no longer than one week. During the whole period of training there shall be 26 weekly sessions. See art.3 para.1 of the Regulation of the Ministry of Justice of 30 June 2009 with regard to the general, judicial and public prosecution application, O.J. 107, p.895 and the annex to the Resolution 37/2010 of the National School of the Judiciary and Public Prosecution.

⁵⁶⁷ See annex to the Resolution 37/2010 of the National School of the Judiciary and Public Prosecution. Interestingly, it stems from the guidelines that only the case-law of the ECJ with regard to specific areas is discussed whereas there is no room for the sources of EU law or the influence EU law exerts on national law.

period, the applicants are to gain practical experience within diverse chamber of different instances courts which should be located in the vicinity of the place of the residence of the candidate.⁵⁶⁸ At the end of this period the candidates are expected to enter a comprehensive exam which will be followed, provided that the applicant is successful, by 24 months long traineeship as an assistant judge or a judicial *référéndaire*.⁵⁶⁹ Obviously, persons who at present occupy judicial positions were trained in the former, decentralized system.

In the last four years there were 3075 new judges nominated.⁵⁷⁰ At the moment of the survey, there were 4535,08 judges working in district and regional courts adjudicating in the divisions which were included in the study and 10 409 judges working in all instances of common courts, including the appellate courts and the Supreme Court.⁵⁷¹ Strikingly, Poland has one of the highest absolute numbers of judges in the EU with only Germany having more judges.⁵⁷² The ratio of judges per 100 thousands of the population is also relatively high and amounts to 25,9 judge.⁵⁷³ The national yearly expenses on the judiciary are the highest in the European Union and amount to 1,78 percent of the national budget which may come a surprise if seen in the light of relatively low salaries in the judiciary.⁵⁷⁴

3.4. Judicial vocational training

A judge is expected to constantly improve her professional qualifications, participate in trainings and other forms of professional improvement.⁵⁷⁵ The already mentioned National

⁵⁶⁸ See art.4 of the Regulation of the Ministry of Justice with regard to the general, judicial and public prosecution application.

⁵⁶⁹ See art.22 of the Act on the Polish National School of the Judiciary and Public Prosecution.

⁵⁷⁰ Source: data of the Office of the President of the Republic of Poland, <http://www.prezydent.pl/wyszukiwarka/szukaj.html> (last accessed on 15 December 2010).

⁵⁷¹ See note 114.

⁵⁷² Siemaszko et al (2006), p.21.

⁵⁷³ See *Conseil de l'Europe CEPEJ Rapport 2010*, p.11 to be found at the website of the Council of Europe at: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2010/2010_pays_comparables.pdf (last accessed 10 January 2011). See also Siemaszko et al (2006), p.22. Slovenia, Greece, Hungary, Czech Republic and Germany have higher proportions of judges which account to 39.4, 33.7, 27.2, 26.6 and 25.3 respectively. The countries with the lowest ration are: Ireland, England and Scotland, Wales, UK, Denmark, Malta and Spain with 3.0, 4.2, 4.5, 6.9, 9.2 and 9.8 respectively.

⁵⁷⁴ Siemaszko et al (2006), p.20. At the same time they amount to 17,3 EUR per citizen yearly which places Poland on the 16th position in the European Union, see p.19 of the publication.

⁵⁷⁵ Art.82a of CCO.

School of Judiciary and Public Prosecution is not only responsible for the judge's application and the preparation and organization of the programmes of training and exams for the judicial candidates but it also organizes various trainings and other cyclical forms of professional and vocational development for already practicing judges. It is one of the primary objectives of the School to conduct an on-going and post-graduate legal training which will provide legal trainees with a necessary general and specialist knowledge, skills and experience.⁵⁷⁶ In that sense, the School constitutes the main vocational training centre for judges. The School's curriculum provides yearly for several trainings, seminars, conferences, symposia and workshops in EU law, including material, institutional and procedural Union's law. Recently, the problem of European international private law occupies a quite a significant place in the training scheme offered by the School. Furthermore, the problem of the influence of EU law on specific realms of law becomes more and more prominent in the training offer.⁵⁷⁷ The School also provides for a limited possibility of international apprenticeships and courses and visits to the ECJ or the ECtHR in the framework of the European Judicial Training Network.⁵⁷⁸ The training activities are mostly organized in the form of lectures and to a more limited extent seminars and workshops of different length in various places across the country.⁵⁷⁹ The trainers are selected especially for specific training reasons and are in principle the representatives of the academy and experienced practitioners of law, including judges.⁵⁸⁰ Next to the School, many university centres offer various post-graduate trainings in distinct EU law related fields. Even though the judge is statutory obliged to deepen her knowledge of law, she is always free to choose the fields of trainings she is interested in. In that respect, there is no regular programme of training

⁵⁷⁶ See Art. 2, paras.1-3 of the Act on the Polish National School of the Judiciary and Public Prosecution.

⁵⁷⁷ See specific trainings which are listed on the website of the School, for instance <http://www.kSSIP.gov.pl/edu/590>, <http://www.kSSIP.gov.pl/edu/424>, <http://www.kSSIP.gov.pl/edu/592> (last accessed 10 December 2010).

⁵⁷⁸ See the website of the School http://www.kSSIP.gov.pl/info/harmonogram_2010/harmonogram_2010 (last accessed 10 December 2010).

⁵⁷⁹ Those may be one day long trainings but also two – three days long trainings. Some of post-graduate trainings are organized in collaboration with national universities such as the Warsaw University or the Polish Academy of Sciences, for more check the website of the KSSIP at: http://www.kSSIP.gov.pl/info/studia_podyplomowe (last accessed 20 November 2010). The author of the present project has personally followed four different 2, 3 and 4 days long trainings in the course of 2009.

⁵⁸⁰ Only judges, prosecutors, academic teachers and other persons who have specialist knowledge from a particular field as well as judges and prosecutors emeritus may become lecturers in the Polish National School, see article 53 of the Act on the Polish National School of the Judiciary and Public Prosecution.

and a judge's knowledge of EU law will very much depend on her own interest and need in the area and the availability of respective courses.

3.5. Judicial career track

The judiciary model in Poland can be classified as the bureaucratic one in which judges are seen as civil servants with a rather low profile career of lifelong character and where the promotion and rules of organisation are very hierarchical.⁵⁸¹ The Polish judiciary consists therefore of professional judges, i.e. those are in an overwhelming number career judges who start their profession from the lowest rung of the ladder and slowly climb up the hierarchical system. A judge may not undertake additional employment, except that of a lecturer or researcher, in the aggregate number of working hours not exceeding the number of working hours of a full time employee holding such a post, if such employment does not interfere with the performance of the duties of a judge.⁵⁸²

A district court judge or a military garrison court judge who has held the post of district court judge or military garrison court judge or the post of public prosecutor for at least four years may be appointed a regional court judge.⁵⁸³ A common court and military court judge who has held the post of judge or the post of public prosecutor for at least six years, including at least three years as a regional court judge, military judge in a regional court or regional public prosecutor may be appointed a court of appeal judge.⁵⁸⁴

Judges are appointed for an unlimited term. After reaching the retirement age (currently 65 years), they become retired judges, retaining some of their rights and obligations.⁵⁸⁵ Female

⁵⁸¹ For more on judiciary models see Bell (2006), pp.14-15.

⁵⁸² Art.86 para.1 of CCO para 2.

⁵⁸³ Art.63 para.1 of CCO.

⁵⁸⁴ Art 64 para.1 of CCO.

⁵⁸⁵ However, the Ministry of Justice may, at the judge's request, allow her to continue performing her duties until the age of 70, see art.66 para.1 of CCO. A judge retires upon attaining 65 years of age, unless, not later than six months prior to attaining 65 years of age, he/she declares to the Minister of Justice the will to continue to hold the post and submits a certificate that he/she is able, as regards the condition of health, to perform the duties of a judge issued in accordance with the principles specified for a candidate for a judicial post.

judges may request to retire at age of 55 and male judges at age of 60.⁵⁸⁶ As mentioned beforehand, a judge cannot be removed. The transfer of a judge to another post may occur only upon her consent.⁵⁸⁷ She may be recalled, suspended or transferred to another court or to another position against her will only pursuant to a decision of a court (including a disciplinary court) and only in the cases specified in the Constitution. The Ministry of Justice may assign (delegate) a judge, upon her consent, to perform duties in another court, the Ministry of Justice or other organizational unit under the supervision of the Minister of Justice, in the Supreme Court at the request of the First President of the Supreme Court and in an administrative court - at the request of the President of the Chief Administrative Court for a specified period not exceeding two years or for an unspecified period.⁵⁸⁸

It may be claimed that the system of promotions in the judiciary is untransparent and arbitrary since there is no separate promotion procedure, except those to the position of the president of the courts or a position in a higher court. In any case, it is up to the court president how judges are supervised and evaluated. In that sense, the system is of hierarchical nature and presidents have various means to both supervise but also influence the judges under his/her management.⁵⁸⁹ Two major factors play important role in the assessment of a judge's performance and subsequently in their promotion, those are, first of all, the efficiency and, second of all, the number of overturned by an appellate court verdicts.⁵⁹⁰ The former criterion

⁵⁸⁶ A judge retires at his/her request, retaining the right to retirement pay specified in Art. 100 § 2, upon attaining 55 years of age in the case of a woman, provided she has worked at the post of judge or public prosecutor for at least 25 years, and upon attaining 60 years of age in the case of a man, provided he has worked at the post of judge or public prosecutor for at least 30 years.

⁵⁸⁷ Art.75 para.1 of CCO. Such a consent is, however, not required in the event of, *inter alia*, cancellation of the post caused by the change in courts organisation, cancellation of a given court or branch division or a transfer of the seat of a court, see para 2 point 1 and following.

⁵⁸⁸ Art.77 para.1of CCO, see also the following paras for other forms of delegation.

⁵⁸⁹ See Open Society Institute (2001), p.347. As claimed elsewhere "the existing procedure for monitoring judicial performance is insufficient to assist judges in their professional development; it is not systematic and is not based on clear criteria or transparent procedures", see Open Society Institute (2002), p.158.

⁵⁹⁰ Yet, those are not statutory regulated. See Open Society Institute (2001), p.343. Importantly, on 2 September 2011 the president of Poland has signed an amendment to the CCO which introduces, *inter alia*, a system of judges' work assessment. See Ustawa z dnia 18 sierpnia 2011 o zmianie ustawy Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw. Art. 106a, para.1 states that a judge is subject to periodical assessment of her work which will include an assessment of effectiveness in undertaken by her activities, professional competences in hearing cases; her specialization and other tasks entrusted to her. Para.2 states that effectiveness and efficiency in the tasks entrusted to her, "culture of the office" which includes personal culture and the manner of treating the parties to the proceedings and respecting their rights; skills to clearly and completely

has a clear link with the fact that efficiency of judicial proceeding remains the major problem the judiciary is confronted with which gains most attention of the public.⁵⁹¹ The violation of the right to a trial within a reasonable time that is Art.6.1 of the ECHR in Poland is a common subject of cases dealt with by the European Court of Human Rights in Strasbourg.⁵⁹² In accordance with the Report of the World Bank, an average length of a contract enforcement proceeding in Poland amounts to 830 days whereas it is, for instance, 380 days in Denmark, 394 days in Germany, 425 days in Estonia and 514 in the Netherlands.⁵⁹³ The fact that material and procedural law has been changing very intensively in the last decade makes the quality of adjudication even more problematic.

In the recent years judges and courts have come under the fire from the media, politicians and public opinion and the public approval ratings with regard to judiciary has

formulate the reasoning given to judgments and process of improving judicial qualifications are taken into consideration while the assessment. In accordance with para 4, the assessment is carried out with taking into consideration the scope and difficulty of tasks entrusted on the judge, work experience, work burden and work conditions. The assessment is carried out by a visiting committee every four years. A committee consists of judges which adjudicate in a court of higher instance, see art. 37c, para.1 of the amendment. The president of the respective court in which the considered judges adjudicates takes the final assessment into consideration and develops an individual plan of professional development for a minimum of four years. The new version of the CCO will enter into force after 6 months from its promulgation. The act is to be found at: [http://orka.sejm.gov.pl/opinie6.nsf/nazwa/3361_u/\\$file/3361_u.pdf](http://orka.sejm.gov.pl/opinie6.nsf/nazwa/3361_u/$file/3361_u.pdf) (last accessed 19 September 2011).

⁵⁹¹ Next to the problem of the inefficiency and the prolixity of proceedings, the lack of, *inter alia*, financial resources and the lack of public confidence which is closely interrelated with the persisting concerns with regard to perceptions of corruption among the judiciary and the lack of transparency should be mentioned. Furthermore, the high level of formalization of the judicial procedures is indicated as one of the questions raised for necessary and thorough consideration or solution, see Beldowski&Sześciło (2010), p.11 and Stępień (2010), pp.12-17. Moreover, some authors point to the problem of reducing Polish judges to the role of civil clerks, see Stępień (2010), pp.12-17. Those perplexing points the Polish judiciary has been faced with, have become subject to different more or less intense but constant judicial reforms of various nature which have been executed in the course of the last 20 years. Those pertained to the aspects of, *inter alia*, the independence of judiciary, judicial capacity, the governance and organisation and administration of the judicial branch, judicial remunerations, judiciary and vocational training and the admittance to apprenticeship. Suffice it to look into the subsequent amendments to the Law on Common Courts Organisation to realize the intensity of the reform processes.

⁵⁹² For more see report by Venice Commission (2007), pp.251-257. Until the 1st of January 2010 there were 674 judgments in which it was held that Poland breached the European Convention of Human Rights. It is assessed that out of this number approximately one third pertained to the infringement of Art.6 ECHR. 143 judgments until April 4 2007 related to the length of proceedings before civil and labour courts, see information provided by the Committee of Ministers <https://wcd.coe.int/ViewDoc.jsp?id=1115721&Site=CM> (last accessed 31 August 2010).

⁵⁹³ Poland occupies therefore the third position after Slovenia and Italy where an average lengths amount to 1350 and 1210 days respectively. See World Bank (2007), pp.100-102. See also Beldowski et al (2010) where a global assessment of the effectiveness of the Polish judiciary is given.

become very low, if not alarming.⁵⁹⁴ Under the pressure of the multitude of judgments of the European Court of Human Rights in which it was frequently found that Poland violated Art. 6 of the Convention of Human Rights, in 2004 a domestic remedy for cases with excessive length of judicial proceedings was established.⁵⁹⁵

4. Sources of law

The Polish Constitution is the most important source of universally binding law in Poland and evidently the paramount normative act in the country.⁵⁹⁶ It is a lengthy document comprising of 243 articles which are preceded by a preamble.⁵⁹⁷ The provisions of the Constitution apply directly, unless the Constitution provides otherwise.⁵⁹⁸ It lists statutes, ratified international agreements and regulations as other universally binding sources of law in Poland.⁵⁹⁹ Furthermore, enactments of local law issued by the operation of local authorities are sources of universally binding law in the territory of the organ issuing such enactments.⁶⁰⁰ From the

⁵⁹⁴ In 2003, 53 percent of the population declared to distrust the common courts and only 36 percent declared to trust the courts. Interestingly, considerably more trust was declared with regard to for instance ECJ (65 percent) and the NATO (62 percent), see TNS OBOP (2003), p.3. In accordance with a recent research 37 percent assessed the working of common courts in a positive way, nearly 50 percent pointed to the problem of corruption within the judiciary and only 9 percent declared full trust into the judiciary see report by the Ministerstwo Sprawiedliwości (2009). On the distrust into the judiciary and the reasons thereof see also Piana (2010), pp.114-117.

⁵⁹⁵ The remedy allows litigants to file a complaint against the court in question and eventually claim compensation for damages (up to 20 000 PLN which is equivalent to EUR 4474) caused by the excessive length which may be a result of action or inaction by court. See Act on the domestic remedy for cases with excessive length of judicial proceedings of 17 June 2004, O.J No 179, p.1843 with subsequent amendments. In 2007 the courts handled 2618 claims and 542 were found well-grounded, the claimants received compensation which amounted to 2 000 PLN on average. The damages, if adjudged, are paid from the own budget of the court against which the complaint was filed. See also the governmental proposal on amendments to the law on the domestic remedy for cases with excessive length of judicial proceedings (Rządowy projekt ustawy o zmianie ustawy o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez uzasadnionej zwłoki, Druk No 1281) pp.6-7, to be found at: http://static.e-prawnik.pl/ustawy/druk1281_1289386052.pdf (last accessed 6 June 2011).

⁵⁹⁶ For more on the role of the Constitution, its character and structure and its place in the national legal order see for instance Masterniak-Kubiak (2003), p.139 and following. It is claimed that the principle of supremacy of the constitution is axiomatic and it constitutes the fundamentals of the hierarchical structure of sources of law, *ibid*, p.211.

⁵⁹⁷ See Garlicki, *Constitutional law* [in] Frankowski (2005), p.4.

⁵⁹⁸ See Art. 8 of the Constitution.

⁵⁹⁹ See Art. 81 (1) of the Constitution.

⁶⁰⁰ See Art. 87 (2) of the Constitution.

foregoing it follows that the system of sources of law is hierarchical and the legal acts enacted by the legislator occupy the top of the pyramid.

Statutes (*ustawa*) are generally binding legal acts of the Parliament signed by the president. International agreements gain binding force after their ratification by the President.⁶⁰¹ In case of international agreements which pertain to issues of, *inter alia*, peace, alliances, political or military treaties, freedoms, rights or obligations of citizens as specified in the Constitution or the membership in an international organization, prior consent for ratification must be granted by statute.⁶⁰² Regulations (*rozporządzenie*) are issued on the basis of specific authorization contained in the statute and in the purpose to implement the statute.⁶⁰³ In addition to the above, the Constitution provides for the regulations having the force of statute issued by the President of the Republic, only in cases defined by the Constitution.⁶⁰⁴ Resolutions of the Council of Ministers and orders of the Prime Minister and ministers are of an internal character and bind only those organizational units which are subordinate to the organ which issues such act. Under Article 178(1) of the Constitution, judges in Poland are subordinate only to the Constitution and statutes and consequently to the ratified international agreements. Importantly, the only sources of universally binding law of the Republic of Poland are normative acts which are promulgated and published in official journals pursuant to the Act on promulgation of normative acts and certain other legal acts.⁶⁰⁵

⁶⁰¹ See Art.133 of the Constitution which stipulates that the President, as representative of the State in foreign affairs, ratifies and renounces international agreements.

⁶⁰² See Art.88 (3) and Art. 133 (1) of the Constitution. Prior consent must be granted by statute if an agreement concerns issues of: peace, alliances, political or military treaties, freedoms, rights or obligations of citizens as specified in the Constitution, the membership in an international organization, considerable financial responsibilities imposed on the State, matters regulated by statute or those in respect of which the Constitution requires the form of a statute, see art.89 of the Constitution. In case of any international agreements whose ratification does not require consent granted by statute, the Prime Minister informs the Sejm of any intention to submit, for ratification by the President of the Republic such an agreement, see Art.89 (2) of the Constitution.

⁶⁰³ Persons competent to issue a regulation are the President of Republic of Poland, the Council of Ministers, the National Broadcasting Council, the Chairman of the Committee who is a member of the Council of Ministers, and the minister that manages the relevant area of public administration, see Art.92, 142, 146, 148, 149, 213, 228 of the Constitution.

⁶⁰⁴ For instance during martial law or whenever the Parliament is unable to assemble for a sitting. See Art.231 and 234 of the Constitution.

⁶⁰⁵ See Act on promulgation of normative acts and certain other legal acts of 20 July 2000, consolidated act of 2010, J.L. No 17, item 95 and Art.88 of the Constitution.

From the formal point of view, case-law does not constitute a source of law in Poland but it can, in particular the case-law of the Supreme Court, play an important role in interpretations of statutes by the courts. Only the judgments of the Constitutional Tribunal are generally binding and final.⁶⁰⁶ It is a common rule that the judgments of the Supreme Court are binding only by means of the authority of the Court.⁶⁰⁷ Furthermore, it should be acknowledged that in compliance of a lower court with the interpretations of law provided by the Supreme Court can be met with disapproval on the part of the latter.⁶⁰⁸ Finally, the resolutions of the Supreme Court become legal principles, i.e. they gain binding precedential value for other courts.⁶⁰⁹ It is against the background of these arguments that the binding role of case-law of the ECJ remains a perplexing aspect attached to the judicial application of EU law and the doctrine is not straightforward on this issue.⁶¹⁰

5. Civil law and civil litigation in Poland

5.1. Sources of civil law and the impact of EU law thereon

The fundamental division of the legal systems into the field of private law and public law was questioned and ignored for ideological reasons in the communist doctrine and the Polish Civil Code⁶¹¹ which was enacted on 23 April 1964 and was clearly based on the communist concept

⁶⁰⁶ See Art.190 (1) and following of the Constitution.

⁶⁰⁷ See interview with Lech Gardocki, the president of the Supreme Court, in Rzeczpospolita of 6 November 2008, to be found at <http://www.rp.pl/arttykul/215311.html> (last accessed on 3 January 2011).

⁶⁰⁸ Which the Supreme Court may explicitly express in its case-law. See Rola (2009).

⁶⁰⁹ See section 2.3 of the present chapter with regard to the Polish Supreme Court.

⁶¹⁰ The problem of the precedential value of the judgments of the ECJ in Poland occupies much space in the Polish doctrine and persists to rise much controversy and doubts. As it is argued by many there are no sufficient normative grounds which would legitimize the general binding force of the jurisprudence of the Court, see for instance Wróbel A. (2004), p.105. See also Bartosiewicz (2009), pp.58-60, Mastalski (2004), p.4 who argues that the judgments of the ECJ should be placed in between judgments binding in a specific case and judgments having general precedential value.

⁶¹¹ From a formal point of view, the Civil Code does not occupy any special position among other pieces of legislation; the doctrine does give the CC a special role in the system though. One can even speak of supremacy of the CC for it encompasses general, leading principles and solutions which are also applicable to relationships regulated by provisions that are formally regulated outside the scope of the Code. The special position of the Code has also been corroborated by the Constitutional Tribunal, see judgment of the CT of 18 October 1994 K4, part II.

of law which rejected the idea of dividing the law into the public and private sphere.⁶¹² At the same time, the Civil Code of 1964 was based on earlier codifications and therefore comprised French, German and Austrian elements and was modeled on the Napoleonic Civil Code.⁶¹³ After the collapse of the communist regime the civil law doctrine has returned to the concept of private law and subsequently the Civil Code has undergone substantial changes.⁶¹⁴ The transformation period naturally brought the necessity of changes in the Civil Code.⁶¹⁵

The Civil Code in its first article defines the scope of the relationships that it regulates, i.e. it encompasses “civil law relationships between natural and legal persons”.⁶¹⁶ This reference does not clarify much for it does not explain what is understood by the notion of civil law relationships which remain thus undefined in the Civil Code. Furthermore, the Code embraces only general issues of civil relationships. There are many separate codes regulating civil law relationship of a special nature, for instance Commercial Companies Code, Labour Code, Law on Public Procurement, Family and Guardianship code, Law on Copyright and Neighbouring Rights Law on Tourism Services.⁶¹⁷ Extracodical laws regulating private law relationship

⁶¹² See Radwański (2006), p.8.

⁶¹³ See Mańko (2008), p.118 and Brzozowski (2005), p.38. The codification of civil law in Poland commenced in 1918, after regaining of independence.

⁶¹⁴ Nevertheless, from a formal point of view the Civil Code of 1964 is still in force and to some extent fifty years of communist doctrine still decide about the form of the legal system in Poland.

⁶¹⁵ On 6 September 1986 the Commission for Reform of Civil Law (Komisja do Spraw Reformy Prawa Cywilnego) under the auspices of the Ministry of Justice commenced its works and in 1996 it was replaced by the Codification Commission of Civil Law (Komisja Kodyfikacyjna Prawa Cywilnego), also under the supervision of the Ministry of Justice, which exists ever since. See <http://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-cywilnego/> (last accessed 10 January 2011). The Commissions have been responsible for the gradual modernization and modification of the civil law system, see Brzozowski (2005), pp.38-40 for the subsequent stages of civil law reform

⁶¹⁶ The Civil Code is divided into several parts which are as follows: Book I - General part - regulates issues of general nature such as natural and legal persons, protection of personal interests, business entities, types of acts in law, limitation of claims and preclusive terms; Book II – Property and other property laws - regulates property rights including land and mortgage registers, ownership, perpetual usufruct, separate ownership of premises, cooperative ownership right to premises, rights to develop a plot of lawn, transmission equipment, timesharing, real security of liabilities; Book III – Obligations and liabilities – governs law of obligations which comprise trade, contracts including consumer contract to some extent and contractual and non-contractual liability including state liability, securities and remittance; Book IV - Inheritance law.

⁶¹⁷ Next to separate codifications of different private law fields, there are several ordinary statutes which regulate specific civil law aspects such as, for instance the Land and Mortgage Books and Mortgages Act of 2001, J.L. No.124, item 1361 or the Ownership of Apartments Act of 1996, J.L. No 149, item 903 with subsequent amendments.

contain provisions describing their relations to the Civil Code by for instance stating that, “for matters unregulated in the Commercial Companies Code the Civil Code should apply.”⁶¹⁸

The process of accession to the EU brought many substantial changes in the field of private law and the Civil Code itself. Secondary EC/EU law was, however, not implemented in the Civil Code only. As a matter of fact only the Unfair Terms Directive, the Product Liability Directive and the Commercial Agency Directive were integrated into the Code itself. The remaining directives concerning, *inter alia*, consumer credit, distance contracts and consumer financial services were transposed in form of separate statutory measures.⁶¹⁹ In that sense, consumer directives are partly either implemented into the Civil Code⁶²⁰ or are regulated by extracodical acts⁶²¹ or are partly regulated in the Code and partly in separate legal acts.⁶²² As it is claimed, the mixed approach to implementation, which was frequently based on transposition of a literal wording of the concerned EU directives⁶²³, resulted in a partial incoherence of the whole civil law system. Those provisions which were implemented in the extra-codical mode were often faithfully and literally reproduced⁶²⁴, which implies that the legal concepts and terminology used in the original EU legal instruments were often copied and pasted in the national legislation.⁶²⁵ The scholars observe that “the adopted method of implementation often

⁶¹⁸ See art.2 of the Commercial Companies Code or similarly art.139 p. of the Law on Public Procurement of 29 January 2004, J.L No 19, item 177 stipulates that contracts for matters of public procurement, hereinafter known as contracts are governed by provisions of the Civil Code of 23 April 1964.

⁶¹⁹ See Mańko (2008), p.123. See also Łętowska et al (2007), pp.873-889. Such an approach to implementation is also popular in other Member States, for instance in Germany.

⁶²⁰ For instance the definition of consumer, abusive contract clauses, liability for a hazardous product.

⁶²¹ Such as for instance: Act on the protection of selected consumer rights and on liability for losses caused by hazardous products which implements directives 97/7/EC, 85/577/EEC, 93/13/EEC and 85/374/EEC; The law on timesharing implementing directive 94/47/EC; Act on the particular terms of consumer sales implementing directive 99/44/EC. See also Michałowska (2005), p.41.

⁶²² See Łętowska et al (2007), pp.875-889. As the authors reckon “This complex system, which uses both the code and separate acts, makes it very difficult to establish norms in the application of the law. There are many models of sales agreements with varying objective and subjective criteria, and it is extremely difficult to point out regulations applicable to a given model (something that Polish courts still do not seem to realize) (...)”, see p.878.

⁶²³ Ibid, p.882. There were however also instances of departure from the literal wording of directives, see p.883.

⁶²⁴ Ibid, p.878.

⁶²⁵ In case of the codical implementation though, the legislator endeavoured to “fit” the EU provisions into the style, method, structure and language of the Code, see *ibid*, pp.879-880. Importantly, according to the authors, in the pre-accession period the European Commission urged the national authorities to implement the directives literally. “Examples of comments from the European Commission showed that in fact the Commission wanted Polish legislators to transfer the literal wording of directives into the national law. The comment charts produced mechanical comparisons of phrases and expressions used mostly in English against the wording of the Polish law translated from Polish into English”, see p.882.

results in individual Polish implementation acts not correlating with one another, which lowers the quality of national legislation and hinders its interpretation and application.”⁶²⁶ Moreover, it can lead to a situation of contradictory regulations and can cause problems with regard to interpretation and application of the law by courts.⁶²⁷

5.2. Nature of civil proceedings and the role of the judge therein

The civil procedure in common courts and the Supreme Court is in principle governed by the Code of Civil Procedure of 1964.⁶²⁸ The Code distinguishes several modes of proceedings such as: examination proceedings including both trial and non-trial and subsidiary proceedings which relate to, for instance, enforcement of verdicts, conciliation proceedings and international civil proceedings which also comprise recognition and enforcement of foreign judgments.⁶²⁹ A typical civil law case will be heard at an examination trial or non-trial proceeding in which two opposing parties participate. Most commonly, in district and regional courts ordinary proceedings with standard procedure will be followed.⁶³⁰

Art.176 of the Constitution guarantees at least two-instance proceedings. In principle all trials are open and public but the court may decide otherwise and sit in a closed session. To begin an action in a court of first instance a statement of claim must be filled with a court possessing territorial and subject matter jurisdiction. A statement of claims should comprise details such as: the trial court, the addresses of the parties and their representatives, the nature

⁶²⁶ Ibid, p.878.

⁶²⁷ Ibid, p.881. Importantly, due to its nature the consumer disputes are not heard by the Polish Supreme Court which makes it difficult to achieve a uniform judicial application of the consumer law, see *ibid*, p.885.

⁶²⁸ Code of Civil Procedure of 17 November 1964, J.L. No.43, item 296 with subsequent amendments. The history of the Code of Civil Procedure is similar to that of the Civil Code and dates back to 1918. After the World War Two, the civil procedure the Soviet influences were integrated into the Code and were reflected in for instance so-called ‘extraordinary revision’ allowing the state bodies to challenge the final judgments of courts provided that the public interest was at stake. After the collapse of communism, the Code was subject to thorough amendments which (re)introduced, *inter alia*, cassation system (in line with the French system) and the principles of equal rights of the parties in proceedings and adversarial proceedings. Furthermore, a multitude of minor alterations have been introduced into the code of procedure in the course of the last two decades. See Ereciński, *Civil procedure* [in] Frankowski (2005), pp.117-118.

⁶²⁹ On the modes of civil proceedings see *ibid*, pp.119-122.

⁶³⁰ In case of family law, labour and social security and commercial law special proceedings will apply. It is also possible for the court to decide a case only on a basis of written documents (for instance disputes involving debt claims on promissory notes), such cases involve a special mode of trial.

and precise details of the claim, the essential factual and possibly legal evidence that substantiate the claim.⁶³¹ A judge is bound by a claim of the plaintiff (for instance he/she may not adjudicate damages if a plaintiff requests protection of his property) but is not bound by legal evidence which a plaintiff refers to support his case. This is underpinned by two leading principles, i.e. *iura novit curia* (the court knows the law) and the *da mihi factum dabo tibi ius* (court applies the law) and is reflected in art.187 of the Code of Civil Procedure which does not oblige the claimant to present the legal basis supporting his claim.⁶³² In turn, pointing at legal arguments which the parties base their claims on is not a prerequisite of further proceedings. The parties are only obliged to present their claims and the factual circumstances of their dispute and present the evidence to substantiate it. In the end, it is the judge who will determine which law is applicable to the dispute in question, regardless of what the parties wish. In other words, it is presumed that the court knows the relevant law and knows how to apply it. The court may thus choose a material legal basis for its judgment and apply its own method of interpretation of those provisions.

After admitting the statement of claim, a court examines its own competence and decides on the mode of trial since, as it has been previously mentioned, some disputes can be resolved in simplified procedures. The date of the first hearing is fixed and a copy of the statement of claims is delivered to the defendant who is, in principle, not required to reply but must explain the grounds if the claim is rejected.⁶³³ The hearing can be divided into following phases: announcement of a dispute and indication of the parties, presentation of the positions, claims and evidence (this may but does not need to include the legal evidence) of the parties, hearing of evidence, taking position by the parties with regard to the evidence presented by the opponent, closing the trial, announcement of the judgment.⁶³⁴ The court has competence to stay

⁶³¹ The CCP provides for a rejection of statement of claim in a few situations: a party lacks legal capacity, the same claim is subject of other litigation or has been already litigated, and the same claim has been submitted to arbitration court.

⁶³² In accordance with art.187, para.1 of the Code of Civil Procedure a statement of claims must enclose the claims and factual circumstances.

⁶³³ This does not apply in commercial cases where the defendant is obliged to reply.

⁶³⁴ For a detailed overview of the stages of a civil proceeding see Jodłowski et al (2009), pp.318-470.

legal proceedings of its own motion.⁶³⁵ After deciding the case both parties have the right to appeal to the court of second instance.⁶³⁶ In that respect, the parties are allowed to invoke new evidence, facts and legal basis.⁶³⁷ The appeal court may confirm or overrule the original judgment. It may annul the original judgment and refer the case back to the court of first instance and the conditions of such annulment are set in the Code of Civil Procedure.⁶³⁸ The second appeal will be a cassation proceeding at the Supreme Court.⁶³⁹ However, as mentioned before cassation is not possible in all cases.⁶⁴⁰ A party may base the cassation claim on the ground of a breach of material law through its incorrect interpretation or application (*errors in indicant*) or a breach of procedural law if such breach could influence the outcome of the case (*errors in procedendo*). It should be noted that the Supreme Court adjudicating in cassation cases may either decide on its own on the case or overrule the judgment of the second instance court and send it back for reopening.⁶⁴¹ In the latter case, the court of second instance will be bound by the interpretation of the law as provided by the Supreme Court.⁶⁴² The Code of Civil Procedure does regulate the issue of the application of foreign law and enforcement of the decisions of other EU members' courts.⁶⁴³ It does not regulate in any way the place of European law and procedural aspects related to the processes of enforcement thereof.

The nature of a civil proceeding is determined by several fundamental principles and prerequisites. Those are not explicitly named in the Code itself but can be derived from various procedural provisions enshrined in therein.⁶⁴⁴ The most pivotal principles which should be mentioned are:

⁶³⁵ Even though the possibility of staying the proceeding is regulated by the Code of the Civil Procedure, some doubts are raised whether a court may stay the proceedings in order to refer a preliminary question to the European Court of Justice. The Code lists the situations when a proceeding can be stayed but a preliminary reference to the ECJ is not included in the list.

⁶³⁶ For the role and place of the appeal procedure and the formal prerequisites thereof see Piasecki (2007), pp.143-166.

⁶³⁷ See art.368 para.1 p.4 of the Code of Civil Procedure.

⁶³⁸ See art.386 of the Code of Civil Procedure.

⁶³⁹ Cassation is an extraordinary and exceptional means of redress and therefore is limited to cases in which it is necessary to provide a definitive interpretation of legal provisions, to standardize jurisprudence of common courts and to decide in precedent cases, see Jodłowski et al (2009), p.491.

⁶⁴⁰ See section 2.3 on the Polish Supreme Court and note 515.

⁶⁴¹ See art.398 (15) and 398 (16) of the Code of Civil Procedure.

⁶⁴² Which is explicitly stated in art.398 (20) of the Code of Civil Procedure.

⁶⁴³ See art.1145-1153 of the Code of Civil Procedure.

⁶⁴⁴ See Ereciński, *Civil procedure* [in] Frankowski (2005), p.122.

- principle of material/substantive truth and the principle of formal truth. The former implies that the factual and legal findings of the courts should be in harmony with the reality to the fullest extent possible. In the course of decades the principle of objective truth was marginalized and ultimately deleted from the Code of Civil Procedure.⁶⁴⁵ The principle of formal truth implies that the evidence presented by the parties should correspond to the factual and legal findings done by the court.⁶⁴⁶
- principle of equality of the parties which means each party is equal and have equal rights to undertake an action in the proceeding
- principle of the autonomy of the parties (*dyspozycyjność*) which is shown in capacity to freely decide about their material and procedural rights, i.e. the decision to avail oneself of a right is at the holder's discretion.⁶⁴⁷ The party has the right to file a suit but also to modify, limit, renounce or withdraw his claim.⁶⁴⁸
- principle of adversarial proceedings (*kontradyktaryjność*) which implies that the parties are obliged to collect and present evidence to the court to support their claims. In some instances, the court is competent to *ex officio* undertake an action to supplement the evidence (inquisitorial proceedings) delivered by the parties which will mostly happen in family cases or when the court suspects collusion between the parties.⁶⁴⁹
- principle of directness which means that the whole case should be reviewed in its entirety before a national court and a closely correlated principle of orally conducted

⁶⁴⁵ Ibid.

⁶⁴⁶ See Jodłowski et al (2009), pp.130-134.

⁶⁴⁷ This freedom to use the material rights must however be exercised in accordance with the rule of law and legality, *ibid*, pp.136-137.

⁶⁴⁸ The principle is based on the assumption that a civil proceeding may be filed only by a person (and not by a court itself). It is yet possible that bodies such as public prosecutor or non-governmental organizations initiate proceedings on behalf of a person. Also, non-trial proceedings may be initiated by the court, for instance in guardianship cases. Issues which are not subject of individual's claim may not be adjudicated, see *ibid*, pp.136-142.

⁶⁴⁹ Inquisitorial proceedings are yet exceptional.

proceedings (*ustność*) which ensures simplification and deformalization of the civil proceeding and transparency.⁶⁵⁰

- principle of accumulation of factual and evidentiary material which is embedded in limitation of bringing facts and evidence to the court and the principle of free evaluation of evidence, i.e. discretionary powers of the courts in assessing the evidence and allowing new evidence. The former one implies that the party is obliged to bring all known facts and evidence at once unless it shows that it was not possible to resort to them at the beginning of the trial.⁶⁵¹

6. Accommodation of general principles of EU law in the national legal order

In the foregoing chapter the entire set of obligations which the *acquis communautaire* puts on national judiciaries was elaborated upon. It is one of the aims of the present chapter to illustrate how those obligations are accommodated in national law and whether national law creates any constitutional or procedural obstacles which could hinder the application of EU law by national courts. Basically speaking, this amounts to the issue of the place of EU law in the national legal order and the relationship between both sources of law from the national perspective. The subsequent discussion, which will be divided in subsections concerning specific tenets of EU law, will not only address the way the issue is regulated in the national Constitution and relevant legal acts but will also examine the jurisprudence of the national Constitutional Tribunal and the Supreme Court touching the problem of the integration of systemic principles of EU law in the national legal order.

⁶⁵⁰ The principle does not imply that the whole process must be conducted orally for the parties are allowed to hand in their statements and motions in writing. For obvious reasons the principle of oral proceedings plays a minor role in non-litigious proceedings.

⁶⁵¹ See Jodłowski et al (2009), pp.149-150.

6.1. The place of EU law in the Polish constitutional framework: supremacy and direct effect

At the outset it shall be observed that the Polish Constitution does not distinguish between international and EU law and no reference to the European Union or EU law can be found in the Constitution.⁶⁵² Consequently, the national constitutional system does not provide for any specific rules which would explicitly regulate the relationship between the national legal order and the law of the European Union. From the constitutional regulation it does not straightforwardly follow how national authorities including courts are to apply EU law either. Nor is it stated in which situations and under what conditions individuals are allowed to invoke and rely on EU law.⁶⁵³ The principles of supremacy of EU law and the direct applicability and direct effect thereof are thus not enshrined in the Constitution or any national procedural rules. Nonetheless, in accordance with Article 9 of the Constitution, Poland respects international law which is binding on it. It is argued that this provision is of a declaratory nature and implies that the legislator is to observe the whole body of binding international law regardless of the form it takes and shows its good will and openness towards international law.⁶⁵⁴ In line with article 90 of the Constitution, Poland may, by virtue of international agreements, delegate to an international organization or institution the competence of organs of state authority in relation to certain matters.⁶⁵⁵ Most importantly, Article 91 of the Constitution defines the place of international and consequently, as it is argued, EU law in the domestic legal order. According to article 91, para.1 and 2 an international agreement after its ratification and promulgation forms

⁶⁵² See Biernat (2006), p.420. As claimed by Albi “The Polish Constitution represents the “international organization” approach towards the EU. Besides providing a “catch-all” solution to legitimize membership in all international organizations, it may also reflect the sensitivity surrounding the question of sovereignty.”, see Albi (2005), p.408. This “international organization approach” is subsequently visible in the jurisprudence of the Constitutional Tribunal which frequently refers to the Communities/EU as to the international organization. See also Biernat (2001), pp.41-42.

⁶⁵³ See Wójtowicz (2004), p.44.

⁶⁵⁴ See Masterniak-Kubiak (2003), pp.182-183. In accordance with the judgment of the Constitutional Tribunal of 10 August 2001, Ts 56/01, Article 9 of the Constitution is first of all addressed to the national legislator and it determines the manner of making use of the competence to regulate particular fields of public life.

⁶⁵⁵ It is argued that the proviso does not enable the national authorities to confer all the national competences to an international organization or institution and it is not possible to confer the competences which would be pivotal for the constitutional system of the country. See for instance Grzybowski (2005), p.18 and Łazowski&Wentkowska, *Poland: constitutional drama and business as usual* [in] Łazowski (2010), pp.280-281.

part of the domestic legal order and is directly applicable unless its application depends on the enactment of a statute and takes precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. Article 91, para.3 provides that “If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws”. It is argued that this article was introduced in the Constitution for the purposes of the later membership in the European Union.⁶⁵⁶ It would namely concern Union’s secondary legislation and more precisely EU regulations which, as it is stipulated in the TFEU, are directly applicable.⁶⁵⁷ It is yet questioned whether this article concerns all EU legal sources. EU directives, namely, are not directly applicable.⁶⁵⁸ It is, nonetheless, put forward that the Constitution by allowing for direct applicability of ratified international agreements and the law enacted by international organizations, allows for direct applicability of both primary and secondary EU law. Biernat argues that the entire *acquis communautaire* is directly applicable in Poland by virtue of Article 2 of the Act concerning the conditions to accession to the European Union and suggests that the notion of direct applicability should be interpreted broadly and comprise the notion of direct effect.⁶⁵⁹ Elsewhere it is argued that the articles of the Constitution do not constitute a sufficiently precise and straightforward basis for the application of EU legal provisions by Polish judges.⁶⁶⁰

Apart from the above, the most intricate problem pertaining to the position and place of EU law in the Polish legal order relates to the fact that, as it has already been pointed out, the

⁶⁵⁶ See Masterniak-Kubiak (2003), p.221 and Albi, *Constitutional changes and challenges in the New Member States* [in] Łazowski (2010), pp.78, 80-81.

⁶⁵⁷ See Article 288 TFEU (ex. 249 EC). In the system of the Treaties it is not stipulated that EU law takes a supreme position which makes the discourse with regard to Article 91, para 3 much more complex.

⁶⁵⁸ See Wróbel (2004), pp.104-105 on the problem of direct effect and direct applicability and their relationship with the Polish Constitution.

⁶⁵⁹ Article 2 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, O.J 2003 L 236/33 reads: “From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before the accession shall be binding on the New Member States and shall apply in those states under the conditions laid down in those Treaties and in this Act.” However, contrary to what Biernat argues, the article does not stipulate direct applicability of Union’s legislation but only its binding force. See Biernat (2006), pp.420-421.

⁶⁶⁰ Wójtowicz (2004), pp.49 and 69.

Constitution takes absolute primacy above all other sources of law. This principle has been confirmed by the Polish Constitutional Tribunal in its well-known judgments concerning the European Arrest Warrant and the constitutionality of the Accession Treaty which gained considerable attention among both Polish and foreign scholars.⁶⁶¹ In both judgments the Tribunal aimed at elaborating on the problem of the place of EU law in the national legal order and the relationship between both. As the Tribunal held in the latter case, the Accession Treaty as such does not infringe the Polish Constitution which however "enjoys precedence of binding force and precedence of application within the territory of the Republic of Poland."⁶⁶² The Tribunal rejected the claim put forward by the applicants that the European Community and the European Union are supranational organizations and referred to both in a traditional way as to international organizations.⁶⁶³ Furthermore, it was held that resolving the problem of inconsistency between both sources of law ultimately belongs to the Polish legislator which may decide to: amend the Constitution, cause modification to Community provisions or, ultimately, decide to withdraw Poland from the European Union.⁶⁶⁴ In a similar vein, in the judgment concerning the European Arrest Warrant, the Tribunal held that provisions of EAW and surrender procedures which were implemented as article 607 para 1 in the Criminal Procedure Code are at variance with article 55(1) of the Constitution.⁶⁶⁵ The loss of binding force of

⁶⁶¹ See the judgment of the Constitutional Tribunal on the European Arrest Warrant of 27 April 2005 P 1/05 and the judgment on the Accession Treaty of 11 May 2005 K 18/04. For comments on the decisions of the Constitutional Tribunal see for instance: Sadurski (2008); Siegel (2008); Komarek (2005); Pollicino (2008); Miąsik (2008); Kowalik-Bańczyk (2005); Kwiecień (2005b); Łazowski (2007); Wyrozumska (2005); Nußberger (2008); Łazowski (2011).

⁶⁶² See the judgment in case K 18/04, point 11 of the reasons for the ruling. The case concerned Poland's membership in the European Union and more precisely the constitutionality of the Accession Treaty. The initiators of the proceeding before the CT claimed that the accession was at variance with the Constitution and more precisely it failed to conform to the principle of sovereignty of the Polish nation and the supremacy of the Constitution within the national legal system.

⁶⁶³ See the judgment in case K 18/04, point 6 of the reasons for the ruling. See also Sadurski (2008), p.19. The Tribunal based its reasoning on the fact the word "supranational" is nowhere referred to in the Treaty system, i.e. from the linguistic point of view the problem of "supranational organization" is non-existent. The foregoing finding of the CT becomes however somewhat perplexed when read in the light of point 12 of the reasoning in which the Tribunal held that: "The concept and model of European law created a new situation, wherein, in each Member State, autonomous legal orders co-exist and are simultaneously operative. Their interaction may not be completely described by the traditional concepts of monism and dualism regarding the relationship between domestic law and international law."

⁶⁶⁴ See K 18/04 point 13 of the principal reasons of the ruling.

⁶⁶⁵ See the judgment of the Constitutional Tribunal on the European Arrest Warrant of 27 April 2005 P 1/05. The proceeding before the CT were initiated by a regional court in Gdańsk which was dealing with a public

art.607 para 1 was however suspended by 18 months which were supposed to give the legislator enough time to find a solution to this conflict by for instance amending the Constitution and temporarily obliged the national courts to continue to apply the contested provision. Even though the relevant judgments of the Constitutional Tribunal evidently speak in favour of the absolute primacy of the Polish Constitution, it is yet put forward that this does not imply that the Constitutional Tribunal has taken an utterly negative or unfriendly stance towards the law of the European Union.⁶⁶⁶ From the Accession Treaty case, it namely follows that the CT does support the principle of precedence of EU law over sub-constitutional legal acts. The Tribunal has confirmed this finding in its subsequent judgments.⁶⁶⁷ Both judgments, which are touching upon the problem of the relationship of EU law and the Polish constitutional law in a very fundamental and extensive manner, do not represent the Tribunal's first opinions with regard to the problem of the relationship of national law with EU law. In cases K 33/03⁶⁶⁸, K 15/04⁶⁶⁹ and K 24/04⁶⁷⁰ the Tribunal expressed its opinion concerning the supreme position of the Polish Constitution but also voiced its stance towards the obligation of interpretation of national law in harmony with EU law and the "constitutional principle of sympathetic predisposition towards the process of European integration and the cooperation between the states" which will be

prosecutor's application on the basis of the EAW to surrender a Polish citizen to the Netherlands for the purpose of conducting a criminal prosecution against her. The content of the Framework Decision of 13 June 2002 on European Arrest Warrant was transposed into Polish legislation (procedural criminal code) but the execution of the provision had raised many doubts among the national academics since Article 55(1) of the constitution prohibited 'extradition' of Polish citizens and the Constitution did not provide for difference between the 'surrendering' and 'extradition'. The prohibition of extradition of a Polish citizen as enshrined in article 55(1) of the Constitution was found to be absolute in nature by the Constitutional Tribunal.

⁶⁶⁶ See point 14 and following of the principle reasons for the ruling on the European Arrest Warrant. Kowalik-Bańczyk suggests that the fact that the Tribunal postponed the effects of its ruling by 18 months and suggested that the national legislator should amend the Constitution implies that in fact the Tribunal implicitly recognized the principle of supremacy of EU law, see Kowalik-Bańczyk (2005), pp.1360-1361. See also a more recent judgment of the Constitutional Tribunal concerning the Treaty of Lisbon in which the Tribunal reaffirmed its stance on the absolute primacy of the national constitution over EU law, see case K 32/09 on Conformity of the Treaty of Lisbon with the Polish Constitution of 24 November 2010.

⁶⁶⁷ See the judgment in case K 18/04, point 11 of the reasons for the ruling.

⁶⁶⁸ See the judgment in case K 33/03 of 21 April 2004 on bio-components in gasoline and diesel.

⁶⁶⁹ See the judgment in case K 15/04 of 31 May 2004 on participation of foreigners in European Parliamentary elections.

⁶⁷⁰ See the judgment in case K 24/04 of 12 January 2005 on inequality of competences of Sejm and Senate committees in respect of European Union legislative proposals.

elaborated upon in the subsequent section of this chapter.⁶⁷¹ In that sense, the Tribunal revealed its friendly approach to the legal order of the EU.⁶⁷² With everything considered, the stance the Tribunal takes towards the issue of supremacy of EU law resembles the one presented by the German and French constitutional court: the principle of supremacy of EU law is accepted as a rule originating from the Constitution itself and valid so long as it conforms to, *inter alia*, the minimum guarantee functions realized by the Constitution itself and the fundamental rights and freedoms of individuals which are guarded by Polish constitutional law.⁶⁷³

The problem of supremacy of EU law is linked to the previously referred issue of direct effect of EU legal provisions. From the doctrinal point of view, putting the principle of direct effect into practice may seem somewhat perplexing an issue for national courts since it has been a leading principle in the Polish legal order that courts do not have competence to decide on the validity of statutes for only the Constitutional Tribunal may avail itself of such competence.⁶⁷⁴ In consequence, the courts cannot refuse to apply normative acts on the grounds that they are unconstitutional. Pursuant to Art.193 of the Constitution, they may address a legal question to the Constitutional Tribunal regarding the compatibility of a given normative act with the Constitution, ratified international agreements or other acts if the outcome of a case pending before the courts hangs on the answer to that legal question. Not surprisingly, this issue raised much controversy when Poland joined the European Union for, from the theoretical point of view, the courts would not be allowed to set aside a statute even if it was incompatible with EU law. At the same time it should be acknowledged though that judges are not bound by enactments which are subordinate to statutes, such as regulations and, when examining a given case, may determine, on an independent basis, whether such enactments are compatible with statutes and with the Constitution. Should an enactment be found incompatible, the court may refuse to apply it and disregard it when handing down a ruling. Despite of foregoing, the task of

⁶⁷¹ See point 10 of the principal reasons for the ruling in the judgment K 15/04. On the historical development of the stance taken towards EC/EU law by the CT see for instance Miąsik (2008), pp.361-364.

⁶⁷² See Łazowski&Wentkowska, *Poland: constitutional drama and business as usual* [in] Łazowski (2010), p.284.

⁶⁷³ See Kowalik-Bańczyk (2005), p.1355 and Miąsik (2008), p.361. See also judgment K 18/04 point 14. Łazowski&Wentkowska observe that “the emerging picture is complex. On the one hand, some consider the Constitutional Tribunal to be following the steps of the Bundesverfassungsgericht; on the other hand, it has demonstrated its pro-EU face too”, see Łazowski&Wentkowska, *Poland: constitutional drama and business as usual* [in] Łazowski (2010), p.284.

⁶⁷⁴ See Górka&Mik (2005) p.23.

scrutinizing the compatibility of statutes and ratified international agreements with the Constitution is an exclusive competence of the Constitutional Tribunal.⁶⁷⁵ In addition to that, the task of setting aside national provisions which are incompatible with EU law seems to conflict with a common presumption of infallibility of the legislator which implies that a judge is merely a passive executor of law as enacted by the law-maker.⁶⁷⁶ Hence, questioning the legislative work performed by the law-maker does not seem to fit in the Polish legal culture.

The issue of the competence to set aside national provisions which are at variance with EU law was finally ruled upon by the Constitutional Tribunal in an interesting, though somewhat intricate, case P37/05.⁶⁷⁷ In this judgment, the Tribunal decided to decline its own jurisdiction on the issue of compatibility of national law with Art.110 TFEU but delivered an extensive reasoning which relates to the problem of the division of tasks between the European Court of Justice and Polish courts in interpreting EU law. The Constitutional Tribunal explicitly stated that ratified international agreements take precedence over statutes in instances of incompatibility between both sources of law.⁶⁷⁸ Further, the Tribunal proceeded to observe that the issue boils down to the problem of distinguishing between the process of application and the process of invalidating of the legal provision in question.⁶⁷⁹ Ultimately, the Tribunal stated that

⁶⁷⁵ Art.188 of the Constitution.

⁶⁷⁶ See for instance Łętowska (2005), pp.3-10.

⁶⁷⁷ See procedural decision P 37/05 of 19 December 2006 that concerned the issue of excise duty which, in accordance with Polish provisions, was to be paid by virtue of a purchase of a passenger car abroad. The claimant raised an allegation with regard to the non-conformity of domestic law to article 90 of the EC Treaty and to provisions of the constitutions. The concerned administrative court observed that Polish courts do not have competence to undermine statutes since such a competence is vested with the Constitutional Tribunal only. Case P37/05 is a very interesting and relevant one and has become sort of a manual for common courts when they deal with European issues. The CT declined its own jurisdiction to answer a question on the conformity of the Polish law with EC law provided that EU-related matters in question do not have constitutional implications. Subsequent case law of the CT and the Supreme Court elaborated further on the issue of EU law and its application and the division of powers between national courts and the ECJ in the interpretation of EU law.

⁶⁷⁸ P 37/05, part III, para 3 of the judgment which reads: "By placing international agreements in the position of hierarchical superiority over statutes, the legislator created a field for review of legality of statutory provisions from the perspective of their conformity to the ratified international agreements, whose ratification required a prior consent granted by statute (article 188 point 2 of the Constitution). Making use of such competence may, however, be justified only in the absence of any other means of eliminating the conflict (e.g. if an international agreement norm does not possess the character of a directly applicable norm) or where an important element relating to the legal certainty weights in favour thereof (e.g. if the scope of binding force of an international norm fully overlaps with the scope of binding force of a statutory norm, resulting in the latter becoming "empty" from the normative perspective)."

⁶⁷⁹ The Constitutional Tribunal observed that: "In principle, preference should be given to the elimination of conflicts between domestic and international norms at the level of applying the law (...) According to the principle

a national court should refuse to apply the statutory national provision conflicting with EU law and directly apply the provision of the latter if possible.⁶⁸⁰ Although it is claimed that the judgment has been of “a lesser caliber”⁶⁸¹ than the previously mentioned judgments of the Tribunal and is in general deemed somewhat vague and implicit⁶⁸², the respective case concerns problems attached to the judicial application of Union’s legal norms whereby it provided some guidelines to national judges on how to proceed with EU law related issues.

Next to the jurisprudence of the Constitutional Tribunal, the line of case-law which touched upon the problems of supremacy and direct effect delivered by the Polish Supreme Court requires attention. As it has been observed, judgments of the Supreme Court are officially binding only in a specific case, the interpretations of law as provided by the SC play, however, an important role in ensuring that *corpus iuris* is interpreted and applied by common and military courts in a uniform and proper manner across the entire state. Since the issues of primacy and direct effect are traditionally the most intricate for national courts, it is rather surprising that the approach the Supreme Court took towards both of them is rather straightforward and complies with the EU expectations. In a number of cases the Court directly accepted the principle of supremacy of EU law by applying the *Simmenthal* formula and decided that national rules incompatible with EC rules should be set aside. The Court has also elaborated on the meaning of direct effect with regard to different sources of EU law. In its judgment of 10 February 2006, the Court ruled on the application of a directly effective

of precedence, the application of an international norm neither repeals, breaches nor invalidates the domestic law norm, but only limits the scope of application thereof. Changes in the contents or loss of binding force of an international norm will alter the scope of application of a statutory norm, without a need to undertake any actions on the part of the national legislator.”

⁶⁸⁰ P 37/05, part III, para 3 of the judgment which reads: “Accordingly, contrary to the stance presented by the court referring the question of law, national courts shall not only be authorized, but also obliged to refuse to apply a domestic law norm, where such norm remains in conflict with Community law norms. National courts shall not, in such case, adjudicate upon the repeal of a domestic law norm, but shall only refuse to apply the norm to the extent that is required to give precedence to the Community law norm.”

⁶⁸¹ From Łazowski (2008), p.188.

⁶⁸² For an elaborate comment on the case see Łazowski, *op cit*. The authors argues however that, despite of being an interesting and pragmatic development, the judgment leaves many questions unanswered, and several points are argued in a vague, imprecise, inconsistent and controversial manner.

provision of the EC Treaty in the case and referred to the principle of primacy of EU law.⁶⁸³ Further, the Court held that, in accordance with the principles of direct effect and primacy of EU law, national provisions which are not compatible with the Treaty may not be applied by national courts in disputes pending before them.⁶⁸⁴ In the so-called *Miś* case, which gained enormous public attention countrywide, the plaintiff wished to directly rely on the Council Directive 93/104/EC⁶⁸⁵. After his claim being rejected in first and second instance courts, the plaintiff applied to the Supreme Court for a cassation. On 6 of June 2006 the Court delivered its judgment in which it once more took the chance to elaborate on the issues of direct effect and primacy of EU law.⁶⁸⁶ The Court held that EU law takes precedence over national law and that individuals may rely on provisions of directives which are directly effective against public authorities. Subsequently, the Court applied a broad interpretation of the notion of the state and ruled that the hospital employing the plaintiff should be seen as a public body what subsequently implied that the plaintiff had a right to rely on the provisions of the directive against it. Several months later the Court rejected the possibility of relying by an individual on Art.13 of the EC Treaty (now partly enshrined in Art.10 TFEU) and provisions of Directive 2000/78/EC.⁶⁸⁷ In the opinion of the Court, Article 13 regulated legislative competences of the Community and therefore could not constitute a basis for individual claims and might not be relied upon before a national court.⁶⁸⁸ Likewise, the mentioned directive is binding upon the Member States only, puts specific obligations on them and may not be relied upon by individuals.⁶⁸⁹ All in all, it may be claimed that the Supreme Court has accepted both principles

⁶⁸³ Judgment of the Supreme Court of 10 February 2006 in a cassation case, III CSK 112/05. The Court held that certain provisions of the national patents act have an equivalent effect to quantitative restrictions forbidden by Article 28 of the EC Treaty which cannot be justified under article 30 EC. The Court based its reasoning on, *inter alia*, the *Dassonville* formula and on the decisions taken in cases C-235/89 *Commission v. Italy* [1992] ECT I-777 and C-30/90 *Commission v. United Kingdom* [1992] ECR I-29.

⁶⁸⁴ The Court also pointed to article 91.3 of the Constitution and the judgment of the Constitutional Tribunal in case K 18/04 of 11 May 2005 as the basis for its decision.

⁶⁸⁵ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, OJ L 307/18.

⁶⁸⁶ Judgment of the Supreme Court of 6 June 2006 in a cassation case, I PK 263/05.

⁶⁸⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16.

⁶⁸⁸ In accordance with Article 13 EC (now Art.19 TFEU) the Council may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. See also judgment in case C-13/05 *Sonia Chacón Navas v. Euresť Colectividades SA* [2006] ECR I-6467.

⁶⁸⁹ Judgment of the Supreme Court of 15 November 2006 in a cassation case, I UK 150/06.

of EU law, that is supremacy and direct effect, whereby it have sent a signal to lower courts how they should proceed with EU law related issues.⁶⁹⁰

6.2. Harmonious interpretation of EU law versus the national legal culture

The doctrine of consistent interpretation between national and European law does not find any explicit mention in either the Polish Constitution or any regulation. Nonetheless, it does seem to occupy an important place in the jurisprudence of the Constitutional Tribunal and the Supreme Court, also in the judgments preceding the membership in the European Union for, at that point in time, the principle of consistent or interpretation was seen as a means to approximate the national law to EU law. Elsewhere it is argued that conforming interpretation has become the most cardinal tool of judicial application of EU law from the moment Poland became a member of the EU.⁶⁹¹ Already in 1997 the Constitutional Tribunal held that, despite of the fact that EU law has no binding force in the country, Poland is obliged to first of all ensure that the future national legislation is in conformity with EU legislation and, what is more, the existing legislation should be “interpreted in such a way as to ensure the greatest possible degree of such compatibility.”⁶⁹² In judgment K 2/02 the Tribunal extensively elaborated on the obligation to interpret national law in the light of *acquis communautaire*.⁶⁹³ Likewise, in judgment K 11/03 concerning the referendum on Poland’s accession to the European Union the Tribunal held that:

“The interpretation of binding statutes should take into account the constitutional principle of sympathetic predisposition towards the process of European

⁶⁹⁰ See Miąsik (2008), p.383. Yet, it should not have been forgotten that the Supreme Court has not addressed the issue of absolute supremacy of EU law in its case-law.

⁶⁹¹ See for instance Górka&Mik (2005), p.28.

⁶⁹² See judgment K 15/97 of 29 September 1997, part III point 4 of the reasoning, similarly judgment K 27/99 of 28 March 2000, part III point 3 of the reasoning and judgment K 35/99 of 5 December 2000. All the cases concerned the problem of difference in age of retirement between males and females.

⁶⁹³ See judgment K 2/02 of 28 January 2003 concerning fight against alcoholism, see especially point 5 and 8 of the reasoning. The Tribunal held also that interpretation of national law in harmony with EU law can and should be employed as a cheapest and fastest instrument aiming at the accomplishment of the obligation of harmonization of national law with EC law in the pre-accession period. Such a stance of the Tribunal was criticised in the academic writing for harmonious interpretation should be considered a subsidiary tool and not a surrogate of harmonization. See Górka&Mik (2005), p.30.

integration and the cooperation between States (this conclusion may be derived from the Preamble and article 9 of the Constitution).”⁶⁹⁴

Following the accession, the Polish Constitutional Tribunal has pronounced several judgments touching upon the problem of conforming interpretation which more or less repeated the reasoning included in the case-law preceding the accession.⁶⁹⁵ However, in line with its own stance towards the principle of absolute supremacy of the Polish Constitution, the Tribunal held that the principle of sympathetic interpretation of national law has its limits and may not lead to results which would be at variance with explicit wording of the constitutional norms or not conforming to the “minimum guarantee functions realized by the Constitution.”⁶⁹⁶ Thus, the judgment illustrated that the obligation of harmonious interpretation has its limits and may not, in view of the CT, contradict the explicit wording of the Constitution.

In a similar vein, the Supreme Court pronounced several significant judgments touching upon the problem of conforming interpretation.⁶⁹⁷ In its judgment of 18 August 2004, which concerned a situation prior to accession, the Supreme Court held that the principle of conforming interpretation may not lead to *contra legem* interpretation of national provisions binding at that time, even if those were at variance with EU norms.⁶⁹⁸ In its judgment of 5 December 2006 the Supreme Court held that in accordance with a consistent line of jurisprudence of the ECJ, a national court which is interpreting national laws, which were issued

⁶⁹⁴ See judgment K 11/03 of 27 May 2003 on referendum on Poland’s accession to the European Union, point 1 of the principal reasons for the ruling. See also Piqani (2007), pp.4-9. See also judgment in case K 33/03 of 21 April 2004 on bio-components in gasoline and diesel.

⁶⁹⁵ See for instance judgment in case K 15/04 of 31 May 2004 on the participation of foreigners in European Parliamentary elections, point 10 of the principal reasons for the ruling which reads: “Whilst interpreting legislation in force, account should be taken of the constitutional principle of sympathetic predisposition towards the process of European integration and the cooperation between States.” Or the judgment in case K 34/03 of 21 September 2004 on the constitutionality of norms regarding the obligation to install cash registers point 3.4.2. of the reasoning in which the Tribunal held that due to the principle of interpreting domestic law in a manner which will enable an efficient functioning of economy in the framework of the EU integration implies the necessity of interpreting national law in line with EU law. This obligation stems from article 5 EC and aims at assuring the compatibility of between national and European law. This, in turn, implies that interpretation of national law which would lead to the results which would be at variance with EU law may not be accepted.

⁶⁹⁶ See judgment K 18/04, point 14 of the principal reasons of the ruling.

⁶⁹⁷ For an overview of the jurisprudence of the Supreme Court touching upon the problem of conforming interpretation see Maniewska (2005), pp.49-57. It is necessary to acknowledge that the SC several times referred to the principle of harmonious interpretation in the pre-accession period, for instance in judgment of 4 April 2003, I CKN 308/01 or judgment of 17 February 2004 I PK 386/03.

⁶⁹⁸ See judgment of Supreme Court of 18 August 2004 I PK 489/03.

both before and after the directive in question went into force, is obliged to interpret those national provisions as far as possible in the light of aims of the directive.⁶⁹⁹ Put differently, national law must be given a meaning so as to conform to the directive and to achieve an outcome consistent with the objective pursued by the directive. For those reasons, the court hearing the dispute at issue was supposed to interpret the provisions of national law in the light of 80/987/EEC Directive. In this judgment the Court directly referred to the *Mau* case in which the ECJ claimed that a national court interpreting national provisions “is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 EC.”⁷⁰⁰ In its decision of 20 February 2008 the Court held, among others, that article 4 of Directive 2002/21/EC is not directly effective since it is not unconditional. For those reasons the plaintiff could not directly derive from that provision the right to bring an action against the decision of the president of the Office for Telecommunication and Postal Regulation. Nevertheless, the right which the plaintiff wished to derive from the directive should be based on the obligation of the national court to interpret national law implementing provisions of a directive in the light of that directive. In consequence, national provisions implementing the respective directive should be interpreted in such a manner as to ensure to the plaintiff the right to bring an action against the decision of the aforementioned Office. Different interpretation would namely deprive the plaintiff of the right to effective judicial review which is guaranteed by EU law and would be contrary to the general principles of EU law and article 6 and 13 of the European Convention on the Protection of Human Rights and Fundamental Freedoms.⁷⁰¹ With everything considered, it may be claimed that both highest courts in Poland take a positive stance towards the obligation to interpret national law in harmony with EU law and attempt to encourage the national lower courts to resort to this methodological tool. Nonetheless, it has become visible that the principle is differently interpreted by the respective courts. Whereas the Constitutional Tribunal speaks of the principle of conforming to EU law interpretation in very general terms, the Supreme Court seems to be much more accurate and detailed in its

⁶⁹⁹ Judgment of the Supreme Court of 5 December 2006 in a cassation case, II PK 18/06.

⁷⁰⁰ See case 160/01 *Karin Mau v. Bundesanstalt für Arbeit* [2003] ECR I-4791, paras.35-36.

⁷⁰¹ Judgment of the Supreme Court of 20 February 2008, III SK 23/07.

jurisprudence and refers to the principle of harmonious interpretation with regard to particular situations when an EU directive the plaintiff wished to rely on was not directly effective. This in turn leads to a certain terminological obscurity and blurring the dividing line between direct and indirect effect.⁷⁰²

In view of the foregoing the execution of the doctrine of consistent interpretation may, arguably, encounter some difficulties which have their roots in the Polish legal culture and more precisely the interpretation methods traditionally practiced by national courts. The Polish judge functions in the realm of a very positivistic, highly formalized and legalistic legal culture where strictly literal (textual) interpretation of “the most-locally-applicable-rule”⁷⁰³ is the main and often the only methodological tool.⁷⁰⁴ The point of departure for a Polish judge are the text of the law and the *clara non sunt interpretanda* and *claritas* doctrines.⁷⁰⁵ In that sense, sticking to the letter of law is the paramount objective of a national judge.⁷⁰⁶ As argued by Zirk-Sadowski

⁷⁰² This terminological vagueness is also present in the academic writing where the term of conforming interpretation is sometimes used to refer to the principles of supremacy and direct effect, see for instance Wentkowska (2009), p.135 who refers to the obligation to refuse to apply national law if in conflict with EU law as to the interpretation in conformity with EU law.

⁷⁰³ From Matczak et al (2010), p.82.

⁷⁰⁴ As claimed by Łętowska&Wiewiórska-Domagalska (2007), p.283: “Another serious problem, based in fact on the lack of openness, is the problem of legal interpretation – in other words a very strong attachment of the Polish courts to the literal interpretation of law. The courts are unwilling to do anything but provide a faithful reproduction of the wording of the rules, which creates problems with, for example, the application of general clauses.”

⁷⁰⁵ See Zirk-Sadowski (2005), p.95. The author argues elsewhere that: “Among lawyers, a conception of the profession prevails referring to legal positivism in which law is regarded as an object entirely external in relation to a lawyer, who is not responsible for its content. In Poland, legal positivism played from this point of view the role of a doctrine which protected Polish lawyers’ education after the war against excessive ideologisation since positivism as a method offers a conviction about the autonomy of law in relation to political and economic developments. Positivism showed that the notional apparatus of law and jurisprudence used by the lawyer is universal. Using this method in education greatly protected Polish legal culture from the belief that law was only a derivative of economic and political phenomena. Thus positivism, at least in its methodological sense, formed a pattern of the lawyer which was easily applicable also in the concept of the state of the rule of law. It regards law as the sovereign’s order which the lawyer, equipped with the methodology of law, only subjects to formal analysis and arranges notionally. In this way, law as the content of the sovereign’s will become the subject of lawyers’ cognition”, see Zirk-Zadowski (2006a), p.308. “A harshly positivistic approach” is also presented towards national case-law, see Mańko (2005), p.535.

⁷⁰⁶ See Kühn who claims that Central European judges are “enslaved by textual positivism” and “consider themselves to be bound only by the law, which means written law as enacted by the legislature. The very post-communist concept of judicial independence means that judges must decide only ‘according to the law’ (...) The judges do not need to listen to precedents, legal writings, the intention of legislature, the rationally reconstructed purpose of the law; they must stick only to the letter of the law, and where the letter of law does not offer any solution, pure arbitrariness and unpredictability often enters the scene.” Kühn (2004), pp.549 and 558 respectively. Similarly, Emmert points to the problems in Central and Eastern Europe by observing that “first of all, the judges

“(…) In Poland, legal positivism entirely leaves out this cultural and communicative character of law by assuming that the content of law becomes known due to the linguistic correctness of the text which guarantees, to a significant degree, its reading in accordance with the legislator’s intention.”⁷⁰⁷ Hence, exploring the objectives and the *spirit* of the legislation would not be deemed feasible and substantial and definitely not the way the judge would proceed with in the context of a purely domestic dispute.⁷⁰⁸ What is more, such an approach to legal provisions might be deemed improper for it easily lends itself to manipulation and may endanger the rule of legalism.⁷⁰⁹ By and large, the purposive and teleological methods which constitute the core of the principle of harmonious interpretation are foreign and abstract tools to Polish judges. Also in the Polish writing, the supreme position of literal interpretation is emphasized and it is argued that pro-European interpretation should take place only in situation when literal interpretation does not provide with clear solutions to the problem.⁷¹⁰ By the same token, the comparative method, which would allow to parallel different language versions of the same legal act, is not a common tool employed by Polish courts.⁷¹¹ As it is suggested by various scholars, the lack of skills and willingness to employ distinct methodological tools is one of the most heavyweight problems rendering the proper functioning of the national judicature as EU courts difficult.⁷¹²

are trained to apply the law and the (written) law only. They have no training to overcome lacunae in the law, for example, by recourse to general principles of law, such as the notion of unjust enrichment. Second, the judges have no experience with the concept of justice in contrast to the concept of law. This can lead to cases where the letter of law is duly followed but the results is obviously unjust, if not outright absurd”, Emmert (2003), p.295.

⁷⁰⁷ From Zirk-Zadowski (2006a), p.310.

⁷⁰⁸ Zirk-Sadowski points out that the problem is not as such rooted in the differences between the methodological categories but has a much more abstract level which originates from the styles and priorities attached to particular interpretation methods, Zirk-Sadowski (2005), p.98.

⁷⁰⁹ Ibid, p.102.

⁷¹⁰ See Zenc (2008), p.288.

⁷¹¹ Zirk-Sadowski (2005), p.99.

⁷¹² See for instance Bodnar (2005), pp.1617-1621; Łętowska (2005), pp.3-10; Łętowska (2000), p.235; Łętowska&Wiewiórska-Domagalska (2007), pp.285-286; Łętowska (2008), p.8, where the author observes that the fact that national courts are EU courts of first instance and that they are obliged to interpret national law in harmony with EU law does not imply that national courts want and are capable to fulfilling this task. The hypotheses are of a purely qualitative nature though, not supported by any empirical data. See also Bartosiewicz (2009), p.74 who observes that the reasoning methods practiced by the ECJ may be difficult to accept for the purpose of judicial application of law in Poland.

6.3. Preliminary ruling procedure

The Polish doctrine refers to the preliminary ruling mechanism as to preliminary question, preliminary issue or a preliminary judgment.⁷¹³ Before the accession to the EU it was discussed whether specific provisions regarding the mechanism of preliminary ruling procedure to the ECJ should be introduced in national procedural laws.⁷¹⁴ Ultimately, the legislator has decided not to amend the procedural norms. As it is claimed, the lack of specific provisions with regard to the preliminary ruling procedure does not prevent national courts from referring their questions to the Court of Justice since the system of Treaties read in line with Art. 91 of the Polish Constitution offer sufficient normative basis for referring a question by a Polish court.⁷¹⁵ Nonetheless, the issue of purely procedural aspects of the preliminary question to the Court of Justice remains unregulated in the Polish law. Since the Polish procedural framework does not provide for an explicit and straightforward legal basis which can be employed for the purpose of sending a preliminary question to the ECJ it is argued that already existing legal institutions and provisions must be employed for the purpose of the procedure.

In accordance with article 390 of the Code of Civil Procedure if a national court hearing an appeal case which triggers some doubts may refer the controversial issue to the Supreme Court which will decide upon. Likewise, in accordance with Art.193 of the Constitution, each national court may refer a question concerning the compatibility of national provisions with the Constitution, ratified international agreements or statutes to the Constitutional Tribunal if resolving the issue is necessary for passing the judgment. In that sense, the preliminary questions to the Polish supreme courts share many characteristics with the preliminary question to the Court of Justice. Therefore, it is claimed that Polish courts should, by analogy, resort to article 390 of the civil procedure should they want to refer a question to the ECJ.⁷¹⁶ However, it follows from this provision that the competence to refer preliminary questions to the Supreme

⁷¹³ See Zielony (2006), p.29 who argues that the most appropriate would be using a notion of legal question do the ECJ since it would resemble the institution of the legal questions which may be referred to the Polish Supreme Court and the Constitutional Tribunal.

⁷¹⁴ See Biernat (2006), p.429; Szpunar (2003), pp.277-301; Póltorak (1997), p.269; Mik (1998), pp.12-38.

⁷¹⁵ See Szpunar (2006), p.187 and Zielony (2006), p.31.

⁷¹⁶ Zielony (2006), p.33.

Court is reserved for second instance courts which consequently puts into question such a right with regard to courts adjudicating in their first instance capacity. Provided that a civil court aims at referring its questions it should do so in line with art.354 of the Code of Civil Procedure⁷¹⁷, i.e. by issuing a judicial decision.⁷¹⁸ Subsequently, the national court is supposed to stay the proceedings. The Polish procedural norms again triggers some doubts in that respect though. In the academic writings it has been debated whether a decision to send a preliminary question should be followed by adjournment of the trial or staying/suspension of the proceedings.⁷¹⁹ In accordance with the procedural norms, the parties to the proceedings may not compel the court to refer a question to the ECJ but one or both parties may file a motion which will be recorded in the proceeding protocol⁷²⁰ for referring a question to the ECJ which may however be rejected by the respective court.⁷²¹ It is acknowledged that the respective national court should refer its questions only after the factual and legal background of the case is established and the parties took their positions in the case.⁷²²

In respect of the preliminary ruling mechanism it seems interesting to investigate the stance of the Polish supreme courts on this issue. In the previously discussed procedural decision of the Constitutional Tribunal P 37/05, the Tribunal decided on the inadmissibility of the case due to its lack of competence to safeguard EU law which belongs to the competences of the European Court of Justice. The CT explicitly stated that its task is to safeguard the Constitution, which is supreme law of the Republic of Poland, and not to decide upon individual matters aspects regarding the application of law, including EU law. Furthermore it stated that:

⁷¹⁷ In accordance with art.354 of the Code of Civil Procedure, a court is expected to issue a judicial decision if the Code does not provide for passing a judgment or an order for payment.

⁷¹⁸ Zielony (2006), p.33.

⁷¹⁹ Ibid, p.34. The author argues that adjournment of the trial should take place in accordance with art 390 and 156 of the Code of Civil Procedure. The latter article states that a court may adjourn the proceedings in response to a motion of both parties if there is an important reason to proceed so. Resorting to the ECJ should therefore be seen as an important reason. Contrary to that opinion, Szpunar argues that the proceedings should be stayed/suspended in line with art.177 of the Code of Civil Procedure which provides for a possibility of staying the proceedings if the final decision is dependent upon a decision which will be taken in another pending civil trial, see Szpunar (2003), p.289 and Szpunar (2006), pp.206-207.

⁷²⁰ See art.158 of the Code of Civil Procedure.

⁷²¹ See Zielony (2006), pp.36-37.

⁷²² Ibid, p.37.

“(…) by virtue of Article 8 paragraph 1 of the Constitution, the Constitutional Tribunal is obliged to such recognition of its position that in fundamental issues relating to the constitutional system of the state it shall retain its status of “the last-word court” The ECJ and the CT must not be positioned as competing courts. This pertains not only to the “duplication” of both courts or the double line of adjudication upon the same legal issues, but also to lack of functionality in relations between Community and domestic legal orders. It is essential to indicate the different roles of both courts.”⁷²³

The CT thus acknowledged the competence of the ECJ which should not be seen as a competitor of the Constitutional Tribunal but rather a court of different competences. Furthermore, the CT admitted that if a national court has interpretational doubts with regard to EU law, it should resort to the ECJ and ask it for a preliminary ruling which would resolve the doubts.⁷²⁴ In the final part of the reasoning the CT stated that the ECJ is one of the pivotal organs of the EC the sole competence of which is to “elucidate the Community law provisions or adjudicate upon the binding force thereof.”⁷²⁵ The preliminary ruling procedure, in turn, constitutes a cardinal mechanism of judicial cooperation between the ECJ and national courts which rests on the division of the tasks of interpretation and application of the law between the former and the latter respectively. Importantly, the CT acknowledged that, in line with the *Köbler* ruling, the state may incur liability in damages if a national court delivers a judgment with an “apparent infringement of the ECJ jurisprudence.”⁷²⁶ What is more, in the opinion of the CT, a preliminary ruling is binding on the referring court and a failure to observe the ruling by the respective court shall be deemed the infringement of EC law which might result in an infringement procedure under Art.258 TFEU (ex Art.226 EC).⁷²⁷

On 8 November 2005 the Supreme Court had its first chance to consider and elaborate on the issue of the necessity of employing the preliminary ruling procedure in a case pending before a national court.⁷²⁸ In this case the Supreme Court took its chance to present its opinion about the relationship between national courts and the ECJ. The Supreme Court pinpointed that the assessment of the necessity of referring a question to the ECJ is an autonomous prerogative

⁷²³ See procedural decision of the Constitutional Tribunal 37/05, part II.

⁷²⁴ Ibid.

⁷²⁵ Ibid, part III, p.4.1.

⁷²⁶ Ibid.

⁷²⁷ For a detailed analysis of the decision see Łazowski (2008) and Łazowski (2011), pp.519-521.

⁷²⁸ Judgments of the Supreme Court of 8 November 2005 in a cassation case, I CK 207/05.

of a national court only and not of the parties to the dispute. Requests of the parties to the proceedings to utilize the preliminary reference procedure are not binding on national courts. The Court also added that the ECJ does not have any competence to interpret national laws and decide about their compliance with EU legal measures. That in turn implies that national courts may not refer questions in which they ask the ECJ to decide whether a national legal rule implements an EU measure in a proper way. It is rather straightforward that in its judgment the Supreme Court followed the reasoning presented by the ECJ in its case-law. It is settled jurisprudence of ECJ that it is up to the national court only to decide whether the preliminary questions should be asked.⁷²⁹ Another important aspect of the preliminary reference procedure was decided upon on the 12th of October 2006.⁷³⁰ In its judgment the Court held that referring a question to the ECJ would be justified only in situations when serious enough doubts as to the interpretation or validity of an EU legal norm exist in the case pending before the national court. In the opinion of the Supreme Court, in the case which was considered by the appellate court in question the condition of a serious enough doubt in the meaning of Article 267 TFEU was not fulfilled since the court was able to assess and decide on its own about the interpretation of a legal notion which was in question. Hence, this judgment implies to national courts that they shall resort to the preliminary reference procedure only when all methods of legal reasoning which they are familiar with are exhausted and yet they did not allow to establish how to interpret EU law at issue. From the foregoing it may thus be concluded that the Supreme Court perceives the procedure as the very last instance mechanism which should be utilized only when all other legal, including interpretative, mechanisms are to no avail whereby it seems to send a somewhat negative signal to the lower courts. By emphasizing that resorting to the preliminary ruling procedure can be justified *only when*, the SC seems to intend to discourage lower court judges from resorting to the mechanism which in fact is not in line with the spirit of Art. 267 TFEU and should, therefore, be considered fault.

⁷²⁹ See for instance case C-369/89 *Piageme* [1991] ECR I-2971, para. 10 and joined cases C-422/93, C-423/93 and C-424/93 *Teresa Zabala Erasun, Elvira Encabo Terrazos and Francisco Casquero Carrillo v. Instituto Nacional de Empleo* [1995] ECR I-1567, para.14.

⁷³⁰ Judgment of the Supreme Court of 12 October 2006 in a case alleging non-compliance with the law of the judgment of an appellate court, I CNP 41/06.

6.4. State liability

The Polish legal framework does not provide for any distinct provision which would regulate the issue of state liability in damages for an infringement of EU law but it does establish general rules on state liability in damages. It is claimed that the general rules apply *per analogiam* to the situations concerning breaches of EU law.⁷³¹ Importantly, the Civil Code regulations with regard to the problem of state liability were considerably amended in 2004 due to their incompatibility with the Polish Constitution.⁷³² The new law repealed previous norms and introduced new provisions which brought the codical norms in line with the Constitution but also with the legal expectations on part of the European Union.⁷³³

In article 77(1) the Polish Constitution provides that each person has the right to be compensated for any harm which is caused to him by any contrary to law action of an organ of public authority. The Civil Code, in article 417, para 1 included states that any harm caused by an act of an organ of public authority or lack of action on part of public authority which would be contrary to law shall be compensated by the State Treasury⁷³⁴ or territorial self-government or any other legal person which performs public tasks.⁷³⁵ If the damage was caused through an issuance of a normative act, a person may claim damages after the incompatibility of the

⁷³¹ The amendments of the Civil Code as introduced by the Act of 17 June 2004 amending the Civil Code and other acts, J.L. No 164, item 1692 were intended, *inter alia*, to bring the Polish provisions in line with the EU law, see the justification by the Commission for the Codification of Civil Law in the project amending the Civil Code, Druk Sejmowy No 2007 of 15 September 2003, Warsaw to be found at: [http://orka.sejm.gov.pl/Druki4ka.nsf/%28\\$vAllByUnid%29/50FE398C4F4090C5C1256DA600492360/\\$file/2007.pdf](http://orka.sejm.gov.pl/Druki4ka.nsf/%28$vAllByUnid%29/50FE398C4F4090C5C1256DA600492360/$file/2007.pdf) (last accessed 10 January 2011).

⁷³² Act of 17 June 2004 amending the civil code and other acts, J.L. No 164, item 1692. See also see judgment of the Constitutional Tribunal of 4 December 2001 SK 18/2000 on the unconstitutionality of art 418 of the Civil Code and the justification by the Commission for the Codification of Civil Law in the project amending the Civil Code, Druk Sejmowy No 2007 of 15 September 2003, Warsaw, particularly point 4 of the justification, to be found at: [http://orka.sejm.gov.pl/Druki4ka.nsf/%28\\$vAllByUnid%29/50FE398C4F4090C5C1256DA600492360/\\$file/2007.pdf](http://orka.sejm.gov.pl/Druki4ka.nsf/%28$vAllByUnid%29/50FE398C4F4090C5C1256DA600492360/$file/2007.pdf) (last accessed 10 January 2011).

⁷³³ Art.417, 419, 420, 420(1), 420(2) and 421 were repealed and replaced by articles 417, 417(1), 417(2) and 421. The new regulation was aimed at eliminating the condition of the fault of a civil servant/public organ which would incur state liability. For more see Skoczylas (2005), pp.35-36.

⁷³⁴ In accordance with the Civil Code, the State Treasury (*Skarb Państwa*) is a legal person which is subject to civil rights and obligations relating to state property that does not belong to other state legal persons, see art.33 and 34 of the Civil Code. The State Treasury may be represented by various officials or institutions depending on circumstances.

⁷³⁵ Para 2 of the same article states that, provided that public authorities tasks were entrusted to a unit of local authorities or other legal person, joined responsibility for the damage caused is incurred by the executor of the public tusk entrusted and the unit of local authority or national Treasury that commissioned the task.

respective normative act with the Constitution, a ratified international agreement or a statute was found in an appropriate proceeding.⁷³⁶ If the damage is caused due to a valid judicial judgment or a final decision or, it can be repaired after the variance with the law of the respective judgment /decision is affirmed in an *appropriate proceeding*.⁷³⁷ This applies also to situations when a valid judicial judgment or a final decision had been based on a normative act which was incompatible with the Constitution, ratified international agreement or a statute.⁷³⁸ Likewise, the damage caused by a lack of a judgment/decision, provided that in accordance with a legal norm such a judgment/decision should be pronounced, can be repaired after the variance with the law of the lack of a respective judgment/decision is affirmed in an appropriate proceeding, unless separate provisions provide otherwise.⁷³⁹ If the damage is caused by a lack of fulfillment of the obligation to issue a normative act, the issuance of which is provided by another legal provision, the infringement of law attached to the lack of the normative act shall be ascertained by the court hearing the liability in damages case.⁷⁴⁰ It seems that the foregoing provision aims at, *inter alia*, allowing individuals to claim damages in cases of a lack of implementation of EU legal acts.

The conditions for the State to incur liability in damages as enshrined in the Polish norms resemble those provided for in EU law.⁷⁴¹ The notion of breach of law is interpreted broadly as any infringement of law. The illegality of action/inaction may concern not only in terms of breach of provision of commonly binding law but also the rules of social relations (justness and fairness)⁷⁴² and in some instances also moral and custom rules.⁷⁴³ Polish law does

⁷³⁶ See art.417(1) para 1 of the Act of 17 June 2004 amending the Civil Code and other acts. It has been argued that also a national legal act which would be incompatible with an EU directive would fall under the respective article since it would at the same time be incompatible with art.2 of the Act concerning the conditions of accession the New Member states providing that new Member States are bound by the Founding Treaties and legal acts of the institutions.

⁷³⁷ Emphasis by the author. The respective article does not stipulate what is mean by the ‘appropriate proceeding.’

⁷³⁸ See art.417(1) para 2 of the Act of 17 June 2004 amending the Civil Code and other acts, J.L. No 164, item 1692.

⁷³⁹ Ibid.

⁷⁴⁰ Ibid.

⁷⁴¹ That is: occurrence of damage, breach of law caused by action or inaction by a public authority (National Treasury, a unit of local authority or other legal person), a clear causal link between the damage and the action/inaction on part of the public authority. In accordance with the doctrine, the damage includes both the actual damage and the lost profits (*lucrum cessans*) but also the non-material damage, see See Skoczylas (2005), p.327.

⁷⁴² See art.417(2) of the Act amending the civil code and other acts which states that of the damage is caused to a person due to a performance of public authorities tasks which are legal in accordance with the law, then the harmed

not provide for the condition that the law which was breached should bestow rights on the individual. This, in turn, implies that a breach of any legal provision may, provided that other conditions are fulfilled, incur state liability in damages.⁷⁴⁴ The fault does not play any role in establishing state liability.⁷⁴⁵ With everything considered, the conditions of illegality as enshrined in Polish law and interpreted in the doctrine are much less restrictive and more favourable for the individual than those established by the ECJ. Whilst the ECJ provided that the breach must be sufficiently serious⁷⁴⁶, neither the Polish Constitution, nor the codical regulations provide for such a condition.⁷⁴⁷ The Constitution and the Civil Code do not stipulate which authorities may be held liable whereas it speaks of the liability of the National Treasury, a unit of local authority or other legal person which performs the tasks of public authorities.⁷⁴⁸ By and large, it can be concluded that the Polish legal system regulates the issue of state liability in a satisfactory way in terms of its compatibility with EU law expectations and in fact provides for a normative framework which is more favourable for an individual than the one established by the ECJ.⁷⁴⁹ Nonetheless, some authors point to several procedural aspects of the codical regulation which may jeopardize the effective enforcement of the right to damages. Especially the fact that awarding damages is dependent upon prior finding of illegality in ‘an appropriate proceeding’, the notion of which is further not elaborated upon, is deemed to effectively hamper the enforcement of the right to damages in instances of infringement of EU

person may claim full or partial financial satisfaction for the damage suffered if the circumstances, and especially the inability of the harmed person to work or his/her difficult financial situation, indicate that such a way of proceeding would meet the reasons of justice.

⁷⁴³ See Skoczylas (2005), p.328.

⁷⁴⁴ Ibid, p.328.

⁷⁴⁵ See ibid, p.329, also Dzienis (2006), p.88.

⁷⁴⁶ See joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*, para.51

⁷⁴⁷ See Skoczylas (2005), p.328, also Póltorak (1998), p.219, Dzienis (2006), pp.88-89.

⁷⁴⁸ In line with the constitutional doctrine, it should however be recognized that the notion of public authorities is understood as comprising legislative, executive and judicial bodies including territorial self-government and other national organs, see Skoczylas (2005), p.329.

⁷⁴⁹ See ibid, p.330. See also the opinion of the Committee of European Integration of 18 August 2003 on the compatibility of the Act amending the Civil Code to be found at:

[http://orka.sejm.gov.pl/Druki4ka.nsf/%28\\$%vAllByUnid%29/50FE398C4F4090C5C1256DA600492360/\\$file/2007.pdf](http://orka.sejm.gov.pl/Druki4ka.nsf/%28$%vAllByUnid%29/50FE398C4F4090C5C1256DA600492360/$file/2007.pdf) (last accessed 10 January 2011).

law by state authorities.⁷⁵⁰ Such a condition implicitly indicates that only the Constitutional Tribunal has the competence to decide with regard to the incompatibility of a normative act with the constitution, a ratified international agreement or a statute and exclusively the Supreme Court may decide about illegality of a final judicial decision. Furthermore, it follows that an individual will be deprived of the right of being awarded damages in case of a breach of EU law by Polish courts of last instance which evidently is at variance with the *Köbler* judgment.⁷⁵¹

7. Preliminary conclusions

The present chapter has illustrated the legal and operational framework the Polish civil judges are functioning in whereby it also allowed to see potential problematic aspects of the functioning of the Polish civil judges as decentralized EU judges. As it has been visualized, in general, the constitutional and procedural frameworks do not seem to pose major stumbling blocks to the fulfillment of the normative obligations following from EU law by the Polish civil courts. It has yet become apparent that the legal framework does not provide for any straightforward and explicit norms which could be utilized by national courts to apply EU law. Thus, the procedures of the application of EU law are communicated implicitly and are supposed to be derived from either other norms concerning national law or from the norms

⁷⁵⁰ See Górka&Mik (2005), p.46 and Półtorak, *Proceduralne aspekty dochodzenia roszczeń odszkodowawczych w tytułu naruszenia prawa wspólnotowego przez państwa członkowskie* [in] Wróbel (2005), p.842 who claims that the fact that the court hearing the state liability in damages case may not independently decided about the alleged illegality will hamper the principle of effectiveness since the plaintiff will be deprived of the right of being awarded damages in case of a breach of EU law by Polish courts of last instance. See article 424(1) of the Code of Civil Procedure in which it is stated that the claim of illegality if judicial decision is only possible with regard to final judgments of a court of second instance which caused damages. It is not possible to bring a claim of illegality from judgments of second instance courts from which an appeal for cassation was brought to the Supreme Court and from the judgments of the Supreme Court themselves. See also Pecyna (2006), pp.62-64 and 81-98. The author extensively and critically analyses the Polish regulation with regard to state liability and more precisely the aspect of the claim of non-compliance of legally valid judgment with the law and claims that the principle of effectiveness of EU law is jeopardized and ultimately leads to the situation where claiming damages for a judicial decision which is in breach of EU law by individuals is virtually impossible. The author adds that in cases where damages are claimed for infringement of EU law, the Polish court should disregard the Polish regulation and independently decide about the breach of EU law by a judicial decision, which will ultimately result in better and effective judicial protection, see pp.95-96. By and large, the author claims that present procedural regulation is not acceptable and jeopardizes the principle of effective judicial protection.

⁷⁵¹ See Półtorak, *Proceduralne aspekty dochodzenia roszczeń odszkodowawczych w tytułu naruszenia prawa wspólnotowego przez państwa członkowskie* [in] Wróbel (2005), p.842.

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pertaining to international law. With the exception of the problematic issue of the supreme position of the national Constitution, both the Constitutional Tribunal and the Supreme Court take rather positive, i.e. being in line with EU expectations, approach towards EU law and the obligation of national courts following therefrom. Be that as it may, from a theoretical point of view, several aspects which have their roots in the national system of sources of law or national legal culture might, arguably, hamper the processes of application of EU law. The first one pertains to the fact that case-law does not occupy a position of a generally binding source of law. Secondly, the interpretation methods commonly practiced by Polish judges and which originate in the national positivistic and legalistic legal culture seem to stand in contrast with the interpretation methods as they are expected from the national judges by the ECJ. Also, several procedural obstacles may hamper the effectiveness of enforcement of EU law in particular instances. The problematic nature of those issues originates in either the vagueness of the normative regulation or the organisation of the judiciary and the features of the Polish judicial community. Finally, the system of legal education and judicial training seems to pay a somewhat scant attention to the law of the European Union.

Chapter 4

Polish Civil Judges versus the EU Legal Order: Knowledge, Experiences and Attitudes

1. Introduction

As it was observed in the previous chapters the research methods traditionally used in the legal academic discourse concerning the functioning of the national judges in the EU capacity do not lend themselves to answering the actual questions which were posed at the outset of this study. This Chapter adapts therefore a different approach which provides a distinct, theoretically and methodologically, outlook on the problem by focusing on the personal perspective on the judicial activity in the context of EU law. Not only does such an exercise make it possible to see how national judges work with EU law on the ground but it also allows to draw a picture which sheds light on distinct, more pragmatic aspects of the functioning of national judges as EU law judges.

This chapter presents the results of the empirical study carried out among the Polish judges of district and regional civil courts. The analysis is predominantly based on the results stemming from the quantitative part of the study which take a form of simple proportion statistics of particular variables which were tested in the questionnaire. In order to achieve a better visualization selected data is presented in the form of charts and graphs. In some instances the method of contingency tables is employed in order to indicate the relationship between variables. The analysis is not confined to the quantitative aspect though. In many instances the outcomes of the quantitative part of the study are broadened by the insights from the qualitative part of the research. For that purpose quotations from the interviews are brought

up in order to faithfully reflect the views of judges and complement the quantitative data.⁷⁵² In addition, the analysis is enriched by observations made by different legal and political science scholars who seem to offer plausible explanations of some of the results. Such a process of a between methods triangulation allows to validate and enhance the presented data and to draw a more complete picture of the situation.⁷⁵³

The gained data is modeled in several clusters which address various aspects of the functioning of the national judges in the context of EU law. The first section is devoted to the aspect of the knowledge of EU law and the manner it operates among the judges. This is dictated by the assertion that knowledge of EU law is a one of the basic preconditions of an adequate functioning of national judges as EU judges. The subsequent section addresses the issue of, generally speaking, attitudes and conceptions concerning EU law and the legal order of the European Union. Finally, the actual experiences of judges with EU law are discussed. The analysis does not strictly follow the subsequent line of questions asked in the survey but aims at combining the results into the sets of problems which became evident and most significant in the course of the empirical study. It is also necessary to acknowledge that the empirical data pertains not only to the problem of a national judge vis-à-vis European Union law. As the reader will notice, it concerns the functioning of the Polish civil judiciary in general for many problems attached to the application of EU law have their roots in the organisation of the judiciary system, the way it is managed and administrated. Next to that, it is shown how the constitutional framework, national judicial culture and the system of legal and judicial training, to name just the most crucial ones, bear on the functioning of national judges in the context of EU law. It should be emphasized that judges are just human beings which partly justifies the common contradictory opinions and views on EU law they shared during the empirical study. In fact, the vivid presence of the human factor has proven to be one of the most tangled and challenging aspect of the study. In that regard it should be reiterated that the entire analysis is

⁷⁵² The citations are literally translated from Polish to English and therefore they may contain some colloquial expressions. Such a practice allows to entirely reflect the perceptions of EU law among judges. Citations originating from the questionnaire are assigned a number, citations originating from the interviews are assigned a letter.

⁷⁵³ See note 108 for the definition of triangulation.

conducted according to the personal responses given to the individual inquiries by the judges. Those may seem self-evident and absorbing or amusing but at times also odd and paradoxical.

2. Knowledge of EU law: *iura novit curia*?

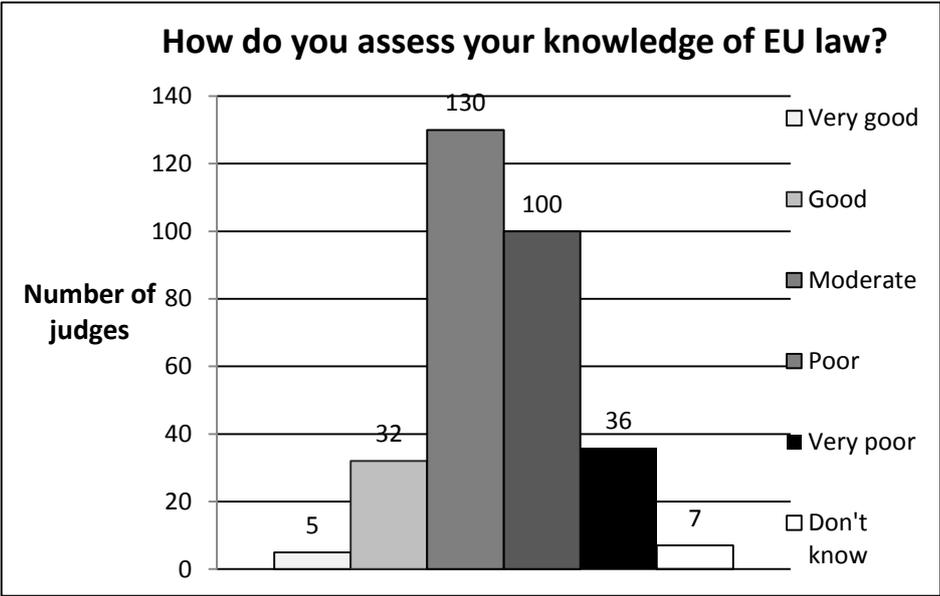
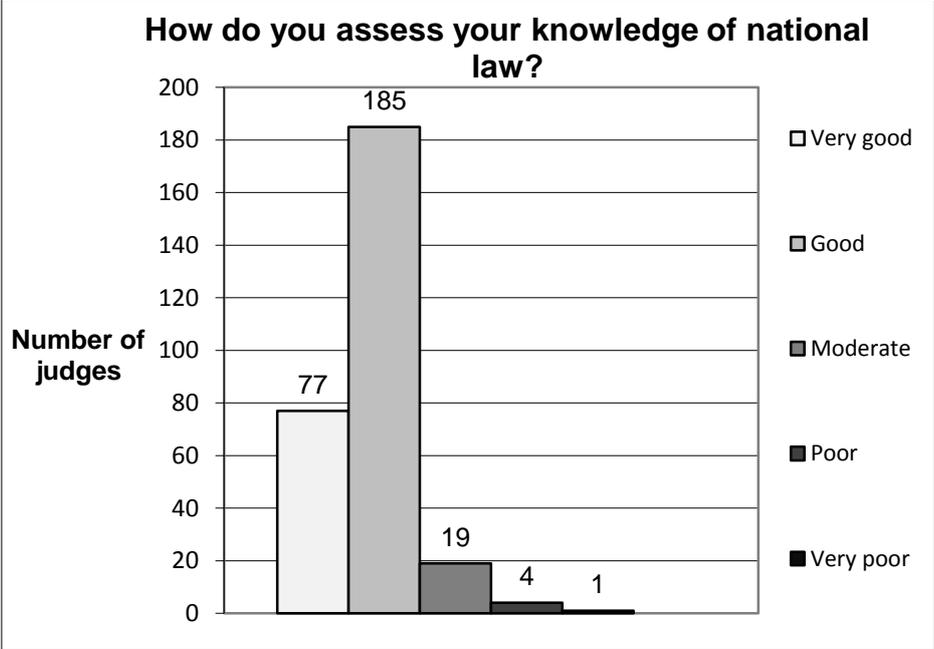
In the survey various aspects of the knowledge of European Union law and the way judges acquire that knowledge were tested and explored. It has also been attempted to examine what the most troublesome and perplexing features of conveying the knowledge of European Union law are. It should not be forgotten that the assessment of the level of knowledge of EU law judges represent must always be seen in a broader context of judicial functioning as well as in correlation with other aspects of the application of EU law. Hence, it has also been looked into various elements of the institutional framework such as, *inter alia*, system for judicial training and the availability of EU law courses. Also, it should be emphasized that the exercise of measuring the level of EU law knowledge among judges is marked with a high degree of subjectivity as it is very much a matter of expectations. Undoubtedly, an adequate level of knowledge of EU law, both material and procedural is necessary to properly function as EU judge. One can however ask what level of knowledge should actually be described as a reasonable and necessary. Both quantitative and qualitative data delivered various insights in that respect.

2.1. General knowledge of European Union law

When asked to assess the awareness of alterations and developments introduced in EU law only 23 percent declared to be well informed in that respect whereas 88 percent ascertained to be well informed about changes in national law.⁷⁵⁴ Likewise, inquired to assess their knowledge of national law 92 percent declared to have a good or very good knowledge of it whereas only 12 percent have such an opinion with regard to EU law. Furthermore, nearly 42 percent thought

⁷⁵⁴ n=313 judges.

that their knowledge of EU law was (very) poor. The following graphs clearly show the stark contrast in the results.



n=310

Polish Civil Judges versus the EU Legal Order: Knowledge, Experiences and Attitudes

The overwhelming number of judges who assessed their knowledge of EU law as (very) good have dealt with EU law on a more frequent basis in the course of the last 12 months which might suggest that practical experience with the application of EU law is the optimal manner of learning it.⁷⁵⁵ Interestingly, those were the younger generation judges who seem to be more sceptical with regard to their knowledge of EU law.⁷⁵⁶

knowledge age	(very good)	moderate	(very) poor	don't know	totals
29-40	10	57	71	4	142
41-50	15	47	41	2	105
51-60	8	18	5	1	32
60+	2	1	2	0	5
totals	35	123	119	7	284

Table 1

58 percent of the judges were of the opinion that their knowledge of EU presented the same level as their colleagues and 20 percent were not able to rate it. 21 percent thought that their knowledge of EU law was better than that of their colleagues.⁷⁵⁷

During the personal testimonies the feelings of frustration and helplessness were frequently expressed about the lack of knowledge of EU law and the methods of its application. The personal testimonies and remarks provided to the anchoring vignettes have also shown that situations when judges are even not aware of the fact that some aspects are regulated by European Union law are present. Next to that, it has become evident that many misconceptions with regard to European Union law and its position *vis-à-vis* the national legal order are common. It has also been detected that the judges quite frequently have a blurred view of the

⁷⁵⁵ 60 percent of the group dealt with 6 and more cases in which EU law played a role in the last year.

⁷⁵⁶ With regard to the distribution of answers across gender, female judges were slightly more critical about their knowledge of EU law than male judges. 11 percent of female and 13 percent of male judges assessed their knowledge as (very) good; 40 percent of female and 46 percent of male assessed their knowledge as moderate and 46 percent of female and 38 percent of male judges assessed their knowledge of EU law as (very) poor, n=282.

⁷⁵⁷ 64 percent of those who thought that their knowledge of EU law is better than their colleagues dealt with more than 2 cases encompassing EU law element in the last 12 months. Only 1 percent assessed its knowledge of EU law as being worse than that of their colleagues.

role of the ECJ's precedent in the legal system which supports the observations included in Chapter 3 concerning the vagueness of the issue in the context of the Polish legal order.⁷⁵⁸

Judge No 25 declares that "We all know civil and criminal law and when we are confronted with any issue regarding those laws we know that there is one or another statute in which the issue is regulated and we know how to find it. We do not possess such knowledge with regard to EU law. I have applied some EU norms only because I came across them by accident. We need trainings which would address the problem of which areas and matters of law are regulated by the European Union and not about which EU institution in which procedure passes the laws."

Judge No 95 states: "Generally speaking Polish judges (including me) do not know European Union law so they do not apply it. They do not know it because both during our legal studies and legal training it was touched upon in a rudimentary way. Furthermore, the workload and number of cases we have to judge in makes individual training impossible in practice."

Judge No 233 declares the following: "I do not know EU law and I cannot assess whether, when and how I am supposed to resort to it."

Judge N: "During my legal studies there was very little of EU law, then during the judicial training I only touched upon it. Then we had some trainings, through the School. Those were fine, some very basics, just in case to know where I have to look for information if I need it. But a decent study? So far not. I cannot say my knowledge of EU law is sound (...) Actually nobody was interested to prepare us to this new function, no one, including the Ministry of Justice, has done something (...) They left us to our faith, that's the way it looks really."

Box 1

2.2. Knowledge of specific mechanisms of EU law application

In the questionnaire also more specific knowledge regarding mechanisms of preliminary ruling and conforming interpretation was tested. From the survey it follows that 57 percent of the judges declared to know in which situations they are expected to refer a preliminary question to the Court of Justice of the EU.⁷⁵⁹ At the same time, 60 percent would know what to do with a judgment provided by the ECJ.⁷⁶⁰ As the qualitative part of the study seems to suggest, the foregoing does not necessarily indicate that the judges know the ins and outs of the mechanisms. Most of the group declared to know the objectives and the purpose of the

⁷⁵⁸ See section 4 of Chapter 3.

⁷⁵⁹ 24 percent declared not to know when to refer a question and 19 percent expressed a neutral opinion.

⁷⁶⁰ 23 percent took a neutral stance and 17 percent disagreed.

preliminary ruling but admitted that it would take a whole process of learning how such a question should be formulated and which requirements it should meet.

A relatively high number of judges knowing when to refer a question and how to proceed with a judgment given by the ECJ might be a corollary of the fact that most of them had followed some basic course in EU law and its institutions before and after Poland joined the European Union. The very basics of the preliminary ruling procedure constituted a necessary component of nearly any introductory course. Next to that, the qualitative data suggests that the process of a dialogue with the ECJ might be associated with comparable national mechanisms that were mentioned in Chapter 3, that is to say the preliminary question which may be referred to both the Constitutional Tribunal⁷⁶¹ and to some extent to the Supreme Court.⁷⁶²

Judge G when asked about the preliminary ruling procedure states: “It is an excellent institution but I suppose it will remain a dead letter for a long time (...) I think there should be ready templates available so you would only need to fill in the factual situation; you would know how to build a question, how to formulate it; how to do it that it meets the expectations (...)”

Judge N: “The procedure is not really clear to me. Yes, it was mentioned to during the trainings but my knowledge of it comes mostly from journal news. I know that administrative courts frequently send their questions but I do not know how it could relate to my daily practice (...) I assume that it would work like the preliminary question to our own Supreme Court. There, in order to ask a question, you must get acquainted with the issue which triggers doubts. But in order to find out that there is some uncertainty you must first know the law and relevant jurisprudence very well. So it is a vicious circle (...) The good knowledge of the law is a condition sine qua non of any application thereof.”

Judge V: “Preliminary ruling? Yes, it is familiar to me, from my legal studies and trainings. They do mention it. I haven’t seen any relevance for my daily practice so far though. Well, I mean, it could be that I simply did not notice it could be relevant because I did not know that EU law should have been applied. “

Box 2

With regard to the knowledge of the principle of harmonious interpretation the situation seems somewhat alarming. Only 18 percent declared to know the rules concerning the principle in their entirety, 51 percent know it partly and 31 percent does not know it at all.⁷⁶³ The qualitative research visualized that the knowledge of the principle is indeed limited. Some

⁷⁶¹ For more details see section 2.4 of Chapter 3.

⁷⁶² For more details see section 2.3 of Chapter 3.

⁷⁶³ n=294.

judges were not aware of the existence of such a mechanism and many were only aware of the mechanism but were not able to substantiate it any further.

2.3. Sources of EU law information and knowledge

Only 5 percent of the respondents were of the opinion that they gained sufficient knowledge of EU law during their legal studies.⁷⁶⁴ This finding does not come as a surprise since, as shown in the previous chapter, EU law has become a part of legal studies curriculum only in the last decade.⁷⁶⁵ By and large, the system of trainings offered to judges by institutions other than their own court is the most important way of gaining knowledge and information about EU law. Nearly 65 percent of the judges have made use thereof to familiarize themselves with EU law. The qualitative data suggests that the trainings serve not only to propagate the knowledge of EU law, they also play a significant role in the process of socialization and exchange of ideas between the members of the group.⁷⁶⁶

Direct consultation of the jurisprudence of the Court of Justice and legal handbooks are respectively the second and third most popular manners of broadening the EU law knowledge. It should be stressed that the number of the surveyed judges who directly consult EU law instruments such as regulations and directives does not exceed 50 percent. In fact, only 37 percent of the judges directly consulted EU directives. More importantly, though, only 3 percent of the group declared to never search for any information concerning EU law. The following chart illustrates the numbers of judges that resort to specific source of information.⁷⁶⁷

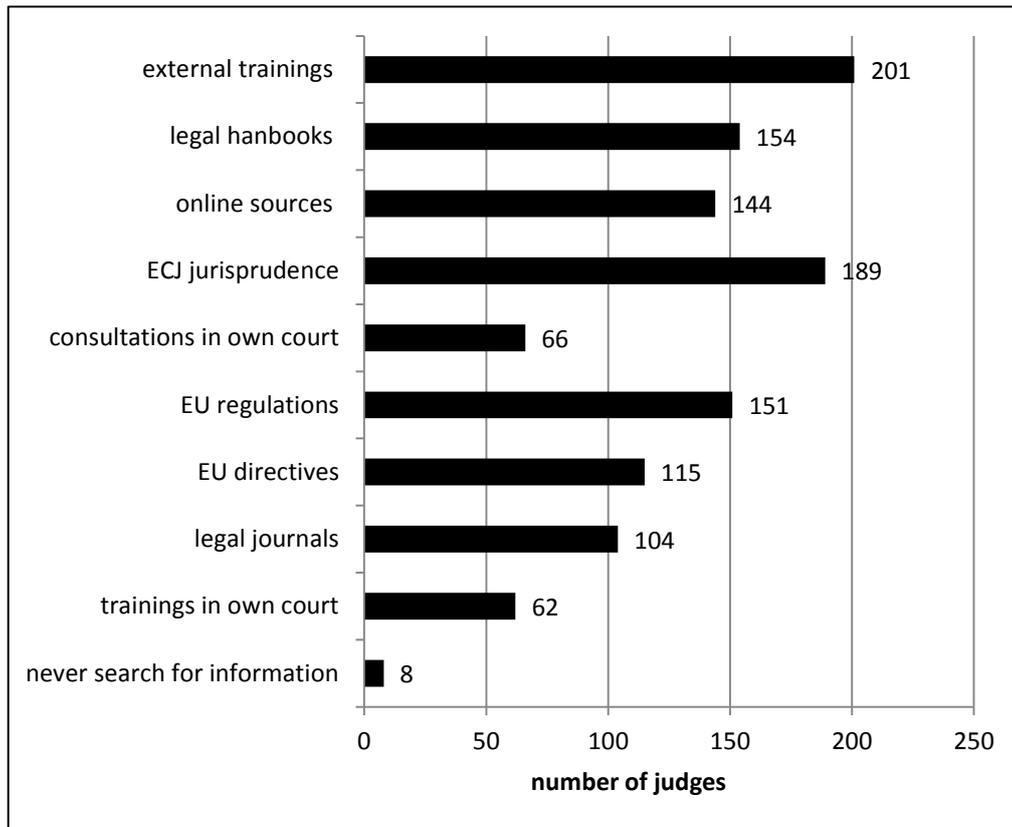
⁷⁶⁴ 9 percent expressed a neutral stance, 29 disagreed and 58 strongly disagreed.

⁷⁶⁵ See section 3.2 of Chapter 3.

⁷⁶⁶ The socialization process might take various forms. In respect of EU law the trainings provide a platform whereby judges who so far have not dealt with EU law learn that the issues of EU law appear before courts in other parts of the country. This in turn makes them more alert and anticipating and induces them to broaden their knowledge of EU law. For more on the role of socialization within judiciary see Bell (2006), pp.24-26.

⁷⁶⁷ Multiply choice question.

Polish Civil Judges versus the EU Legal Order: Knowledge, Experiences and Attitudes



n=312

From the qualitative part of the study it indeed follows that trainings in EU law have been and remain the most popular manner of gaining information about EU law which very much stresses how important role a (university) courses plays in the processes of mainstreaming EU law into the daily practice of national courts. The modern channels of communication through the internet receive increasingly more adherents but qualitative data suggested that some judges might treat them with mistrust. It is worth emphasizing that the traditional manners of learning such as finding the relevant information in the legal handbooks still play an important role in the processes of disseminating the knowledge of EU law.

Quite a proportion of judges tend to consult other persons when confronted with EU law in their practice. 62 percent of those who have dealt with a question of EU law in the last twelve months declared to have consulted someone else with regard to the EU law problem that

occurred.⁷⁶⁸ It is evident that an overwhelming number of EU law related problems stay within the judicial circles since seeking any aid beyond the court is very exceptional a case. More than 90 percent of those who sought help with EU law issues did turn to their colleagues, 10 percent approached an academic scholar and 6 percent the Ministry of Justice.⁷⁶⁹ Nonetheless, the institution of a judge-consultant who would be appointed in the court to offer a helping hand with EU law related issues is not popular. 14 percent of the group declared that such a person is available at their home courts⁷⁷⁰ but only 5 percent of the judges have ever resorted to such a possibility.⁷⁷¹ Similar conclusions follow from the qualitative part of the study. It is apparent that judges mostly consult EU law related problems with their closest colleagues who they mostly work with. In the opinion of the judges, such an exercise renders establishing the same line of proceeding with a specific EU law issue possible and thereby assists with meeting the requirement of coherence and uniformity of judicial decisions.

2.4. Forms and scope of EU law trainings

The empirical data revealed that the methods of conveying the knowledge about EU law and subsequently processing that knowledge is rather complex an issue. As it has been illustrated, 65 percent of the judges participated in some form of EU law training in the course of the last year.⁷⁷² Nearly 60 percent of those trainings were organized by the National School for Judiciary and Prosecutors. The remaining courses were set up by either local courts and appellate districts or by various academic centres. Only 4 judges declared to have participated in the trainings organized by ERA in Trier.

Importantly, only 22 percent of the judges deemed the courses to be of a high quality and only 26 percent agreed that the offer with regard to the trainings is satisfactory. What is more, two thirds of the respondents agreed that the trainings in EU law are too theoretical and

⁷⁶⁸ That is 112 judges.

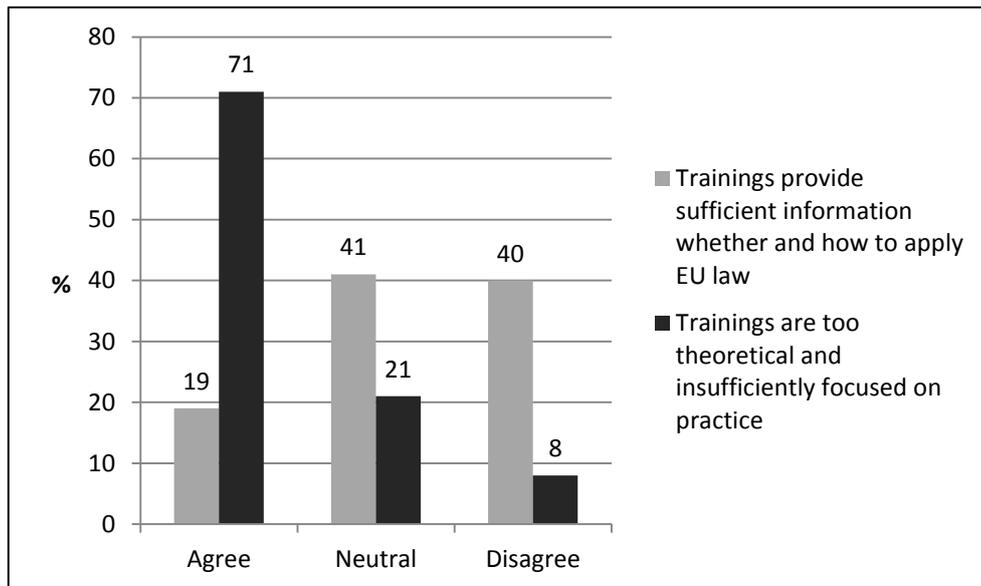
⁷⁶⁹ The ratios of responses concerning consultation with advocates, family, friends and judges in other countries were insignificant.

⁷⁷⁰ And 32 percent did not even know whether there was such a person appointed in their own court.

⁷⁷¹ Of the total number.

⁷⁷² Out of which 49 percent spent up to 10 hours on it (including preparations), 22 percent spent between 11 and 20 hrs, 9 percent spent between 21-30 hrs, 5 percent spent 31-40 hrs, and 15 percent spent more than 40 hrs.

insufficiently focused on practice and only 19 percent agreed that the trainings in EU law provide sufficient information when and how EU law should be applied in a specific case. Answers provided to both inquiries are illustrated below.⁷⁷³



n=306

In response to the question concerning the matters which should be covered by trainings in EU law a high number which amounted to 92 percent pointed to the issue of obligations of national courts with regard to EU law. This finding suggests that the judges are not certain of the tasks which they are expected to fulfil with regard to EU law and frequently they are ill-informed of the situations in which EU law becomes relevant. As much as 35 percent of the group pointed to the most basic matters such as the sources of EU law and its tenets. 73 percent of the surveyed group wish to learn more about EU material law and 64 percent pointed to the EU procedural law. 54 percent of those who directed to the material law of the EU wish to expand their knowledge of EU contract law and 40 percent of consumer protection. One-fourth of the group is interested in the area of labour and social security law and 17 percent in

⁷⁷³ 1 percent strongly agreed and 7 percent strongly disagreed that trainings provide sufficient information on whether and how to apply EU law. 32 percent strongly agreed that trainings are too theoretical and insufficiently focused on practice.

competition law. It does not come as a surprise that judges pointed to those fields of law which they specialize and adjudicate in.

A clear disagreement exists with regard to the question of who should be in charge of giving EU law courses. One-third was of the opinion that only judges should teach EU law but 36 percent disagreed with such a proposition. By and large, the quantitative study reflects that the range of issues which should be covered by trainings is very comprehensive and varies between the most basic aspects of EU law to detailed studies on selected EU material law issues. Likewise, there is no single form of EU law trainings which would be the most preferred one. 3 to 5 days long trainings in the country seem to have most adherents as they were chosen by 41 percent of the group and E-learning is the least supported form with 7 percent of the group choosing that option.⁷⁷⁴

The qualitative part of the study confirmed the quantitative findings. Most of the interviewed judges emphasized that they had followed various trainings in EU law which were organized by different institutions and took disparate forms varying from one day trainings organized by their courts, several days long trainings organized by the School for Judiciary to postgraduate studies organized by different academic centres. It also follows that the quality of the trainings has varied considerably.⁷⁷⁵ Most importantly, judges feel a need to broaden their knowledge in two areas. The first area concerns the obligations EU law imposes on the national judiciary. The second area pertains to specific fields of material law regulated by the European Union which a judge specializes in. The most important objection was raised with regard to the fact that trainings are evidently too theoretical and very rarely capable of providing any information on how EU law should be applied in a specific case. In that sense, the empirical data, both quantitative and qualitative, reaffirmed the observations presented in the previous chapter concerning the positivist, abstract and passive approach to the teaching of law present in Poland.⁷⁷⁶

⁷⁷⁴ 20 percent prefer 1 day long trainings in own courts, 15 percent would like to follow trainings abroad, 17 percent prefer postgraduate trainings.

⁷⁷⁵ From the personal testimonies also follows that occasionally contradictory information was provided.

⁷⁷⁶ See section 3.2 of Chapter 3 and notes 551 and 552.

Judge V says: “As for me, the biggest problem is that the system of trainings is completely other-worldly and anything that they attempt to teach us does not translate to my own practice. Certainly there are some formulas but I do not know how to translate them and apply them in a concrete case (...) After all, it is a common rule of all the trainings: a trainer does not condescend to something as down-to-earth as a local judicial practice”

Judge C says: “The trainings in EU law should foremost cover the issues of material law because that is what matters in practice. And they should take form of workshops where practical issues would be discussed and where we could work on cases from life.”

Judge N when asked what kind of trainings she is need of states: ”In general: start from the basics. This also applies to my colleagues here (...)”

Judge W asserts: ”The trainings are poor. Judges do not enjoy abstract issues, they want to learn things which are linked to their daily practice. But the trainings are really paltry and there are not enough of them. So it all must be accessible and must relate to what we are doing.”

Box 3

Finally, the last point to be made concerns a very pragmatic aspect of trainings which relates to the accessibility of EU law courses and the manner the information about the available courses is disseminated. Obviously, this aspect goes beyond the mere matter of EU law and pertains to the entire system of trainings for a professional judiciary. The attempts of the School for Judiciary to create one, comprehensive state-sponsored system for judicial training have not delivered the desired effects yet.⁷⁷⁷ Besides, there is no one, coherent source of information with regard to trainings and at times the information is not at all provided to the judiciary.⁷⁷⁸ The

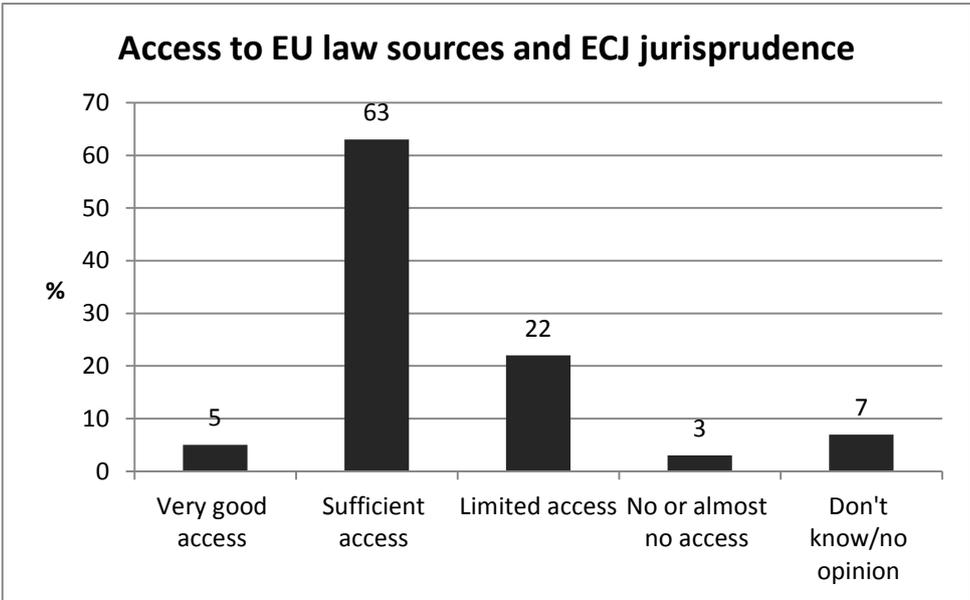
⁷⁷⁷ The way the National School for Judiciary and Prosecutors is organized, managed and operates in practice has recently become a point of a serious concern of the National Council of the Judiciary of Poland which found the present state of affairs unacceptable, for more check the opinion of the Council of 29 July 2010 to be found at <http://www.krs.pl/admin/files/200457.pdf> (last accessed 1 August 2010).

⁷⁷⁸ The National School for Judiciary and Prosecutor did not even have a schedule of trainings for 2010. Scraps of information were available from the official website of the School, some information is occasionally forwarded to the appellate courts which are supposed to disseminate information further. Moreover, various systems of enrolling for the courses exist. All in all, frequently it happens that judges who express the willingness to participate in the courses in EU law cannot find the relevant information and are convinced about inaccessibility of the trainings. The situation improved somewhat in 2011 since the School provided a schedule of trainings for the entire year. The schedule does not foresee trainings in EU law which would be open to civil judges as such, only several opportunities to follow courses abroad at ERA and the European Judicial Training Network. For the 2011 schedule see http://www.kSSIP.gov.pl/info/harmonogram_2011/harmonogram_2011 (last accessed 21 September 2011) and http://www.kSSIP.gov.pl/info/szkolenia_biezace for the current trainings. There are also several trainings in, *inter alia*, the problem of implementation of EU directives, the preliminary ruling procedure, the obligations of national last instance courts with regard to EU law and the judicial methodology in interpreting national and EU law which are financed by the European Social Fund and are organized in the framework of the School, see for instance <http://www.kSSIP.gov.pl/edu/902> (last accessed 21 September 2011).

selection and enrolment processes are inconsistent and intransparent. In addition to that, a number of various, mostly academic, organizations offer their own, frequently paid, postgraduate courses which certainly enrich the range of available courses but at the same time they generate even more fragmentation in the system of training and may entail serious discrepancies in the levels of teaching, its merits and substance. Under the given circumstances, it might be therefore claimed that only those who are truly interested in EU law will eventually succeed in their endeavours to follow a proper training. Others will grope for anything or will, possibly, not embark on searching.

2.5. Access to EU law sources versus language skills of judges

In the survey the judges were asked to assess their access to the sources of EU law, including the jurisprudence of the Court of Justice. From the quantitative part of the study it emerged that 68 percent possess either a good or sufficient access to the sources of European Union law but a considerable number of judges which amounts to 25 percent of the group experience problems in that regard. The graph below illustrates the distribution of the answers.



n=300

The personal testimonies provided additional insights into the problem. It namely occurred that it is not that uncommon that judges experience a lack of or a limited access to the internet which in consequence may hamper a proper access to EU law sources.⁷⁷⁹ The gravest problems arise with regard to the jurisprudence of the Court of Justice though. Many shortcomings in the access to translated case-law of the ECJ were identified during the qualitative part of the study. It has occurred that the jurisprudence preceding the membership is translated in a very fragmentary way and the existent translations are, in the opinion of judges, of poor quality.⁷⁸⁰ It can be also concluded that the language problem is of a twofold nature. On the one hand, there are frequently no proper translations and, on the other hand, foreign languages skills are virtually nonexistent among the judiciary.⁷⁸¹ Similarly to other former ex-communist states, only Russian language was a compulsory element of the educational system in Poland up to the collapse of the Soviet bloc. Next to Russian, it was possible to acquire knowledge of German but English and French were practically non-existent. In the transformation period the possibilities of learning other modern languages were mushrooming

⁷⁷⁹ Each court takes its own responsibility for assuring that judges are offered a proper access to the sources of law. This, in turn, may very much depend on own financial resources of the court but predominantly on its management which is performed by its president. From the qualitative study it followed that situations when the internet access to, for instance, the website of the European Court of Justice is blocked are also present. In general it is however difficult to draw a clear map of the situation in Poland. In the course of the research trips in Poland it has been discovered that the courts in most desolated places might have better access to legal sources than courts in big urban concentrations.

⁷⁸⁰ See Łazowski (2011), p.523 who claims "(...)This "lost in translation" syndrome extended to the pre-accession case law of the ECJ which in Poland was only available in very modest quantities as purely private and academic endeavour. The special edition of the European Court Reports has never materialized and the availability of literally a few selected judgments on the website of the ECJ can be called anything but satisfactory.(...) several comprehensive textbooks available commercially should not replace access to fundamental tools – legal acts and case law (...)"

⁷⁸¹ The problem has also been identified in the European Parliament's Draft Report on the role of the national judge in the European judicial system, 2007/2027(INI), p.15 from which it follows that: "Many judges from "new" Member States, in particular Poland, Slovenia and Hungary, complained that not all ECJ case-law prior to accession had been translated into their language. Several judges from "new" Member States were not aware that any of the *acquis*, and in particular that ECJ case-law existed in their own language. A substantial number of judges from a wide variety of Member States commented on the question of translation of judgments. Many judges expressed concern at the time it took for all linguistic versions of an ECJ judgment or Advocate General Opinion to be available. Numerous judges considered the quality or reliability of translations of Community acts or case-law into their language to be inadequate. A German judge also noted certain discrepancies between linguistic versions of a same Community act." See also Tatham (2010), pp.17-26 who also underscores the issue of the lack of translation and the problematic aspect of the foreign linguistic capacities among Hungarian judges. From the paper it follows that Hungarian judges often translate respective ECJ's case-law on their own. The author also points out that the knowledge of foreign languages results in more openness to EU law and in turn in a more frequent application of EU law.

but foreign languages skills are yet not occupying any prominent place in the legal training curriculum.⁷⁸² By and large, it might be assumed that there are very few judges who are in fact capable of using other language versions of ECJ's jurisprudence and EU legislative acts.

The lack of foreign language skills is not, however, the only reason why judges would be resistant to resorting to other versions of either the case-law of the ECJ or EU legislative acts. As some judges suggested during the interviews, it would not be feasible to rely only on a foreign language version of a judgment/document since such a way of proceeding could, in their opinion, undermine the principles of legal certainty and legitimate expectation. To put it crudely, a decision of a court and the legal basis underpinning should be accessible and comprehensible to the parties to the dispute.⁷⁸³

Judge Y: "First of all, it should be emphasized that the jurisprudence of the ECJ has received a very step-motherly treatment by our legislator. They translated the hard law but they paid a lip service to the case-law. So the jurisprudence up to 2004 actually does not exist in the official Polish version. Taking into account that binding legal rules follow from the precedents of the ECJ you must ask yourself: but how?! How can we convince a judge that she should apply EU law when he even cannot find the specific rule in his mother tongue? It's unpardonable and incomprehensible that they disregarded this aspect."

Judge E: "Unfortunately I am handicapped with regard to foreign languages. I wish I could refer to the jurisprudence of the ECJ but it is mostly not translated. This simply renders a proper and decent adjudicating in EU law matters impossible."

Judge F: "I know that the case-law of the ECJ plays a cardinal role but I do not like referring to it since I do not have access to the translated versions. I am handicapped with regard to foreign languages. Moreover, I cannot know to what extent it is taken out of the context. Some cases are translated and then I read them but I do not apply it because it is not the original version of the case."

Box 4

⁷⁸² For the problem of foreign languages competence of the judiciaries in the former Soviet bloc see for instance Bobek (2006), pp.24-25.

⁷⁸³ The issue of legal certainty and legitimate expectations in situations when there is no access to a translated EU legislation became a point of concern in the case-law of the national administrative courts. Even though the judgment in which the national court set aside an EU Regulation which was not published in Polish was given in a different context and by a court which is not of interest for the present study, it does yet indicate the potential problems attached to the issue. The court argued that applying EU Regulation at stake would undermine the principle of legal certainty as it was possible that addressees had not learnt about the rights and obligations which are put on them by means of the respective Regulation, see case I SA/BD 275/05 of 20 July 2005, voivodship administrative courts in Bydgoszcz. The issue of enforceability of EU measures which are not published in the language of the concerned Member State has finally been decided upon the ECJ in case C-161/06 *Skoma-Lux sro v. Celní ředitelství Olomouc* [2007] ECR I-10841 in which the Court decided that EU legal acts not published in local language are not enforceable against individuals. For more on the problematique of the application of unpublished EU legislation see Bobek (2007), pp.43-80.

With everything considered, for those judges who are eager to resort to EU law, the lack of translated jurisprudence of the ECJ often poses an insurmountable technical obstacle to the proper functioning as a decentralized EU court.⁷⁸⁴ In a nutshell, the application of the precedent of the ECJ cannot take place so long as there are no translations thereof into the Polish language. One will therefore agree with Łazowski who claims that “(...) certainly, it was a paradox. On the one hand, the judges of the new Member States were supposed to transform themselves into EU judges in a very short time. On the other hand, some basic tools were hardly available and one does not have to be a rocket scientist to appreciate the importance of primary sources (...)”.⁷⁸⁵ What is more, such a state of affairs might seriously jeopardize and hinder the participation of the Polish courts in the process of a dialogue with the Court of Justice. As it will be illustrated in the section concerning the functioning of the preliminary ruling procedure, the potential consequences of the *acte éclairé* and *acte clair* doctrines may suffice to deter courts from referring preliminary questions to the ECJ. Taking the foregoing arguments into account it becomes evident that the issue of the access to translated case-law has been so far gravely disregarded and awaits a proper attention on part of the national authorities and the European Court itself.⁷⁸⁶

With regard to the preceding discussion a parallel can be drawn for the problem of resorting to different language versions of EU secondary legislation. From the quantitative results it follows that only 6 judges out of the whole group has ever consulted a different language version of an EU directive.⁷⁸⁷ In view of such a finding, the presented by the Court vision of a judge who reads and compares different versions of EU law, be it a judgment of the

⁷⁸⁴ The most telling instance of how the lack of translations makes the application of EU law excessively difficult in practice is a case originating from a second instance social security court which finally found its end at the Supreme Court as a cassation case. First and second instance courts experienced problems with the terms “the date of the onset of the employer's insolvency” included Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. Only the Supreme Court commissioned a translation of the jurisprudence of the ECJ regarding this problem and found out that indeed the term has been interpreted by the ECJ in a different way than it was commonly interpreted by the national courts. For more see judgment of the Supreme Court of 5 December 2006, II PK 18/06.

⁷⁸⁵ From Łazowski (2011), p.523.

⁷⁸⁶ In this respect it should, however, be observed that the availability of translations of the recent case-law of the Court has substantially improved.

⁷⁸⁷ See the section concerning the indirect effect of EU law.

Court or a provision of a secondary EU measure proves to be unrealistic and illusory.⁷⁸⁸ In the context of the Polish civil judiciary, the multi-lingualism of EU law seems therefore just an abstract concept which does have only a fractional bearing on the daily judicial practice.

2.6. Need to broaden EU law knowledge

The entire analysis pertaining to the aspect of knowledge of EU law reveals the magnitude of problems in each area concerning accessing and disseminating information concerning EU law and gaining, processing and conveying the knowledge of EU law. The lines of evidence should have made abundantly clear that deficiencies in knowledge of EU law exist in all areas and that not only do many judges lack a proper knowledge of EU material law but they also very often do not know whether and how EU law might be relevant for a dispute or how national and EU law correlate and intertwine. With everything considered, as both quantitative and qualitative data suggests many judges end up in a situation when they are either not aware of the fact that EU might be of importance for a specific dispute and they unconsciously disregard EU law or they do not possess sufficient knowledge of EU material law and ECJ precedents that would allow them to resolve the issue correctly and promptly and without much damage for other official functions. In that respect, the disorder in the manner the trainings are organized and the information about EU law is disseminated is undoubtedly worrisome. By and large, it has become apparent that the *iura novit curia* principle may by no means be taken for granted with regard to the Polish civil judiciary.⁷⁸⁹

The foregoing findings are even more magnified and emphasized if seen in the light of the fact that 91 percent of the judges declared to be in need of extending their knowledge of EU

⁷⁸⁸ See also Zirk-Sadowski (2006b), p.23 who claims that “the requirement of recognizing the equality of different language versions of legal text in the Community law is not used by Polish courts. So, it is the reason that the comparative interpretation is rarely used as a method of interpretation of the Polish law.” See also Ballin&Senden (2005), pp. 90-93, based on empirical data, the authors also argue that recourse to other language versions is very uncommon and used only to solve grave interpretation problems. Similarly Paunio (2007), pp.397-398.

⁷⁸⁹ Bobek argues that the problem also applies to Czech Republic and Slovakia. The author puts forward that the amount of EU law and ECJ’s jurisprudence renders the principle virtually unfeasible, see Bobek (2008a), pp.10-12, Bobek (2006), pp.287-289. The author’s observations are not based on empirical evidence.

law and only very few did not find it a requisite.⁷⁹⁰ In a similar vein, 95 percent declared to be willing to participate in the trainings in EU law. Furthermore, as much as 64 percent agreed that trainings in EU law should be obligatory which stresses the necessity of upgrading the EU law knowledge among the judiciary even more.⁷⁹¹ Those results have been confirmed in the personal remarks included in the questionnaire and the interviews. Virtually all judges, including those who deal with EU law on a daily basis and those who do not come across it at all, admitted that they are in a great need of upgrading their EU law knowledge.

Judge No 265 declares: “My knowledge of EU law is not really impressive and there is really nothing to boast about in that regard. I however see the need, or actually a necessity to broaden my knowledge in that field. Yet I don’t have time to do so.”

Judge No 230 states “I propose that EU law trainings are given on a permanent basis, in all possible forms and at all levels of jurisdiction in Poland.”

Box 5

This evidently clear need to broaden the knowledge of EU law underscores the fact that the present situation in that respect is indeed worrisome and leaves a considerable room for improvement. However, there is second side of this coin. The results also clearly show that the judges are aware of the deficiencies in their knowledge of EU law and, most importantly, that they wish to remedy the situation. Therefore, it could be put forward that the significance of EU law is not rejected and its importance for the daily practice is recognized. Those conclusions also indicate that the judges look ahead and anticipate an increasing occurrence of EU law in their daily practice. To substantiate this view the interviewed judges referred to the fact that EU law is at present an integral part of legal studies which subsequently implies that the new generations of judges, attorneys and solicitors is familiar with EU law and will bring it to the courts on a more frequents basis. Undoubtedly, this willingness to broaden the knowledge of EU law should be interpreted as a very positive sign which, on the one hand, indicates that the judges do not reject the significance of EU law for their daily practice and, on the other hand, it also gives hope that the situation will improve in the course of time.

⁷⁹⁰ 8 percent did not have an opinion with regard to that.

⁷⁹¹ And 57 percent agreed that obligatory trainings should take place yearly. It should be reiterated that there is no system of obligatory trainings in Poland, judges are free to choose the trainings and their subjects.

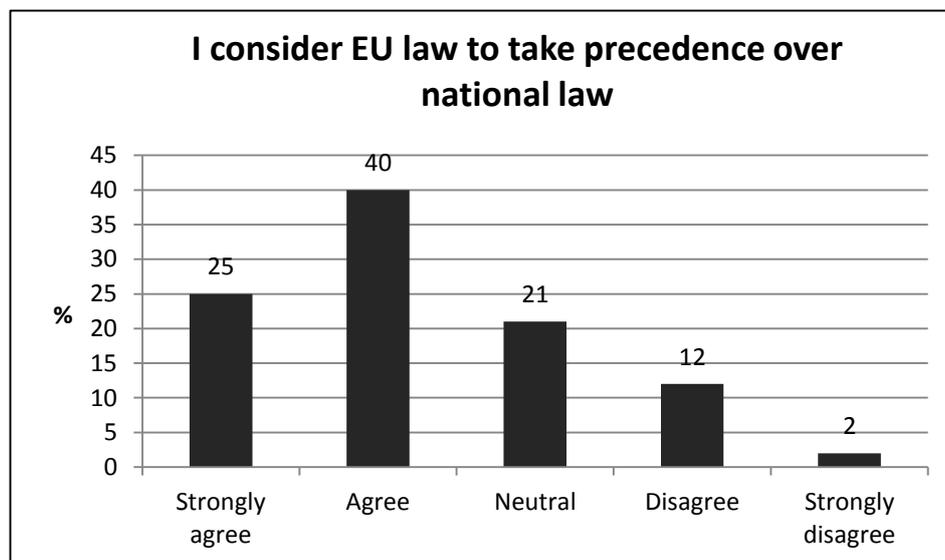
3. Attitudes towards the EU, its law and institutions

One of the aims of this study is to explore how judges perceive the European Union, its institutions and the process of European integration in general and what their attitudes towards and conceptions concerning the legal order of the European Union are. Furthermore, it has also been attempted to examine whether the stance judges take towards the European Union and its institutions might have some bearing on the way they perceive their role as decentralized EU courts and in consequence on the way they function in the European capacity. The following discussion touches upon, *inter alia*, the way judges perceive the principle of supremacy of EU law, the membership in the European Union and its institutions.

3.1. Acceptance of the principle of supremacy of EU law

One of the most significant and absorbing albeit perplexing matters with regard to the functioning of national courts as EU courts is their acceptance of and compliance with the principle of supremacy of EU law. The main question which arises with regard to the principle has been whether national judges accept that European Union law takes precedence over national law and conform to the rule. In the course of the present study it has been discovered that the foregoing inquiry is not as straightforward and that the issue is characterized by various nuances and features which normally do not occupy much room in the academic discourse. Moreover, it has been observed that the principle of supremacy should be seen in correlation with other aspects of judicial application of EU law and foremost with the preliminary ruling mechanism. Arguably, the most important finding with regard to the functioning of the principle of supremacy in Polish civil courts is related to the fact that it, as such, seem to evoke a relatively slight objection and controversy on the part of the civil judiciary. It appears that in total 14 percent of the judges rejected the idea that EU law is supreme to national law.⁷⁹²

⁷⁹² 66 percent of which had no or nearly no (1 case) experience with EU law in the preceding 12 months and 56 percent of which assessed their knowledge of EU law as poor or very poor. None of the judges that declared not to accept the principle of supremacy assessed her knowledge as (very) good.



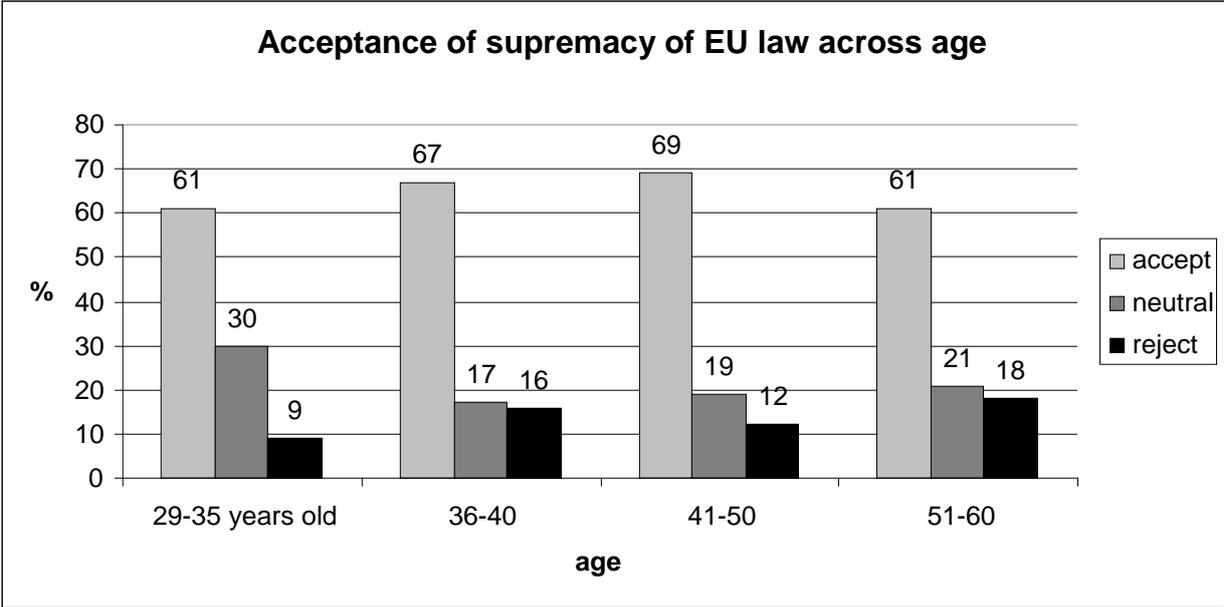
n=289

Further analysis of the quantitative results has shown that in the group which does not accept the principle of supremacy the youngest judges were slightly underrepresented but in general there are no stark differences between the age groups which is visualized in the subsequent graph.⁷⁹³

	accept	neutral	reject	totals
age				
29-35	42	21	6	69
36-40	47	12	11	70
41-50	72	19	13	104
51-60	21	7	6	34
totals	182	59	36	277

Table 2

⁷⁹³ The oldest group of the judges excluded from the analysis.



n=277

It is readily apparent that the majority of the judges which amounted to 65 percent of the group accept the principle. And yet, the number of judges who took a neutral stance to supremacy leaves much leeway for interpretation and evokes further questions. Also, the data following from another inquiry leaves one somewhat perplexed. It occurred that 22 percent of the group agreed that a national judge should give precedence to the judgment of the national Supreme Court and/or Constitutional Tribunal if the judgment was in collision with a judgment of the European Court of Justice.⁷⁹⁴ The qualitative study provided some insights into this issue which, however, do not seem fully exhaustive and satisfactory. One of the grounds which might explain the high rate of neutral answers is scant experience with the application of EU law and, consequently, difficulty with assessing how the principle operates in practice.⁷⁹⁵ The other possible explanation has its roots in the stance the Constitutional Tribunal has taken towards the principle which was discussed in Chapter 3.⁷⁹⁶ The remarks shared in the questionnaires and the qualitative part of the study revealed that the judgments of the Tribunal might indeed take their

⁷⁹⁴ 50 percent disagreed and 28 expressed a neutral stance.

⁷⁹⁵ 52 percent of those that took a neutral stance had no or nearly no (max 1 case) experience with the application of EU law in the last 12 months.

⁷⁹⁶ See section 6.1 of Chapter 3.

toll and influence the manner judges accept and conceive of the principle. The fact that the Tribunal, on the one hand, opted for the absolute supremacy of the national Constitution in case of collision with EU law but, on the other hand, it agreed with the principle of supremacy of EU law in situations when national sub-constitutional law is incompatible with EU law seems to render taking an unequivocal position towards the principle difficult.⁷⁹⁷

Judge X: “In my opinion the national constitution takes precedence. In my system the constitution is absolutely the supreme legal act. EU law may take precedence above any other sub-constitutional legal acts. Anyway, this discussion is pointless since a collision between the Constitution and EU law is impossible on the level of a first instance court. I cannot see how this can bear on my own practice.”

Judge V: “I think that our constitution takes primacy. It is my own feeling yet confirmed by the Constitutional Tribunal. In my opinion it also follows from the Constitution itself that it is the primary law.”

Judge A: “I know the principle and I accept it. I have not dealt with an issue of conflict between national constitution and EU law and I’d rather not find myself in such a situation. I am capable of understanding why EU law takes precedence but how can I explain that to the parties to the proceeding? The system is so blurred and so unfunctional.”

Judge No 329: “The ECJ has an exclusive competence to interpret EU law and EU law takes precedence over national law, but not the national constitution.”

Box 6

Leaving apart those who either reject the principle of supremacy or take a neutral stance towards it, it follows from the personal testimonies and a multitude remarks provided to anchoring vignettes that the reasons of the acceptance of the principle of supremacy of EU law are in most instances very legalistic and formal in nature and boil down to the legal argument, which were illustrated in the previous chapter, that the national Constitution recognizes the primary position of international law over national statutory law and so do the judges.⁷⁹⁸ As the qualitative data shows, the normative legitimacy of EU law follows from the fact that Poland by entering the European Union consented to giving EU law the supreme position in the national legal order.⁷⁹⁹ In that sense, the data suggests that those judges who claim to conform to the

⁷⁹⁷ On the respective jurisprudence see the section 6.1 of Chapter 3.

⁷⁹⁸ See section 6.1 of Chapter 3.

⁷⁹⁹ For more evidence see for instance Chapter 5, section 2.1.

principle simply take it for granted and believe in legitimacy and authority of EU law. Yet, the acceptance of and compliance with the principle of supremacy seem quite theoretical and abstract, i.e. the judges reiterate the rule, figuratively speaking, like a *Buddhist mantra* but are not able to give a practical shape to the principle.⁸⁰⁰ The qualitative data seems to suggest that the foregoing follows from the fact that the supremacy discourse does not occupy much space in the practice of Polish civil courts. This in turn implies that the principle remains a somewhat meaningless and elusive notion to the overwhelming part of the group.

The seldom occurrence of the supremacy principle in the daily practice of civil courts might be explained by several grounds. First of all, it is necessary to observe that from the qualitative part of the study it followed that the judges interpret the principle of supremacy of EU law very tightly as the obligation to disapply national provisions if those are at variance with directly effective provisions of EU law. In that sense, supremacy does not exist without direct effect. Such stance has profound consequences for private law courts. As illustrated in Chapter 3 the process of implementation of EU directives in the area of private law in many instances took the form of a literal transposition of the concerned EU directives⁸⁰¹ which implies that the instances of explicit incompatibility are nearly impossible. It should also be kept in mind that an overwhelming number of civil cases concern horizontal situations to which the principle of direct effect (of directives) is not applicable. All in all, in purely horizontal situations the principle of supremacy would not, crudely speaking, be applicable.⁸⁰² Second, from the qualitative data it follows that judges seem to take for granted the good will of the legislator and believe that he has done anything to correctly implement EU law into the national legal system. In a similar vein, many judges are of the opinion that the task of eliminating the instances of incompliance of national law with EU law rests on the national legislator. Such a

⁸⁰⁰ This may also be concluded from the remarks judges gave to the anchoring vignettes.

⁸⁰¹ See section 5.1 of Chapter 3 and note 619.

⁸⁰² The foregoing does not imply that there are no situations whatsoever when supremacy of EU law would be at stake. In the context of cases pertaining to social security or employment, one of the parties to the dispute, for instance the Social Insurance Institution, local authorities, public healthcare and public education institutions, is mostly interpreted as an emanation of the state which in turn may involve the principle of direct effect and in consequence that of supremacy. Social security and employment law chambers judges are therefore much more likely to deal with direct effect and supremacy principles than other judges. This is also reflected in the case-law of the Supreme Court concerning EU law, in a considerable number of cases the dispute was taking place between individuals and social insurance bodies or individuals and public health care institutions. See for instance judgment of 6 June 2006, I PK 263/05. This has been confirmed in the qualitative phase of the study.

stance is a reflective of the national doctrine and the place of the judiciary vis-à-vis the lawmaker in the national legal system in accordance with which the law is an instruction established by the sovereign which must be followed by the courts.⁸⁰³ Put differently, courts are to resolve disputes and apply the binding law and are not to conduct judicial review of national legislation and scrutinize, make or amend the laws. As explained in Chapter 3, from the normative point of view, the power to review the constitutionality of legal instruments is namely reserved for the Constitutional Tribunal. The empirical, both quantitative and qualitative, data confirms that the *Montesquie's* maxim referring to a judge as to the *la bouche de la loi* or a *Subsumptionsautomat*⁸⁰⁴, that is to say a passive representative of the lawmaker who mechanically applies the law seem to still have a solid standing in the Polish legal environment.⁸⁰⁵ In that sense, it may be claimed that for many judges the potential *empowerment* through EU law proves to be only an additional, unwanted and burdensome task. Many judges do not necessarily intend to exercise the job which is supposed to be practiced by the legislator and therefore they may be somewhat anxious about being confronted with the principle of supremacy in practice.

Judge No 231: "In principle I am of the opinion that incompliance between national and EU law should be eliminated by the legislator. We should not forget that in judicial cases we are dealing with a set of norms which should not be put into question each time that, for instance, the ECJ decides something else."

Judge No 235: "I think that the legislator should meet the obligation of adjusting national law to EU law."

Judge C: "I have dealt with cases in which the parties argued the incompatibility of the national provisions with the EU consumer directives but in principle the new statute seems to implement it correctly. At least I think that the implementation should not be called into question. So it is enough to refer to the national law."

Box 7

⁸⁰³ See Zirk-Sadowski (2005), p.111. In that sense, the judicial role of a civil judge in Poland very much resembles that of the French civil judge who "is nothing more than a passive agent of the legislature, mechanically generating required judicial decisions by plugging fact scenarios into the all-encompassing matrix of the Civil Code", see Lasser (2004), pp.60-61, 166-202.

⁸⁰⁴ See Mańko (2005), p.534.

⁸⁰⁵ This has also been pointed out in the literature as one of the obstacles to the full integration of the Polish judiciary in the process of legal integration in the EU, see Łętowska (2005), pp.3-10, Wyrozumska (2000), pp.222-223. Similarly Bobek observes that Czech judges "perceive themselves as docile interpreters of the will of the legislator", see Bobek (2008b), p.107.

In their responses to the subsequent question, 69 percent of the judges agreed that the principle of supremacy is a necessary pre-condition of the existence of the European Union legal order.⁸⁰⁶

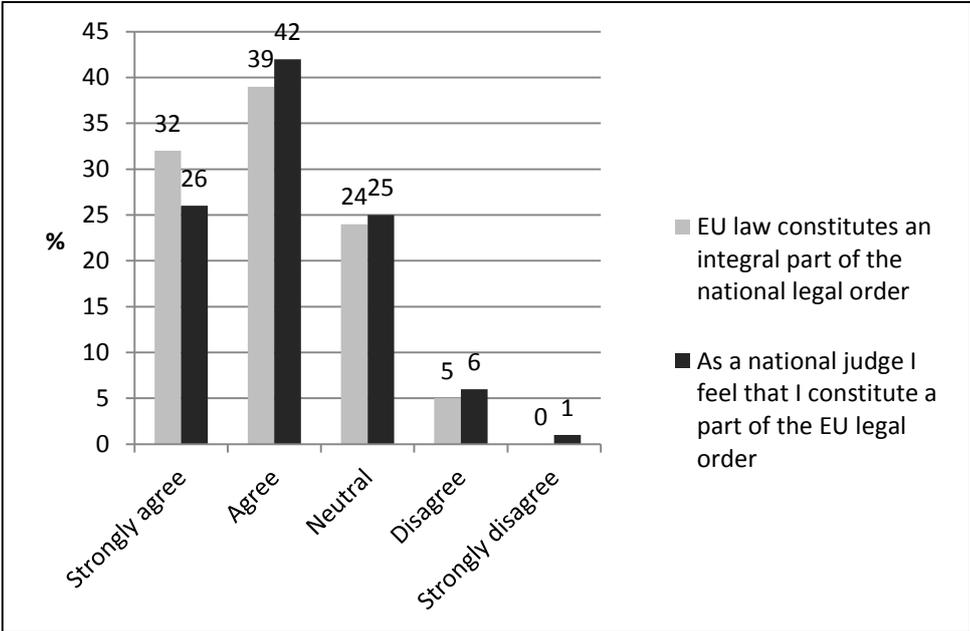
The foregoing synopsis demonstrates that from a theoretical point of view the civil judiciary does not seem to experience grave problems with accepting the principle of supremacy of EU law, albeit the situation is marked by some perplexity and is far from being unambiguous. The rejection of the principle of absolute supremacy of EU law does not seem to have further consequences for the acceptance of the principle in case of collision of national statutory law with EU law though. And yet, it might be misleading to assume that the principle does not elicit much concern among the judiciary. It has namely emerged that due to the lack of supremacy discourse in the civil courts, giving a practical form to the principle and its enforcement might possibly pose a considerable problem to the judge.

3.2. Conceptions concerning the EU legal order

Next to the attitudes towards the principle of supremacy of EU law the conceptions judges share about their place of EU law in the legal system and the role judges play in the process of enforcement of the law of the European Union have been examined. 71 percent of the group were of the opinion that EU constitutes part of the national legal system and there were few judges who would disagree with this statement. Likewise, 68 percent of the group declared to feel that they are part of the EU legal order.

⁸⁰⁶ 23 percent took a neutral stance and 8 percent disagreed with the statement.

Polish Civil Judges versus the EU Legal Order: Knowledge, Experiences and Attitudes

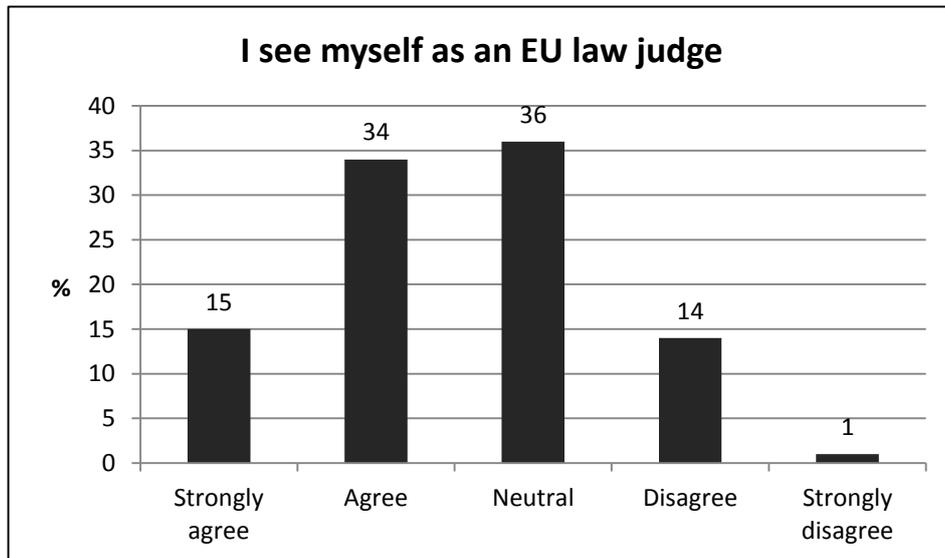


n=290

Interestingly, fewer judges see themselves as EU law judges. This result may seem somewhat odd if seen in the light of the foregoing graph but as the further statistical analysis and qualitative data seem to suggest it could be explained by the seldom experience with the application of EU law.⁸⁰⁷ Importantly though, 79 percent thought that the application of EU law is an important task of the national judge.⁸⁰⁸

⁸⁰⁷ 66 percent of the group that took a neutral stance had no or maximum 1 EU law case in the last 12 months. 67 percent of those who disagreed had no or maximum 1 EU law case in the last 12 months. In the group that agreed 36 percent had no or maximum 1 EU law case in the last 12 months.

⁸⁰⁸ 18 percent took a neutral stance and 3 percent disagreed.



n=289

Judge N when asked how she perceives the new role which is put on her by means of EU law states: “It is something that we should not question or discuss (...) I do not see as good or bad, it is the law and that’s it, I have to apply it. Another thing is that we are simply not prepared to do so.” When asked whether she feels that she is part of the EU legal system: “Well yeah... (laughing) . It is all about your skills or actually the lack thereof.”

Judge C when asked whether she thinks that EU law is an integral part of the legal system declares: “Well, the last training made me realize that indeed it is part of the our legal system, albeit we are so much embedded in our national law that it is priority for us. If I had to spontaneously answer the question what kind of judge I am I would say I am a judge of a Polish court.”

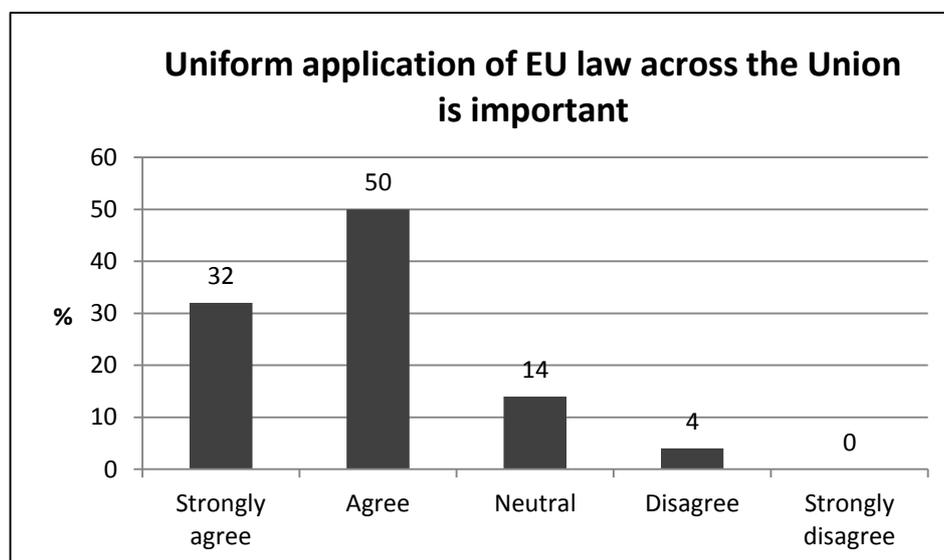
Judge D when asked how she sees the place of EU law in the legal system states: “It goes without saying: it is part of our national law; but I am afraid that I am in the avant-garde in that respect.”

Judge G when asked whether he feels he is an EU judge says “It is still very abstract to me, I am rather ambivalent about it; it is not a living law (...)“ later on he adds however that “EU law is obviously an integral part of our law. That is natural. It is like that in the Treaty, isn’t it? It is more or less coherent but in the end it is one, integral thing.”

Box 8

As it was mentioned in the context of the previous sections, the coherence and uniformity of the legal system(s) occupy paramount positions in the hierarchy of the judicial principles. In the quantitative part of the study, an overwhelming number of judges were indeed of the opinion that the uniform application of the European Union law in all the Member States is important.

The importance of generating coherence across the legal system(s) has also been confirmed in the remarks given to anchoring vignettes and the qualitative part of the study.



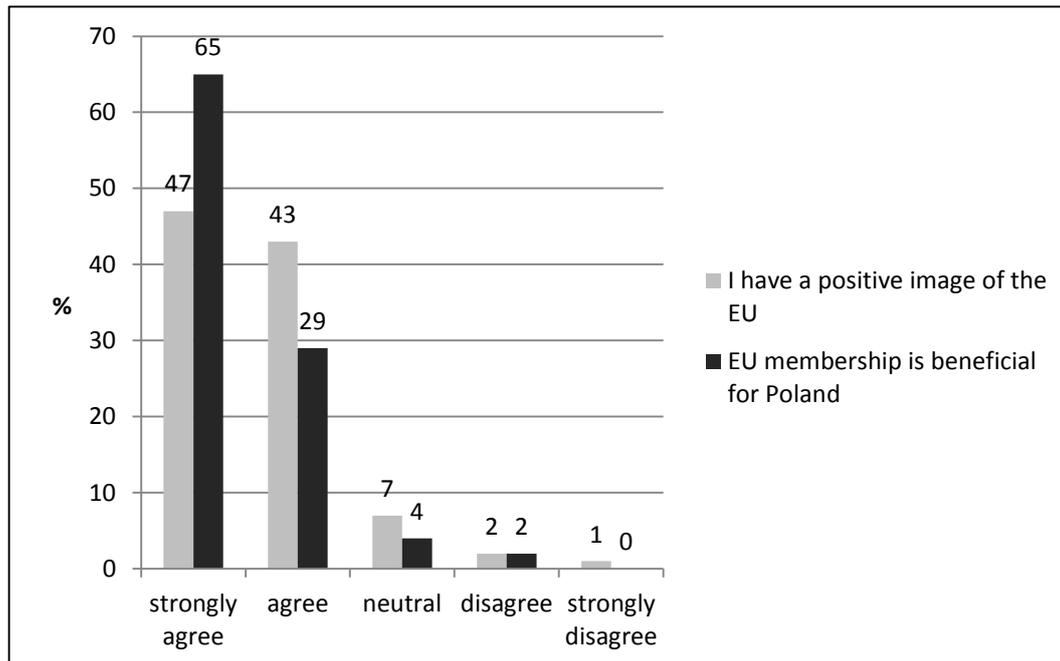
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3.3. Views on Poland's membership in the European Union

The results concerning the conceptions regarding Poland's membership in the European Union and the general picture of the EU are unambiguous and straightforward. Polish civil judges are definitely pro-EU and the proportion of judges being euro-skeptic is virtually insignificant. As much as 94 percent of the group see the membership of Poland in a positive way and slightly fewer – 89 percent - have a positive image of the Union.⁸⁰⁹ The following graph reflects the distribution of the answers.

⁸⁰⁹ Those results show that the Polish civil judge is somewhat more enthusiastic with regard to the European Union than an average EU citizen. It occurs that 53 percent of Europeans perceive the membership in the EU as a positive thing and more specifically 65 percent of the Polish citizens see the membership as a positive thing. 56 percent was of the opinion that their country benefited from the EU membership, the ratio for Poland was higher and amounted to 73 percent. Accordingly, 45 percent of Europeans and 54 percent of the Polish citizens have a positive image of the EU. For the data see Eurobarometer (2010), pp.130, 134 and 174-175 respectively.

Polish Civil Judges versus the EU Legal Order: Knowledge, Experiences and Attitudes



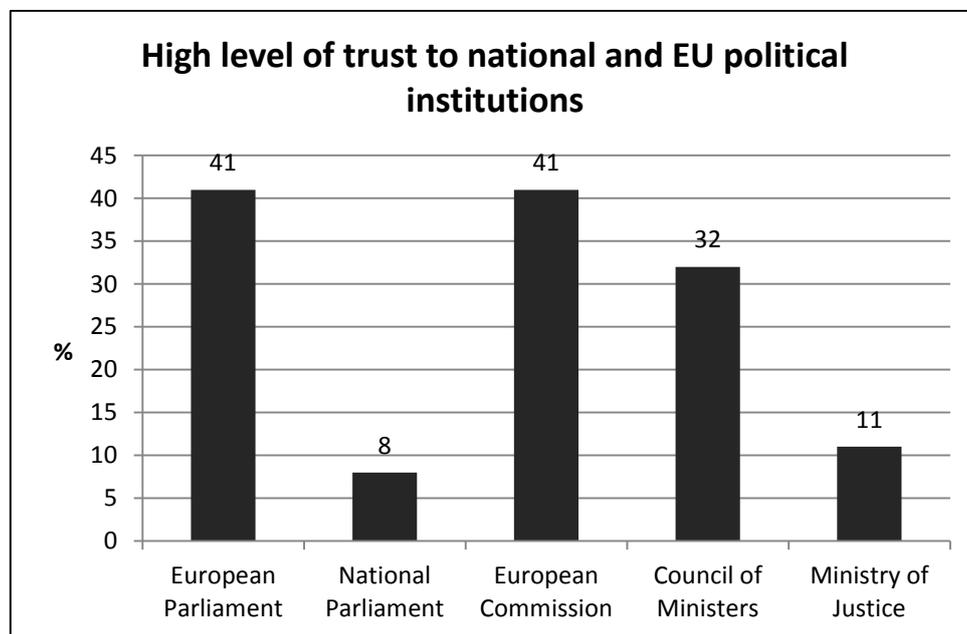
n=293

The above findings were confirmed in the qualitative part of the study. The membership in the European Union is associated with, *inter alia*, the economic growth, open borders, freedom to travel freely and the internal market which the country and foremost its citizens can greatly benefit from.⁸¹⁰ It is yet necessary to acknowledge that the interviewed judges expressed somewhat more concerns and reservations with regard to the European Union seen as an international political organization and its functioning in practice. It should be however emphasized that despite some objections concerning the EU, its institutions and the manner the whole system functions, in the opinion of the respondents the beneficial aspects of the integration processes outweigh the possible negative consequences thereof.

⁸¹⁰ Which in turn very much overlaps with the conceptions concerning the EU the ‘ordinary’ citizens of the European Union have. In accordance with the Eurobarometer (2010), p.124 “For more than four out of ten Europeans, the European Union represents first and foremost the freedom to travel, study and work anywhere in the twenty seven Member States.” It also occurs that the freedoms are more appreciated by people with a higher education level, see p.128.

3.4. Trust in national and European political institutions

The assessment of the level of trust to the particular EU institutions juxtaposed with the level of trust to the national authorities delivered very absorbing results. The most striking observation follows from the fact that the Polish judges reveal much higher level of trust in the political institutions of the EU than in the national parliament and the Ministry of Justice which administers the functioning of the national courts.⁸¹¹



n=292

At first blush, those are seemingly paradoxical findings which might be interpreted in manifold manners. It is yet equally important to observe that the level of trust in EU institutions, despite of being emphatically higher than that in the national political bodies, cannot be, as a matter of

⁸¹¹ As the study did not pay attention to the possible background of those results any explanation is necessarily conjectural in nature. The potential causes of those results might relate to the whole spectrum of factors such as, inter alia, historical developments in Poland and the impact of the communist rule on the judiciary which at that time was just one of the tools at the hands of the political elite used to enforce the socialistic objectives, political turmoil after the collapse of the communistic regime, more present developments concerning the practice of administrative supervision of the Ministry of Justice over the courts and the questions of independence and impartiality and finally the aspects attached to the working conditions but foremost the relatively low salaries in the Polish judiciary.

fact, called high as such since it oscillates between 30 percent and 40 percent.⁸¹² What is more, a gross number of judges which accounted to approximately 50 percent of the group took an indifferent position towards the EU institutions.⁸¹³ This result might indicate that judges are either not knowledgeable of what the particular institutions are in charge of or they are simply not interested in them.

The principles of good governance such as transparency, participation and better regulation to name just a few, have also been touched upon in the interviews. The judges have subjected the institutions of the European Union to much criticism which mostly pertained to the fact of overgrowth and remoteness of the EU machine, red tape, procedural complexity but foremost the overregulation and excessive complexity of legislation.

Judge X: “You know, the law is a source of income for multitude of people so for them it is definitely favorable. But the scope of it is just devastating, no one is capable of embracing it. This is obviously a very negative development for in most instances they just split hairs and search for rules in simple, straightforward situations, they multiply provisions which only pervert any logical approach to normal functioning. If you have a simple situation and in order to resolve it you must approach a group of specialists then it is outrageous, isn’t it? (...) Anyway, the institutions of the EU can perfectly deal with this even without citizens. They have created a closed enclave and do not need any input from outside to continue their functioning. ”

Judge K: “There is so much of it! Who is going to read that all? And the whole jurisprudence, how can one ever embrace it?!”

Judge W: “Of course it’s a huge body of law but I am of the opinion that it’s the reality of the present times. Our national law is also very excessive. It has become standard thinking that we must regulate any possible issue.”

Judge G:” The more law the worse. If you start to regulate all realms of life which should never be touched upon then you are very wrong. In that sense, the direction the EU is taken is wicked. You cannot regulate everything since it means closing in a vicious circle of positivistic law and this can only lead to degeneration and Orwell’s *Animal Farm* (...) You mustn’t normalize actual states of nature! It’s absurd.”

Judge F: “Yes, we definitely face a process of inflation of legal regulation in the EU. They try to regulate too many spheres of social relationships. Is it right? It does not easily lend itself to a straightforward assessment. It is yet possible to establish a system of law, look for instance the code of Napoleon, which would be universal enough and would not have to pertain to any single

⁸¹² In that sense the extent of trust to the institutions of the Union presented by the judges is only very slightly lower than that presented by the average European citizens. It follows that in Autumn 2008, 51 percent of Europeans and 52 percent of the Polish citizens, trusted the European Parliament and 47 percent of Europeans and 47 percent of the Polish citizens trusted the European Commission, see Eurobarometer (2010), pp.165-167.

⁸¹³ 49 percent with regard to European Parliament, 52 percent with regard to European Commission and 58 percent with regard to the Council of the EU.

aspect of social life and which would leave considerable leeway for interpretation.”

Judge V: “The amount of EU law regulation makes one’s hair rise! It is definitely harmful since the problem of finding the relevant provisions becomes very evident. The scope of this law has achieved such an extent that I heard from my friends working in the advocacy that they use the arguments of EU law just because the judge hearing the case would not be capable of finding the provision at issue!”

Judge O: “My motto is the less (regulation) the better. It is just impossible to apply it all. It is easily said ‘iura novit curia’ but the ignorance of the law has its roots in the nature of that law, which, as all of us can see, the way it is...”

Box 9

From the quantitative and qualitative results it yet followed that that the functioning of national political institutions has been subjected to much more devastating criticism.⁸¹⁴ This is however an issue which cannot be expounded here in more detail. Suffice it to say that from the qualitative part of the study it follows that the personal attitudes of judges towards the European Union and its political institutions but also the national legislator do not seem to bear on the way the judges function in their professional capacity and apply the law. Arguably, the overwhelmingly positive stance towards the EU and the prevalent negative attitude towards the national legislator would, otherwise, imply much more eager engagement with EU law on part of the judiciary and arguably the rejection of the national legal sources, which is, as it will be shown in the following sections, not the case. Likewise, it could be conjectured that the judges would frequently resort to the procedure of the preliminary ruling to the ECJ. In a similar vein, the potential democratic deficit in the Union might be considered a problem by judges but it does seem to significantly affect the way judges approach EU law. This finding seems to be suggested by the quantitative results. 6 percent of the group declared to apply EU law with reluctance due to the democratic deficit in the Union whereas as much as 63 percent disagreed with the statement.⁸¹⁵ All in all, the whole debate pertaining to the level of confidence to the EU and its institutions, albeit very absorbing, comes down to the conclusion that the Polish judiciary does endeavor to distance itself from any political discourse and does not seem to condition the application of law on their political inclinations and aversions. The qualitative

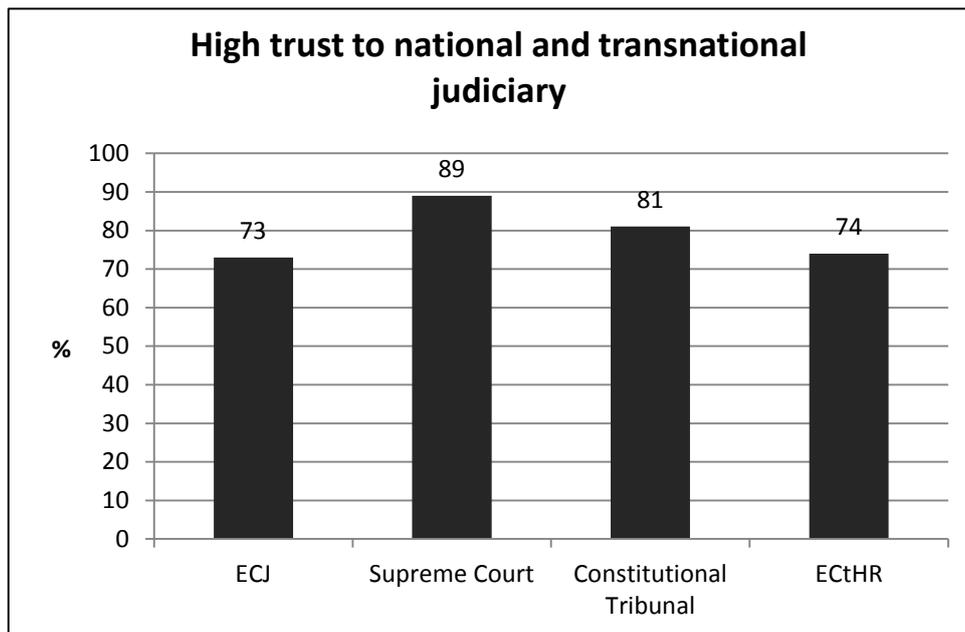
⁸¹⁴ The most important reason of criticism follows from the fact of disregarding the demands of rising the salaries in judiciary and improving the work conditions, not addressing the problem of the workload and efficiency in a proper way and many concerns about the attempts to encroach on the independence of judiciary.

⁸¹⁵ 30 percent took a neutral stance, n=289.

results seem to indicate that the rule of law and the principles of judicial objectivity, independence and impartiality preponderate other concerns.

3.5. Trust in national and transnational judiciary

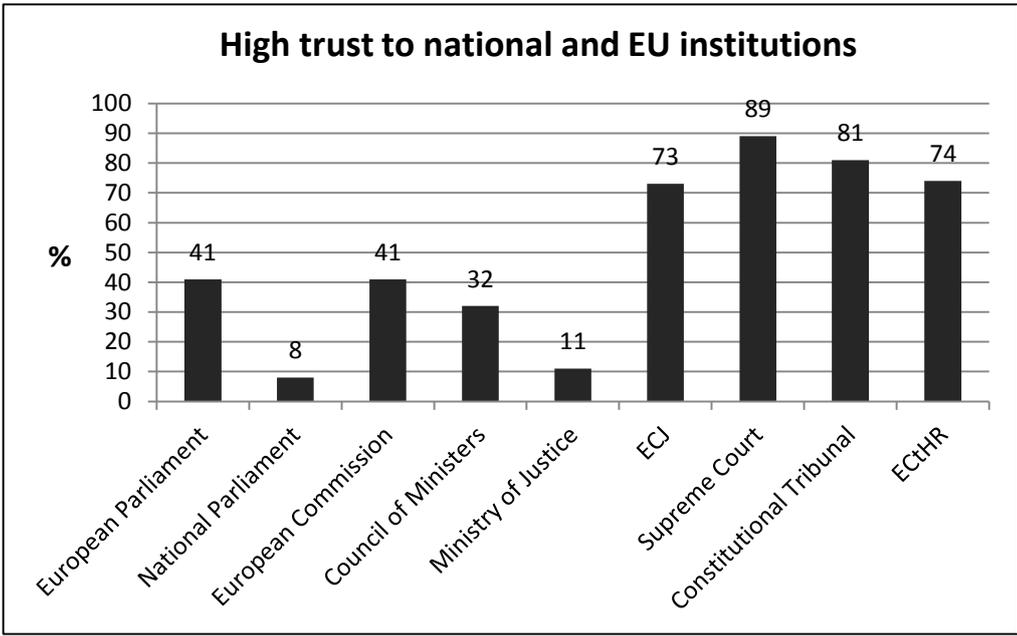
In view of the preceding section the level of trust in the national and EU judicial bodies would seem a more significant aspect for the functioning of national courts. The following graph illustrates the distribution of answers concerning the trust in the national and transnational judiciary.⁸¹⁶ By and large, the Supreme Court enjoys the highest level of trust (and the lowest level of distrust) among the judges. As it stands, the national highest courts receive somewhat more trust than the Court of Justice and European Court of Human Rights.



n=292

⁸¹⁶ 22 percent took a neutral stance and 5 percent had (very) low trust to the ECJ, 10 percent took a neutral stance and 1 percent had low trust to the Supreme Court, 13 percent took a neutral stance and 6 percent had (very) low trust to the Constitutional Tribunal, 21 percent took a neutral stance and 5 percent had (very) low trust to the ECtHR.

Equally important to notice is that the level of distrust to the international judicial bodies fluctuates around 5 percent which again might indicate that the rest of the judges who took a neutral stance to the Court of Justice and ECtHR could not directly see the relevance of the bodies for their practice.⁸¹⁷ Arguably, the most important finding relates to the fact of a decidedly higher trust to the judicial bodies if confronted with that to the political institutions. This can be deduced from the next graph which collates the entire set of the results.



n=292

The trust in the Court of Justice of the European Union is the most heavyweight concern in the present analysis. Even though the EU judiciary enjoys a relatively high level of confidence it should be emphasized that during the qualitative part of the study several judges did express some reservations as to the functioning of the Court. The problem of judicial activism, output legitimacy of judge-made law and the extensive use of the teleological method of interpretation but also the length of the proceedings at the Court have proven to be prime concerns and the major points of criticisms among the judges. Indeed, in the quantitative part of the study 22

⁸¹⁷ 22 percent and 21 percent took a neutral stance to respectively the Court of Justice of the EU and the ECtHR. 12 percent and 13 percent took such a stance with regard to the Supreme Court and the Constitutional tribunal.

percent of judges did agree with the statement the ECJ adapts too active a role when it interprets the law of the European Union whereas as much as 64 percent took a neutral stance and 14 percent disagreed with the statement.⁸¹⁸

Judge H: “ECJ creates new, in its own opinion desirable, social phenomena and that is all done by few people who are not controlled whatsoever. What is more, they even don’t observe the standards they have once made. They expect from us but they themselves are not capable of doing it. The ECJ has too much power and cannot say what is in its own competences. They make abuse of it and none can negate it so they go on. It is undemocratic (...) Those are law professors and that’s the problem. They are in their own enclave and have nothing to do with reality. An elite which does what it wants.”

Judge A: “I dislike this manner of adjudicating where they create legal rules and principles in situations where there is no legal basis for it. The ECJ makes law and that is alien to my way of perceiving the role law plays in general. A court applies the law, it mustn’t make the law. I know the arguments of the Court why they do it but I do not agree with them. So you suddenly discover that there is something which in fact is not there.”

Box 10

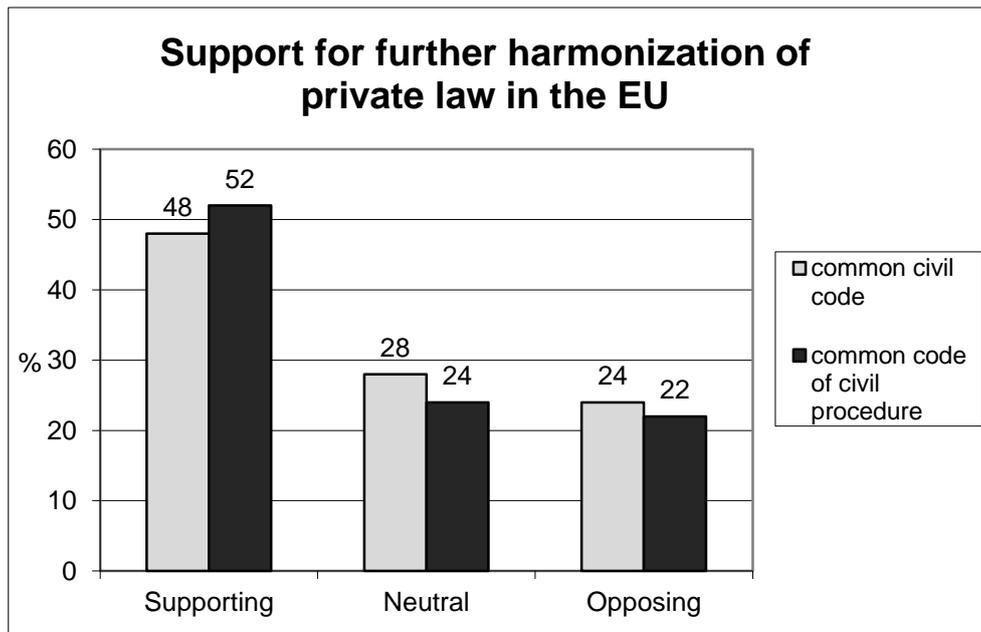
Importantly though, those judges who were critical about the activism of the Court admitted that their position towards the ECJ should not, in principle, influence the practical application of their judgments. The obligation to observe the rule of legality, the principle of supremacy of EU law and the necessity to ensure uniformity and coherence of jurisprudence proved to be absolute values for the judges. However, as the following chapter will illustrate, there is some room for exercising discretionary powers in the context of judicial application of ECJ’s judgments which might have bearing in situations when a judges does not agree with a view presented by the Court in its judgment.

3.6. Attitudes towards further harmonization

Having observed the way judges view the EU law and its place in the entire legal order it is interesting to examine the attitudes judges have towards further process of harmonization of law on the EU level which might have taken a form of one common civil code and code of civil

⁸¹⁸ n=296

procedure. The results revealed a clear dichotomy in the group but those supporting this form of harmonization evidently outnumbered the opponents. In the course of the qualitative study the judges also expressed mixed feelings with regard to further harmonization of national laws.



n=288

Those results which should be seen in the light of the prior findings yield themselves to various interpretations. First of all, they seem to suggest that the Polish civil judge is not strongly attached to the present system of law. This finding is not surprising as it can be explained with the tremendous alterations the national sources of law have passed through in the last decades. As observed by Mańko “Polish culture of private law does not have a ‘unique’ or ‘original’ character when compared to other continental systems of private law.”⁸¹⁹ The constant change across all branches of law and multiplication of its sources has not allowed to become attached to any kind of law. Moreover, as it has been observed in Chapter 3, the process of fragmentation of private law in Poland which has been intensified by the impact of EU law on the national legal sources has reached a stage where we can no more speak of a coherent system, not to

⁸¹⁹ See Mańko (2008), pp.135-136, see also Mańko (2007), pp.83-103.

mention a unitary one.⁸²⁰ In addition to that the snippets of EU law and the terminology employed therein do not easily fit in the national law.⁸²¹ The qualitative data suggests that in the opinion of the judges, the thick of provisions, regulations, legal acts, jurisprudence, norms and principles dangerously undermines the principles of legal certainty on part of both the judiciary and the individuals at stake. All of the foregoing seems to justify the relatively high support for one, common, coherent and united civil code which could greatly facilitate the daily life of a judge. Also, as both parts of the empirical study have shown, the intricacies judges experience with the EU regulations relating to the transnational judicial cooperation between the courts in civil matters which are applied on an increasingly more frequent basis explain why one code of civil procedure binding across the European Union gains even more adherents. The fact that the majority of the Polish preliminary references originating from the civil courts pertain to the issues of cross-border judicial cooperation might indicate the significance of the problems attached to the issue.⁸²² The introduction of such a general tool of harmonization as a common civil code would, however, mean a revolutionary change in the daily practice of the courts which, arguably, would not be feasible.

4. Experiences with resorting to and applying EU law

Having discussed the issue of knowledge of EU law among the civil judges and their attitudes towards and conceptions about the legal order of the EU, it is necessary to turn to the problem of the factual experiences with the application of Union's law in the daily judicial practice. The subsequent section visualizes the impact on and significance of EU law for the daily practice of Polish civil judges but also the feasibility of the specific mechanisms of the application of EU law.

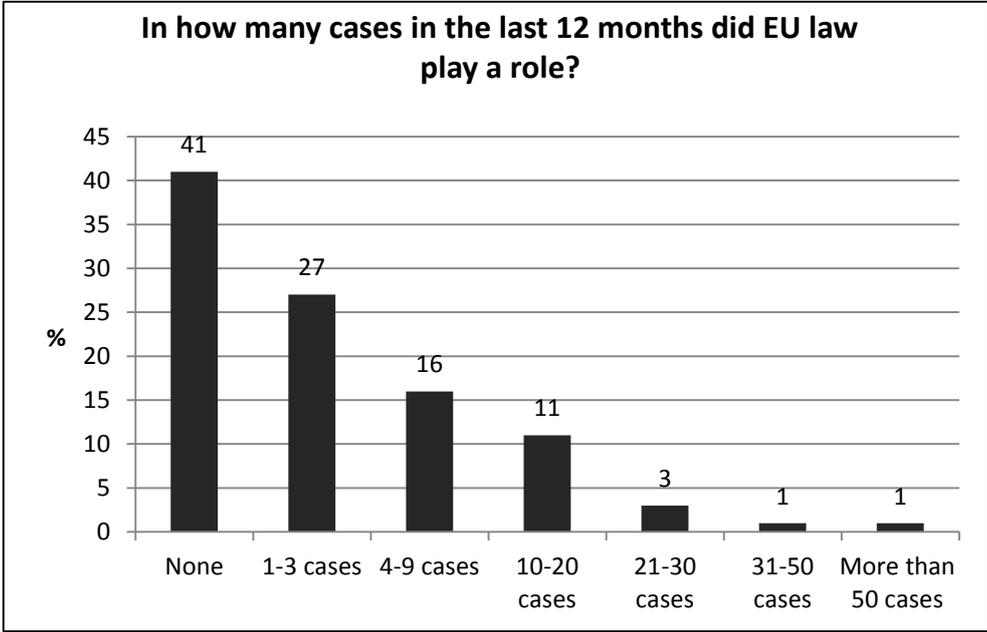
⁸²⁰ See section 5.1 of Chapter 3.

⁸²¹ See section 4.5 of this chapter.

⁸²² See section 4.4 of this chapter.

4.1. General presence of EU law in the daily practice of Polish civil courts: *much ado about nothing?*

The analysis preceding this section should have already made clear that Polish civil judges have a rather scant experience with resorting to and applying EU law. Indeed, from the empirical data it follows that the relative impact of EU law on the functioning of the courts has so far been fairly limited. According to the responses, 41 percent of the judges who participated in the survey have not dealt with any case involving EU law in the last year, 27 percent have dealt with 1-3 cases in which they resorted to EU law and 4 percent dealt with more than 20 cases involving an EU law aspect.⁸²³ The other essential point to note is that from the inquiry concerning the preliminary ruling procedure which was included in the questionnaire it follows that approximately 40 percent of the judges have not ever dealt with any EU law issue in practice. The following chart illustrates the numerical ratio of cases comprising EU law elements in the preceding 12 months.



n=307

⁸²³ Under the notion of EU law aspect it was understood: a direct reference to or an application of EU law source such as for instance EU Treaties, directives, regulations or jurisprudence of the ECJ.

From the subsequent statistical analysis it has been concluded that the occurrence of EU law takes the highest rate in company law chambers. 82 percent of company (commercial) law judges declared to have dealt with EU law in the last 12 months. The employment and/or social security judges deal with EU law to a much lesser extent (60 percent) and civil judges occupy the last position in that respect (50 percent).

The foregoing figures must be interpreted in the context of the absolute numbers of cases judges are confronted with yearly. From the quantitative results it follows that nearly 55 percent of the judges dealt with 400 and more case in the course of the last 12 months. The qualitative phase of the study showed that the numbers in some instances exceeded 1500 cases per annum.⁸²⁴ The statistical records of the Ministry of Justice are also very telling in that respect since they show a sharp increase in the number of cases year by year.⁸²⁵ According to the qualitative study and available studies and reports, the fact of overload and, in its aftermath, backlog and overwork is a systemic and grave problem which the judiciary suffers from for long years and which has a profound influence on the functioning of national courts, their efficiency and the length of the proceedings and the quality of the decision-making.⁸²⁶ The institutional and administrative capacity of the Polish judiciary was therefore a point of concern in the pre-accession process⁸²⁷ and remains a highly criticized characteristic present in the daily functioning of the Polish judiciary.⁸²⁸

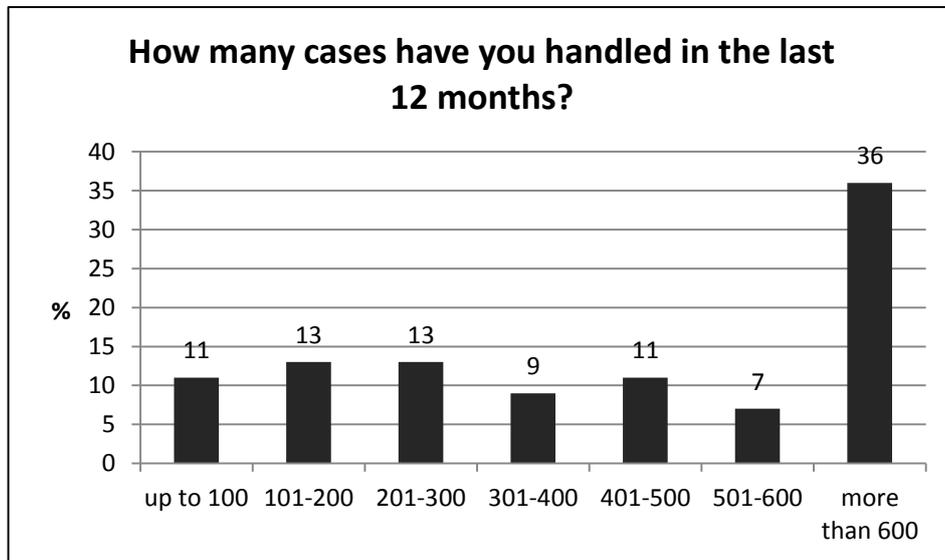
⁸²⁴ The highest registered was 2200 cases. It must however be recognized that in the extreme instances the gross of cases should be considered utterly routine decisions of administrative nature which mostly require barely signing of relevant documents. The interviewed judges shared the feelings of frustration with regard to the workload but also the nature of cases which they deal with. Many were of the opinion that the overwhelming number of the cases could be handled by assistants to judges since they do not require much processing and relatively basic legal knowledge would be sufficient to resolve the issues. The fact of bringing the role of a judge down to the role of a clerk is strongly emphasized and criticized by diverse authors in Ignaczewski (2010).

⁸²⁵ In 2006 the absolute number of cases dealt with by civil chambers was 5 040 201, in 2007 it increased to 5 508 180, in 2008 it reached 6 214 982 cases and in 2009 6 701 686 cases. The statistical data is available on the website of the Ministry of Justice at <http://bip.ms.gov.pl/statystyki/statystyki.php> (as of 31 August 2010).

⁸²⁶ See Chapter 3, section 3.5.

⁸²⁷ See Open Society Institute (2002), pp.153-168.

⁸²⁸ See for instance Report of the World Bank et al (2006), p.38 and the report by Ignaczewski (2010).



n=313

After having juxtaposed the number of cases yearly with the number of cases comprising EU law, it may be claimed that the ratio of occurrence of EU law issues is for most of judges insignificant, or put differently, the impact of EU law on national civil courts is relatively limited and incidental. The observation that EU law plays a marginal role in the practice of national courts has also been confirmed in the personal interviews. Most of the judges have admitted that, despite the fact that EU law occasionally occurs before national courts, it yet remains an abstract and remote aspect of judicial reality.⁸²⁹

Judge V: “The infrequency of the occurrence of EU law is actually one of the biggest problems attached to it. If one case in a thousand cases has to do with EU law then you do not associate this law with something that is relevant, something that you can establish clear links with.”

Judge U: “Before we entered the Union they used to threaten us about EU law. That a tide of EU cases is coming, that everyone will base his claims on EU law. But it all has proven to be a total falsehood! So far I have not dealt with any EU law issue. All the knowledge of EU law I gained before we entered the EU is actually lost, what a shame.”

Judge W: “So far I have dealt with one case only but you would expect that there would be more cases. I know that in my court two other judges were confronted with some EU law issues but further there are simply no cases. Well, I must admit we simply have no time to engage with EU

⁸²⁹ And those who deal with EU law on a more frequent basis stipulate that they are forerunners and their situation is different from their colleagues.

law and I even know judges who knew there might be incompliance between national and EU law but decided not to touch upon that because it would cost them a few days of extra work.”

Judge S: “I have come across only one case so far. My colleagues do not deal with those issues either. Maybe in the future? I don’t know. Somehow the European Union law has not caught on here.”

Judge F: “My contact with EU law is very marginal so the whole issue remains a rather abstract one. It is different, interesting but irrelevant.”

Judge A: “EU law is like a country behind the mountain. It does exist and we are aware of its existence and very occasionally someone from this country visits us, but it is really very exceptional.”

Box 11

With regard to the nature of EU law aspects which judges deal with, it occurred from the qualitative study that that frequently the same questions of EU law or similar claims based on EU law occur across the country.⁸³⁰ In that sense we can speak of tides of identical suits and subsequently the same EU law arguments. Furthermore, according to the personal testimonies, the nature of the EU law which mostly occurs in practice is, first of all, the application of EU regulations pertaining to the judicial cooperation in cross-border litigation⁸³¹ and, second of all, reference to the jurisprudence of the ECJ. With regard to the latter it should nonetheless be observed that the interviewed judges have referred to case-law of the ECJ mostly for purpose of finding ancillary and subsidiary arguments. In that sense, EU law does not constitute the decisive argument for resolving the dispute but only one of the arguments which support the line of the adopted reasoning.

4.2. Reasons of infrequent occurrence of EU law in the daily judicial practice

From both the quantitative and qualitative data it follows that the reasons behind the infrequent presence of EU law in the daily practice of Polish civil courts are multifold and complex. The seldom occurrence of EU law discourse seems to be closely interrelated with, *inter alia*, the

⁸³⁰ Such as for instance package travel, holidays and tours and the vehicles licences cards.

⁸³¹ Such as EU Regulation 1393/2007 on service of judicial and extrajudicial documents in civil or commercial matters, Regulation 805/2004 on European Enforcement Order or Regulation 1896/2006 on European Payment Order.

position judges take towards the issue of the application of EU law of a judge's own motion which goes hand in hand with judges' acquaintance with EU law and the fact that the private parties and more precisely their attorneys are not eager to reach for European sources of law. Furthermore, the daily operational context seems to play a significant role in that respect.

From the empirical study it follows that the aspect of *ex officio* application of EU law goes far beyond the issue of national procedural autonomy and eventually comes down to a very essential question concerning the position of European Union law in the national legal order and the role both the judiciary and the parties to the proceedings play in the process of application and enforcement of European Union law. Likewise, as the qualitative data seems to suggest, it has a direct bearing on the frequency of occurrence of EU law in civil courts. From the quantitative and qualitative part of the study it follows that the issue of *ex officio* application of European Union law is one of the most complex and tangled aspects of judicial application of EU law in Poland. It emerged clearly that there is a significant legal uncertainty with regard to this field which in consequence may entail many different outcomes in various respects of the judicial decision-making. It occurs though that this aspect concerns a whole range of problems in which the somewhat incoherent and blurred jurisprudence of the European Court of Justice regarding the issue of *ex officio* application of EU law by national courts constitutes but one of the elements. The issue seems to be interrelated with the national legal culture and legal doctrine and, to some extent, with the opinion of the national Supreme Court in that regard. Furthermore, it does not come as a surprise that the whole question is dependent upon the judges' familiarity with EU law.

According to the quantitative results, 48 percent of the judges were of the opinion that it is clear when European Union law should be applied *ex officio*.⁸³² This in turn implies that more than a half of the group does struggle with a question whether and how they are responsible to point out that EU law might play a role in a dispute. From the qualitative study it follows that a gross number of the judges is of the opinion that EU law applies exclusively in cross-border cases which might indicate that many of those who declared to know when EU law should ex

⁸³² Out of 313 judges. 19 percent displayed a neutral stance and 33 percent disagreed.

officio be taken into consideration would in practice do it only when confronted with a foreign element in a dispute.

The conducted interviews visualized that judges have contrary views with regard to this problem. Part of the judges is of the opinion that it is the role of the judge to point out that EU law is applicable in the dispute. Those have indicated that the parties and their professional representatives may play a role in that regard, it is yet mainly the judge whose active role is of a crucial importance in this area. But yet, even those judges pointed to the aspects of operational context which render the whole process of *ex officio* application of EU law very intricate.

Judge X “The parties are not obliged to point whether EU law should be applied. The parties are not obliged to show any legal basis for their claims, you cannot expect that from them. If there is a need to apply EU law then it rests only on the judge’s shoulders. It is the judge who must find the legal basis and reason for giving a judgment. If you say that it is only up to the parties then you’ve got it completely wrong.”

Judge O “I know “my” EU law and I apply it on a daily basis but in practice of an ordinary civil judge the presence of EU law is purely theoretical and it’s totally abstract. The judge is however supposed to know that law and apply it but a Polish judge does not know EU law, let’s face the truth (...) It is however easy to say *ignorantia iuris nocet* but the ignorance of EU law has its roots in the nature of that law. It is impossible to get acquainted with this enormous body of law. So indeed, it is the role of the judge to know when and apply the law but from a practical point of view very much depends on the parties and whether they show that EU law might be applicable.”

Judge 170: “It does not matter whether the parties point out that EU law might be applicable or not because I have to apply EU law of my own motion.”

Box 12

On the opposite bank, there are judges who reckon that so long as the parties do not base their arguments on EU law, there is no necessity to resort to EU law of a judge’s own motion. Those have accordingly pointed to very pragmatic reasons standing behind such a claim. First of all, the incompetence in EU law matters, that is to say the lack of knowledge of EU law and the relevant jurisprudence of the Court of Justice entails that it is impossible to see whether it may play a role in a dispute and whether there might be inconsistencies between national and European Union law.⁸³³ Indeed, in the survey nearly 60 percent of the judges admitted that it is

⁸³³ This in turn is very closely connected to the problem of the lack of time, i.e. there is no time to investigate whether and how the issue is regulated by EU law.

hard to see whether EU law plays a role in a dispute if the parties and their representatives to the proceedings do not point out the relevance of EU law.⁸³⁴ This becomes however paradoxical if taken into consideration that every judge participating in the interview admitted that the knowledge of EU law of legal professionals (attorneys) is poor and if they decide to bring EU law issues into the dispute they mostly are not capable of amplifying this argument. Furthermore, some pointed out that in a civil procedure the judge should not go beyond the ambit of the dispute and the claims of the parties. What is more, it has emerged from the qualitative study that the national law is frequently considered the law which is apposite and directly at the judge's disposal and remains the law which is most close to the individual. As a result, any engagement with EU law seems to be redundant. It was also underlined that EU law seems to be correctly implemented by the legislator which implicates that any engagement with EU law would be pointless. Finally, some judges directed to the principle of adversarial proceedings to support their stance.⁸³⁵ Given the reach of Union's law into the area of private law, the opinions reflected by the judges obviously open up various complex inquiries with regard to the factual role and place of EU law in the judicial practice.

Judge A when asked whether he has dealt with EU directives states: "I do not have any experience with directives. But I must admit that I have never really engaged in this issue out of my own motion and willingness. Why shall one make this effort when a case can be based on national provisions which are moreover clear and evident? Furthermore, this would make the whole process of adjudicating much longer and as you know statistics play much more important role here." Later on he adds "I have never dealt with a problem of a collision between national and EU law provisions which would entail the application of the principle of primacy. The conflicts simply do not happen! And even if they happen then I am not conscious of that, to be honest with you. On the other hand, in order for EU law to become relevant for the dispute a cross-border issue must appear therein and there are not that many cases with cross-border aspects at all. However, taking into consideration the magnitude of EU law regulations I am never really sure whether I processed with an issue correctly, whether I have not overlooked, omitted something. This feeling of anxiety is continuously present since my knowledge of EU law is too general (...) So indeed, there is a high risk that EU law elements pass by totally unnoticed (...) The will of the parties should be decisive here though. It is up to them to support their claims and adduce evidence so also to prove that EU law can be at stake"

Judge C says "EU law requires much engagement but since we know our national law so well we lack determination to consult EU material law or the jurisprudence of the ECJ directly. It's a

⁸³⁴ 22 percent disagreed.

⁸³⁵ Which means that it is up to the parties to collect and present the evidence supporting their claims, see section 5.2 of Chapter 3.

system of connected vessels: the parties do not touch upon it so we don't deliberate whether EU should be applied. We don't split hairs and we simply apply national rules. And if the parties do not refer to it then nobody is going to be bothered. It also follows from the fact that the judges are overworked and have no time."

Judge G declares that "It is absolutely and evidently in the interest of the parties to bring up the issues of EU law and it is up to them to show to the court that EU law is relevant in the dispute. The court should not go beyond the ambit of the dispute. Our assumption is that we apply local law, national law that is. We don't apply EU law when national law is just here at our disposal, on our desk. EU law would require more effort, more time and that is the biggest technical obstacle to the application of EU law."

Judge K says "It might be that the European aspects of the cases which we deal with are totally disregarded. It is due to the fact that we have so much work to do - you know, the statistics rule over the courts - and never enough time to do it. Put differently, if a party to the proceeding does not enlighten the judge that EU law should be applied in the case then there is no chance that the judge can detect it on his own. So far I have been applying national law only, this is the law which is closer to me."

Box 13

The legal uncertainty with regard to the obligation to *ex officio* apply EU law is caused by several factors. The most important one seems to have its roots in the legal doctrine and the nature of civil procedure. As it was discussed in the previous chapter, the Polish system is based on the *iura novit curia* principle which implicates that the court knows the law and applies the binding law of its own motion. Taking into account that European Union law constitutes an integral part of the national legal order and must be applied in the same manner as national law (principle of equivalence) and in line with the discussed in Chapter 2 *Van Schijndel* case in which the ECJ held that the national court is obliged to invoke *ex officio* points of EU to the extent that similar obligation exists under national law, it might be put forward that a national judge would always have to raise issues of European Union law of its own motion.⁸³⁶ This argument seems to be supported by the national Supreme Court.⁸³⁷ Be that as it may, such

⁸³⁶ See similar Bobek (2008a), pp.4-5 and 10-13.

⁸³⁷ See Judgment of the Supreme Court of 18 December 2006 II PK 17/06. In this quite far-reaching case the Court indicated that every case in which a national court decides on a basis of national provisions implementing an EU directive belongs to the group of so-called "Community cases". As it follows from the respective reasoning and the academic discussion with regard to the respective judgment, the Supreme Court implicates that national courts do function as European Union law courts not only when they apply directly effective provisions of EU law or when a cross-border element occurs in a case but also in every situation when national law which implements EU law constitutes the legal basis for the judgement. This reasoning would imply that in each dispute in which national legal provisions implementing EU law are applicable, the court would be obliged to *ex officio* take EU law into

expectation is based on a rather naive and unrealistic assumption that a judge indeed knows the entire body of law, including EU law which as this chapter has shown not the case. Moreover, it clashes with the common belief in the good will of the legislator who has done anything to correctly implement EU law. What is more, it optimistically presumes that a judge has plenty of time at her disposal to embark on yet another activity. In concluding the discussion on the *ex officio* application of EU law it is worth mentioning that more than half of the group took indifferent stance to the question whether *ex officio* application should be broadened.⁸³⁸ This result is reflective of the fact that the whole issue is somewhat ambiguous and hazy and leaves much leeway to the judge.

Another factor, which goes hand in hand with the issue of *ex officio* application of EU law, that influences the infrequent occurrence of EU law disputes relates to the daily operational context. The qualitative part of the study provided significant insights with regard to this problem. The workload and backlog the judges are confronted with were pointed out as those aspects which incur plenty of concerns among judiciary. Practice shows that the judicial performance is mostly assessed on the basis of quantitative, not qualitative, measures, i.e. compliance with statistical expectations and her reversal rate by the appeal court. In very crude terms, judges are expected to resolve as many cases as possible in as little as possible time and a judge's performance is reflected through her backlog and reversal rate. Consequently, a judge's promotion will be dependent upon her (high) efficiency and (low) reversal rate. On the other hand, as it will be illustrated hereafter, the processes of application of EU law or generally speaking any engagement into an EU law discourse requires much more time and labour input on part of a judge than in a purely domestic dispute in which only national provisions would be applied. This combined with the incessant lack of time on part of judges and evident gaps in EU law knowledge seems to have profound consequences for the functioning of national judges as EU law judges. Seen from that perspective, the claim of Baum that "a trial judge who struggles with a flood of cases may come to care less about interpreting the law well and more about

account and scrutinize whether national provisions are in compliance with EU provisions. See Miąsik (2007), p.63 and Miąsik (2008b), pp.16-22.

⁸³⁸ 29 percent agreed with the proposition and 20 percent disagreed with it.

copying with the work load” seems very plausible.⁸³⁹ It is certainly true that in this respect the institutional framework or more precisely the efficiency expectations, tremendously bear on the way EU law is (not) integrated into the daily practice of civil courts. Trivial as it may sound, according to the quantitative and qualitative study an overwhelming number of judges have hardly ever sufficient time at their disposal to, first of all, broaden their knowledge of EU law and, second of all but most importantly, *ex officio* engage within any EU law discourse which would go beyond of what is deemed absolutely necessary to resolve a dispute. In that sense, a rational calculation, judicial economy and self-interest might influence the way judges (do not) engage with EU law.⁸⁴⁰ By and large, from the preceding analysis not a very optimistic picture of the judicial reality emerges. A reality where, as it has been illustrated, production numbers prevail over a legal discourse and where judges do not find any room to engage with the sources of EU law or, what is more and much worse, reality where any engagement with a EU law discourse may even cause some reversal effects to the judge.

There is another side to this coin as well. Provided that a Polish civil judge is indeed always supposed to apply EU law of her own motion but taking into account that most likely she will have a rather poor knowledge of that law and very rarely enough time to engage with EU law, the question arises to what extent judges disregard and do not apply EU law, albeit mostly unintentionally and unconsciously. Obviously any answer to this inquiry would be conjectural and speculative and no research methodology would be capable of providing a legitimate response. Arguably, the amount of cases in which EU law has been detected and scrutinized by Polish civil courts constitutes only a scant part of the whole body of cases in which EU law might indeed have played a role but went unnoticed. As a result, an argument may be advanced that the acceptance of the role EU law plays in the national legal order and conformity to the supremacy, direct effect and harmonious interpretation tenets might be totally

⁸³⁹ See Baum (1997), p.15.

⁸⁴⁰ See Posner (2008), pp.19-56 where the author provides an overview of nine theories of judicial behaviour. In accordance with the economic theory of judicial behaviour a judge is a “rational, self-interested utility maximizer.” In that sense, the goal of limiting workload (or put differently preference for leisure or minimizing efforts) may bear on the choices of judges. Likewise, social psychology research proves that institutional framework influences judicial behaviours, see Baum (2007). With everything considered a positive economic theory of judicial behaviour provides for many interesting and plausible insights into the judicial behaviour and the determinants thereof, see also Posner (2000), pp.219-259.

meaningless concepts when the practice shows a very down-to-earth reality where judges do not know the skills and ‘time-space’ to explore the possible EU law relevance and in consequence do not resort to it and apply it.

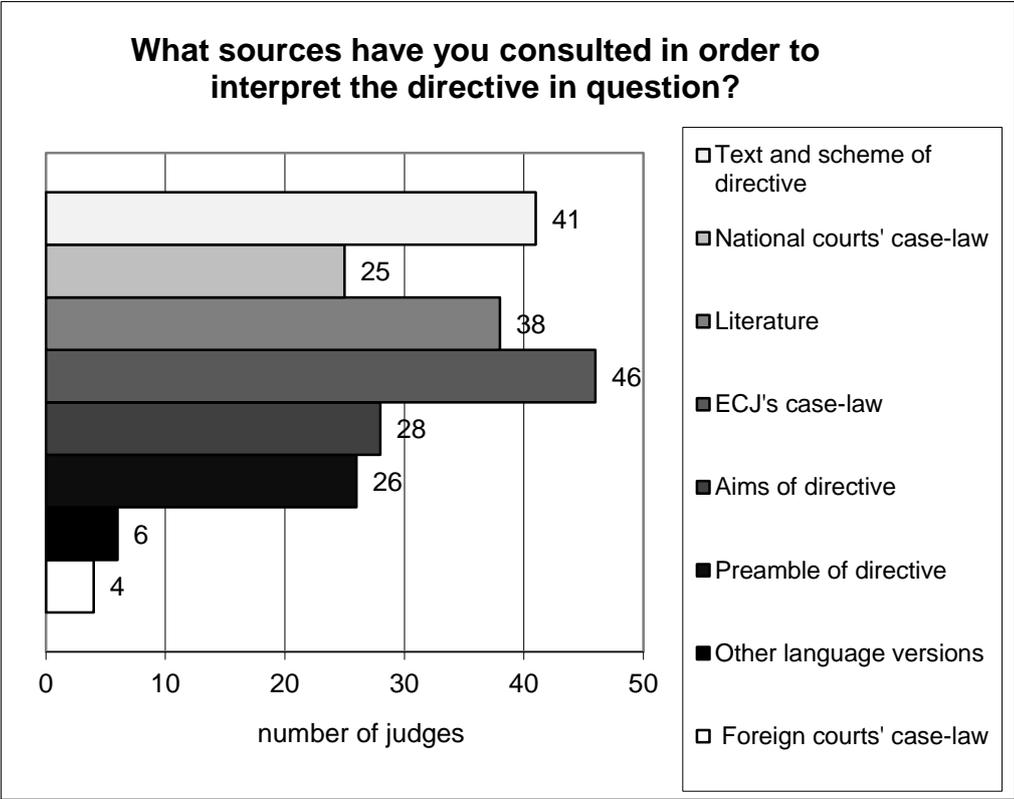
4.3. Experiences with the principle of harmonious interpretation

From the perspective of private law the principle of harmonious interpretations seems to be an indispensable instrument placed at the disposal of any civil judge. As it has already been indicated, the principle of harmonious interpretation is of utmost importance for the proper functioning of national civil law courts as EU courts and in the enforcement of individuals’ rights flowing from EU law. This observation is a corollary of the foremost horizontal nature of the disputes civil courts deal with and the fact that the area of private law is in its gross part harmonized by means of EU directives.

Before embarking on the issue of indirect effect it shall be recalled that the knowledge of the mechanism among the surveyed judges is evidently unsatisfactory. Subsequent survey questions showed that 22 percent have ever resorted to the mechanism in their practice⁸⁴¹ but only 31 percent of those who have employed the mechanism found the rules regarding the indirect effect fully practicable.⁸⁴² Those judges who have had experience with harmonious interpretation used the following sources to gain information about the directive in question.

⁸⁴¹ That is 64 judges. Interestingly 7 percent did not know whether they have employed the principle in practice.

⁸⁴² Out of the total number 18 percent thought that the rule concerning harmonious interpretation are practicable. Not surprisingly 51 percent did not have any opinion about it. There were no judges who would find the principle not feasible at all though.



With regard to the above data it can first of all be observed that the case-law of the ECJ and the wording of the directive would be the primary sources to look for supplementary information about the directive in question. Importantly, only 6 judges interpreted a directive in the light of other language versions and less than half factually scrutinized the aims of the directive. It should therefore be recognized that in fact only a marginal number of judges fulfils the exact obligations following from the *Marleasing* formula and many interpret the principle as the obligation to resort to and apply the jurisprudence of the Court of Justice. 55 percent of those who resorted to the mechanism of indirect effect have interpreted the national provisions at issue in a manner which would deviate from the usual way of reading them.

In the light of the significance of the indirect effect tool for the civil judiciary, the foregoing findings are somewhat worrisome. The grounds of such a situation are multifold. The fact that this aspect of judicial application of EU law has been given a step-motherly treatment (or no treatment at all) during the trainings for the judiciary partly explains the low level of knowledge of the principle. Further reasons may also be found in the national legal

culture and the methodological tools at the disposal of a judge, that is to say the interpretation methods which are traditionally employed by Polish courts. As illustrated in Chapter 3, the Polish judge functions in the realm of a very positivistic legal culture and the strictly literal (textual) and legalistic interpretation of legal provisions is the main and often the only methodological tool.⁸⁴³ Looking for the objectives and the *spirit* or *telos* of the EU legislation would, therefore, not be deemed feasible and substantial and definitely not the way the judge would proceed with in the context of a purely domestic dispute.⁸⁴⁴ What is more, such manner of approaching legal provisions might be deemed improper for it easily lends itself to manipulation and may endanger the rule of legalism.⁸⁴⁵ As it was illustrated in the section concerning the trust into the transnational judiciary, many judges express their concerns and reservations about the teleological method of interpreting the law as exceeding the boundaries of judicial decision-making or even as in some instances being *contra legem*.⁸⁴⁶ In that respect it is equally important to acknowledge that for some older judges who adjudicated in the communist period the obligation to resort to the purposive method of interpretation in order to ensure *effet utile* of EU law might to some extent resemble the old days when teleological method of legal reasoning was extensively used to serve the interests of the dominant workers class and to secure the victory of socialism.⁸⁴⁷ Paradoxical and seditious as the foregoing thesis may sound, this concern has been expressed in the academic writing⁸⁴⁸ and confirmed in the qualitative part of the study.

Judge D: “Yes, it does raise some concerns. We have established that we apply the letter of law and suddenly we discover that the precedent and the teleological method of interpretation are more important. We are very closely attached to the textual interpretation of law but with EU law you must see the context and the objectives. You are supposed to look for the spirit, but it is difficult for us. It goes too far in our eyes and somewhat reminds me of the communistic times. I don’t like crossing the same river twice.”

⁸⁴³ See section 6.2 of Chapter 3.

⁸⁴⁴ Zirk-Sadowski (2005), p.98 points out that the problem is not as such rooted in the differences between the methodological categories but has a much more abstract level which originates from the styles and priorities attached to particular interpretation methods.

⁸⁴⁵ Ibid, p.102.

⁸⁴⁶ See section 3.5 of the present chapter.

⁸⁴⁷ On the judge being a *bouche de la société* see for instance Mańko (2008), pp.120-122.

⁸⁴⁸ See for instance Bobek (2008a), p.23, Bobek, *The New European judges and the limits of the possible* [in] Łazowski (2010), p.145. Similarly Albi (2010), p.816.

Judge H: “When you apply the dynamic methods of interpretation you run a great risk, you stray from the most pivotal role the law plays in the society, the stabilizing role, because you don’t know what to expect, you don’t know what you are standing at (...) A dynamic way of interpreting legal provisions means that from A I will arrive at G, that is to say A provision will become something totally different (...) It’s a great risk.”

Box 14

By and large, the empirical data seem to support the arguments put by different scholars that the purposive and teleological methods of law interpretation remain rather foreign and abstract tools to Polish judges. The attempts of the Polish Supreme Court and the Constitutional Tribunal to disseminate the knowledge about harmonious interpretation and encourage the judges to employ it in their daily practice do not seem to bring about the desired effects yet.⁸⁴⁹ By the same token, as it has been illustrated, the comparative method, which would allow to parallel different language versions of the same legal act, is not a common tool employed by Polish courts.⁸⁵⁰ With everything considered, it may be corroborated what was already observed in the foregoing chapter, i.e. from the methodological point of view the Polish judge seems to be considerably handicapped which certainly hampers a proper functioning as EU judge and may badly endanger the effectiveness of EU law.

4.4. Feasibility of the preliminary ruling procedure

As the previous sections suggest, the participation of national judges in the preliminary ruling mechanism is deemed to be one of possible manners to assess the reception and integration of the European Union legal order by the national judiciary. From the section concerning the knowledge of the mechanism it follows that, in principle, judges are aware of the existence of the procedure and its general purpose. However, the data shows that only 41 percent found the procedure of the preliminary ruling mechanism clear.⁸⁵¹ The high rate of neutral and negative

⁸⁴⁹ The Supreme Court frequently points to the mechanism of harmonious interpretation as to a tool which can facilitate the judicial application of EU law, see for instance the judgment of the Supreme Court of 5 December 2006 in case II PK 18/06.

⁸⁵⁰ Zirk-Sadowski (2005), p.99.

⁸⁵¹ 38 percent expressed neutral stance and 21 percent disagreed.

answers to the query might be interpreted in the light of a lack of practical experiences with the mechanism. To date of the empirical part of the study there were only four references to the European Court originating from the Polish first and second instance civil courts.⁸⁵² Next to that there has been one referral coming from a criminal court and 4 referrals from the Supreme Court.⁸⁵³ This somewhat modest number of references stands in stark contrast to the national administrative jurisdiction which seems to eagerly participate in the process of dialogue with the European Court.⁸⁵⁴ Strikingly, the majority of the recent preliminary questions sent by the Polish civil courts concerns interpretation of directly applicable EU regulations pertaining to the

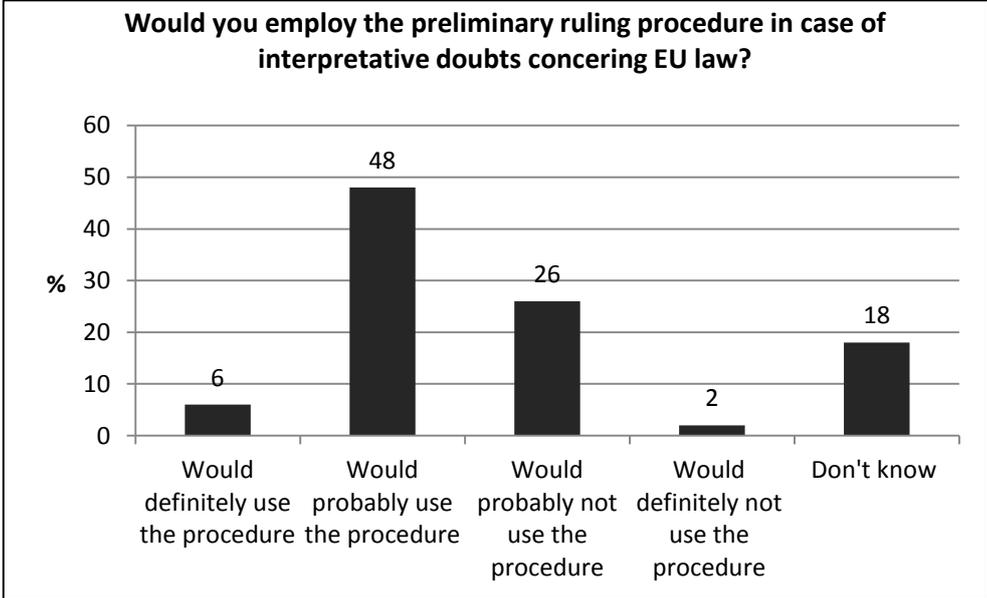
⁸⁵² See: judgment in C-499/06 *Halina Nerkowska v. Zakład Ubezpieczeń Społecznych Oddział w Koszalinie* [2008] ECR I-03993 referred by a regional court in Koszalin concerning the interpretation of Article 18(1) EC; order in C-134/07 *Piotr Kawala v. Gmina Miasta Jaworzna* [2007] ECR I-10703 referred by a district court in Jaworzno concerning the interpretation of Articles 25 and 90 EC; judgment in C-444/07 *Insolvency proceedings opened against MG Probud Gdynia sp. z o.o.* [2010] ECR n.y.r. referred by a district court in Gdańsk concerning the interpretation of Regulation 1346/2000; judgment in C-283/09 *Artur Weryński v. Mediatel 4B Spółka z o.o.* [2011] ECR n.y.r. referred by a district court in Warsaw concerning the interpretation of Council Regulation 1206/2001. One of the four judges has been approached personally in the course of the empirical study. Until July 2011, five more references were sent in cases: C-589/10 *Janina Wencel v. Zakład Ubezpieczeń Społecznych w Białymstoku* concerning the issue of social security of migrant workers by an appellate employment and social security court in Białystok; C-115/11 *Format Urządzenia i Montaż Przemysłowe v. Zakład Ubezpieczeń Społecznych I Oddział w Warszawie* concerning interpretation of Council Regulation No 1408/71 by an appellate court in Warsaw; C-116/11 *Bank Handlowy, Ryszard Adamiak, Christianapol sp. z o. o.* concerning interpretation of Council Regulation 1346/2000 by a district court in Poznań; C-325/11 *Krystyna Alder, Ewald Alder v. Sabina Orłowska, Czesław Orłowski* concerning interpretation of Regulation 1348/2000 by a district court in Koszalin and C-215/11 sent by a regional court in Wrocław concerning the interpretation of Regulation 1896/2006. All five references are still pending.

⁸⁵³ See: judgment in case C-344/08 *Criminal proceedings against Tomasz Rubach* [2009] ECR I-7033 referred by a criminal chamber of a district court in Kościan; judgment in C-99/09 *Polska Telefonía Cyfrowa sp. z o.o. v. Prezes Urzędu Komunikacji Elektronicznej* [2011] ECR n.y.r. referred by the Supreme Court concerning the interpretation of Directive 2002/22/EC; judgment in C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o., now Netia SA* [2011] ECR n.y.r. referred by the Supreme Court concerning the interpretation of Council Regulation 1/2003; judgment in C-410/09 *Polska Telefonía Cyfrowa sp. z o.o. v. Prezes Urzędu Komunikacji Elektronicznej* [2011] ECR n.y.r. referred by the Supreme Court concerning the interpretation of the Accession Treaty; judgment in C-440/09 *Zakład Ubezpieczeń Społecznych Oddział w Nowym Sączu v. Stanisława Tomaszewska* [2011] ECR n.y.r. referred by the Supreme Court concerning the interpretation of the Council Regulation 1408/71.

⁸⁵⁴ Up to date there were 25 references to the European court originating from administrative courts including the Supreme Administrative Court. All references can be found on the website of the Supreme Administrative Court www.nsa.gov.pl. The frequent occurrence of EU law (and in consequence its application) may partly be explained by the tremendous influence EU law exerts in the area of administrative law and more precisely in the realm of taxation and customs: 20 references out of 25 concerned solely taxation issues. The topic of the application of EU law by Polish administrative courts is definitely worthy of separate examination which is however beyond the scope of the present project, for a general overview of the functioning of Polish administrative courts in the European capacity see Jaremba (2011).

area of judicial cross-border cooperation between the Member States.⁸⁵⁵ This, in turn, supports the observation that the application of EU regulations in the mentioned area seems the most frequent aspect which the Polish civil courts deal with.

But yet, this limited number of references can by no means indicate that the procedure is rejected by the Polish civil judges. The data illustrates that, likewise the principle of supremacy, the preliminary ruling procedure gains considerable acceptance and support on the major part of national civil courts. 66 percent of the judges agree that the mechanism of the preliminary question is a useful one and only 3 percent disagreed with the statement.⁸⁵⁶ From the findings it also follows that 6 percent of the group declared to definitely be willing to employ the procedure in case of doubts concerning interpretation of EU law in and 48 percent would probably make use of the procedure. 28 percent would not resort to the mechanism and 18 percent did not know how they would proceed. The following graph illustrates the distribution of the responses.



n=295

⁸⁵⁵ In total there has been eight preliminary references concerning the problem of interpretation of EU regulations pertaining to the problem of cross-border judicial cooperation sent by the Polish civil courts (including appellate courts and the Supreme Court).

⁸⁵⁶ 31 percent took a neutral stance.

Polish Civil Judges versus the EU Legal Order: Knowledge, Experiences and Attitudes

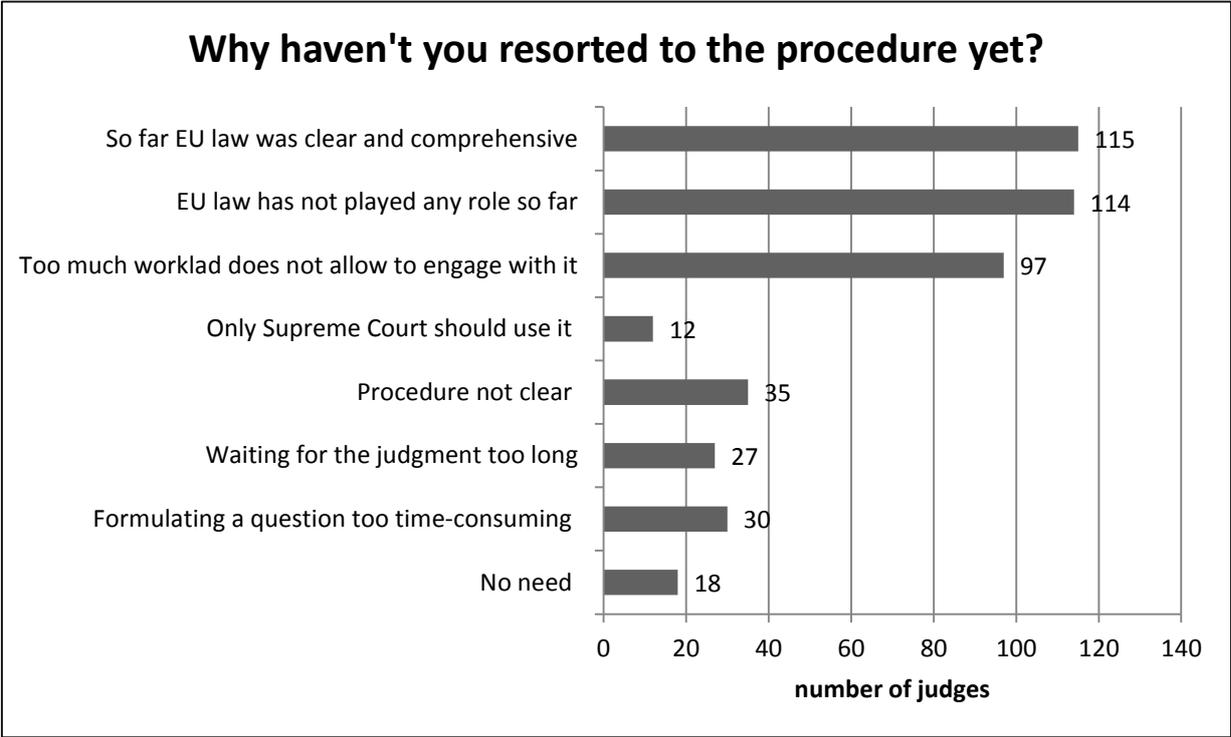
A cross tabulation between the results concerning the willingness to employ the procedure and the manner judges assessed their knowledge of EU seems to suggest that poor level of EU law knowledge might negatively influence the willingness to resort to the mechanism.

	(very good)	moderate	(very) poor	totals
would ask	27	77	52	156
would not ask	5	25	46	76
don't know	4	22	23	49
totals	36	124	121	281

Table 3

Taking into consideration a rather high ratio of judges that would be willing to resort to the procedure one might wonder why there are so few cases in which judges in fact employed the mechanism. When enquired to give reasons of not having resorted to the procedure yet, the judges mostly pointed to the fact that they have not dealt with EU law so far in their practice or that they found the respective EU law provisions clear and comprehensive. After excluding the aforementioned grounds, it becomes apparent that the fact of the daily overwork and overload again prove to be one of the most cumbersome obstacles to the proper functioning of judges in the EU capacity.⁸⁵⁷

⁸⁵⁷ Multiple answer question.



n=296

The qualitative research delivered some additional and arresting clues and insights into the issue. The length of the procedure itself but foremost the problem of finding time to familiarize oneself with, on the one hand, the mechanism and, on the other hand, substantive EU law at stake to such an extent that formulating a (correct and faultless) question would be possible have been the most frequently occurring arguments. Indeed, as plausibly observed by Ramos, preparing a question is time- and cost-wise perplexing an issue.⁸⁵⁸ This in turn should be seen in relation to the already discussed aspect of the daily operational context which clearly shows that output numbers is one of the paramount priorities for the Polish civil judges. In other words, a judge engaging with the procedure runs a risk that she will be forced to put other daily tasks aside as the process of preparing a question is so much effort- and time-consuming.

Further exploration of this aspect brought another absorbing thread into the issue. It emerged that anxiety of referring a wrong question, i.e. improperly formulated or not meeting

⁸⁵⁸ See Ramos (2002), p.12 who observes: “making a reference is costly because the judge must prepare it, explain the facts and point to the legal issues. It is an activity that would require her to invest resources in law-finding that go beyond the scope of her ordinary tasks.”

the formal requirements established by the Court⁸⁵⁹, concerning an issue which has already been judged upon by the Court, would be one of the most important impediment factors.⁸⁶⁰ Put very crudely, being afraid of losing face and discrediting oneself might effectively suppress a judge from any engagement within the procedure. In that sense, inappropriately referred/formulated question may harm the professional reputation of a judge and, what is more, it might also reduce the chance to be promoted.⁸⁶¹ In a similar vein, referring a question might be captured by other judges as a sign of incapability of coping with the legal issue unaided and on one's own.⁸⁶² Thus, invoking the preliminary ruling procedure might be equated with labelling oneself as 'the incapable' and therefore might be one of the stumbling blocks to mobilizing the procedure.

Judge H: "If I could avoid employing the procedure then I would definitely do so. First of all, the length of the procedure, second technical problems and lack of know-how. Furthermore, I would have to master this issue and EU law so I would ask a wise question. To ask a question is never difficult but to ask a good question so the Court of Justice would not ridicule you is a different thing. So it is all about not making a fool of yourself. But that costs time and effort. You must thoroughly investigate the issue. But eventually, after knowing all ins and outs of the legal problem, why shall I still ask them? Then I can resolve the problem on my own, can't I? All in all, it would be a useless effort which could be utilized in other manner."

Judge R: "If there was a need then I would refer a question. Those 16 months would not be a problem. The parties here have to wait 6 months for our decisions so they will also wait 16 months. But the Polish judge has many complexes and they are not using the mechanism. They are afraid to speak out, they are afraid of losing their face so they don't make use of it. So you must be very courageous to ask a question. Judges tend to think that it is better not to step out of line."

Judge C: "I would consider all ins and outs, all pros and cons because resorting to the preliminary ruling is in some sense equivalent to admitting that you lack judicial skills to decide the issue on your own; to interpret the provisions correctly."

Judge F: "I do not think I would make use of the procedure. It is long, too long. It is easy to stay the proceedings but I must always justify myself if I do it. And the parties have to wait so if they wanted me to refer a question then I would do it. But what if only one of the parties wanted it? I could suspect that they wanted to deliberately prolong the proceedings."

⁸⁵⁹ See section 8.5 Chapter 2.

⁸⁶⁰ This shall be seen in correlation with the fact that much case-law is not translated into the Polish language which in view of foreign languages barriers renders the claim even more legitimate.

⁸⁶¹ In a similar vein judges avoid reversal since it is believed that it harms their reputation and bears on the career track and promotion, see Kim (2007), p.401, see also other authors referred to by Kim at note 69.

⁸⁶² Also signalled as one of the hindrances to the participation of judges in the preliminary ruling procedure by Łętowska (2000), pp.229-238 who claims the reluctance of the national judiciary towards any feedback. Elsewhere, it is pointed that "(...) some judges appear to believe that asking questions is also a form of curtailing judicial independence (...)", see Open Society Institute (2001), p.314.

Judge L: “Preliminary question? Yes, it’s a very interesting institutions but God forbid !...I mean, with my lack of experience with the procedure itself it would take me so much time and intellectual effort to prepare a question, and alas, I don’t have that time. Besides, I cannot imagine that the parties to the proceeding would agree to stay it for such a long time.”

Judge O: “I am not going to refer a question. Full stop. It takes way too long. I could come up with many questions which bother me but referring a question would mean staying 50 percent of the cases which are pending before me. You can imagine that I cannot afford that. I would run too much risk (...)”

Judge G: “Because every judge is very much afraid of one thing: that she will make a fool of herself, that others will see that she is not capable of doing something correctly. So the anxiety that others could see that I did not really know what I was doing stops me from engaging with this issue.”

Judge D: “On the contrary, referring a question would be taken wrong by others. You would see that the management of the court would become angry with you that you prolong the proceedings. Every month I would have to excuse myself in writing why I have sent a preliminary question. Moreover, other could totally misinterpret it: you are either not good enough to deal with it on your own or you are showing off.”

Judge Z who sent a preliminary reference to the ECJ: “You know, it was first such a question here so, in order to avoid blunders at the international level, and to be sure that nothing was missing in the reference, so they would not reject it we had to consult it with many other people, with the Ministry of Justice.”

Box 15

The foregoing arguments visualize how extra-legal factors such as the societal context, ties with other judges and the interaction between them and particular features of judicial environment but most importantly the status and reputation anxiety might bear on the willingness to employ the mechanism. In that respect, Baum’s theory of personally motivated self-presentation seems very plausible by pointing to personal audiences of the judges, in this case their colleagues, which may bear on the way judges make decisions.⁸⁶³ Next to that, Posner convincingly points to the factor of reputation as determining judicial behaviour.⁸⁶⁴

⁸⁶³ See Baum (2008) who provides an elaborate account of what motivates judges in their decision-making processes. The author points to the so-called personally motivated self-presentation, also called impression management, in which personal audiences of the judges, such as for instance their colleagues, may bear on the way judges make their decisions. As observed by Oldfather (2007), p.143: “Judges are susceptible to all sorts of influences and psychological processes as they make decisions, only some of which are consistent with the dispassionate, rational, Olympian figure at the heart of our conception of judging. In this respect judges are – like the rest of us – human.”

⁸⁶⁴ See Posner who points to the factor of reputation as determining judicial behaviour, as he claims “Reputation is a function of effort, but, for the judge of ordinary abilities, only of a minimum effort. Effort beyond that level may actually make a judge unpopular among his colleagues, and this in two ways: first, by making him seem a rate

This aspect has also another, more institutionalized dimension. It has been explained in the preceding chapter that national law allows the parties to the proceeding to file a complaint against the court which hears their dispute in situations of infringement of the right of the party to the proceeding to hearing of his case without undue delay.⁸⁶⁵ The party may claim damages in cases of inaction and in cases of undue actions. A preliminary question to the ECJ which by reason of an existing *acte clair* or *acte éclairé* situation would result in a reasoned order instead of a judgement might, arguably, induce the parties to the proceeding to file a complaint against the national court at stake and claim state liability in damages for an unnecessary protraction of the proceedings. Of course, the foregoing observation is of a very conjectural nature. Yet, it is no doubt true that in view of the immensity of the case-law of Court of Justice, especially that preceding the membership, which in many instances is not translated into Polish the foregoing argument might play a role and only those judges who are absolutely certain of the correctness and legitimacy of their questions would refer them to the Court. With all the foregoing arguments considered, a rather thin knowledge of EU law among judges and the procedure itself, very limited experiences with the application of EU law, the lack of ‘space-time’ and courage to step out of line result in a situation when the mechanism seems reserved to the very few brave ones.

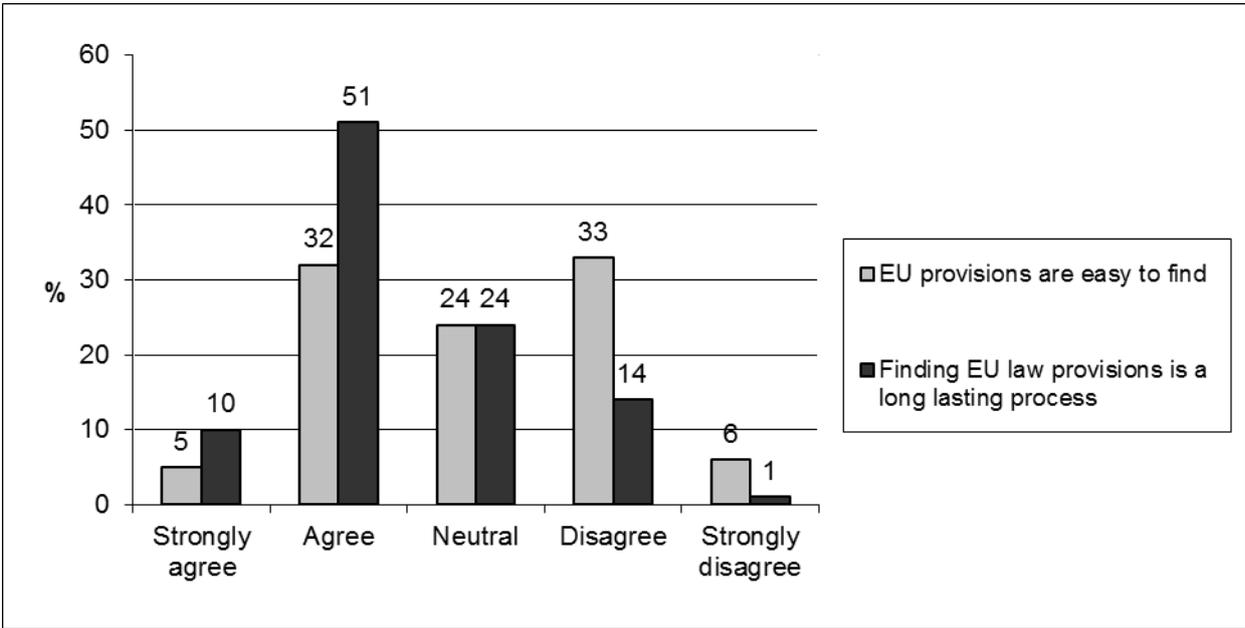
4.5. Intelligibility of EU law sources

One of the objectives of the present study has been to examine how intelligible and accessible the sources of EU law are. Any process of the application of EU law will mostly commence with the seemingly trivial tasks of finding the relevant legal provisions. Nearly 40 percent of the judges were of the opinion that finding EU law provisions is an intricate task and 61 percent agreed that searching for EU provisions is a time-consuming process.

breaker, show off, or know it all (...) Second, a busy, active, forceful judge can impose costs on his colleagues by writing many separate opinions to which they have to respond, by criticizing their work, and by making arguments that they have difficulty answering.”, see Posner (2000), p.233.

⁸⁶⁵ See section 3.5 of Chapter 3 on the Law on a complaint concerning the infringement of the right of the party to the proceeding to hearing of his case without undue delay.

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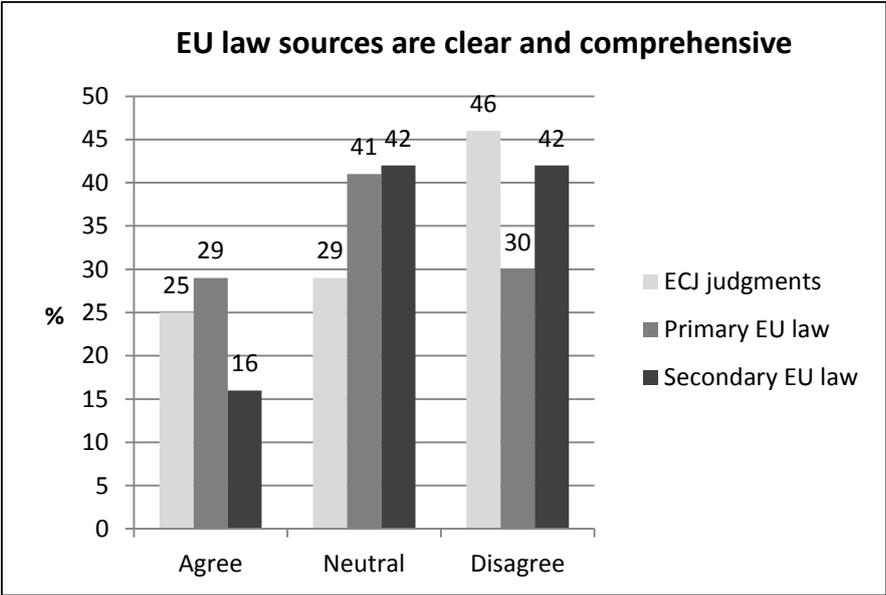
EU provisions are easy to find n=298

Finding EU law provisions is a long lasting process n=295

The following inquires concerned the transparency and legibility of the provisions of EU law. The answers to the questions suggest that dealing with the sources of EU law might pose considerable problems to the Polish civil judge. Only 16 percent of the group agreed that the provisions of EU secondary law are clear and comprehensible and 29 percent found the primary EU law unambiguous and plain. In a similar vein, the jurisprudence of the Court is comprehensible to a rather limited part of the group. A high number of judges again expressed an ambivalent stance.⁸⁶⁶ Likewise, only 21 percent of the group found the rules concerning the obligations put on the national court with regard to state liability in damages legible.⁸⁶⁷ The following graph collates the reception with regard to particular sources of EU law.

⁸⁶⁶ 40 percent of those that took neutral stance to the motion that primary EU law is clear assessed their knowledge as moderate and 50 percent declared their knowledge to be (very) poor.

⁸⁶⁷ 26 percent found them clear and as much as 53 percent took a neutral stance to the problem.



n=298

It emerges that nearly half of the group found the judgments of the Court of Justice difficult to comprehend and ambiguous.⁸⁶⁸ This finding was investigated in more detail in the qualitative part of the study. Leaving aside the already discussed problem concerning the lack of translated judgments and the problematic issue of the role of Court’s precedent in the entire system, it should be mentioned that the style of judgments and the language the Court utilizes but also such a trivial reason as the extensiveness of the rulings seem to constitute a significant obstacle to many judges. Moreover, as the qualitative data seems to suggest, the abstractness of rulings may dishearten a potential judge from becoming acquainted with it. In that regard the judges might tend to resort to the available literature which analyses and comments on the case-law of the Court in order to consolidate their views on a particular ruling.

⁸⁶⁸ 29 percent took a neutral stance and 25 percent found the judgments clear and comprehensive.

Judge Y: “The judgments of the Court are written in other language which is very much different from the language we are used to. So we assume that an ordinary judge will start reading any judgment of the Court then he will fall, to be honest. Here we seriously need an icebreaker to overcome the barriers in mentality and approach.”

Judge N: “I have tried to read the *Leitner* judgment but unfortunately it is not easily asimilable, the terms and definitions are seemingly the same but they are understood in a different manner. I could handle and manage that only by means of available literature on the subject. I assume that other people have carefully thought it out and I therefore applied their approach to the judgment.”

Judge C: “It is written in a different language, different from the one we are used to. Our style is more formal and “dry” whereas when you read EU law it sometimes even seem colloquial and definitely very descriptive. In our law everything is more definite.”

Judge B: “I have read two judgments of the Court. I don’t have time to read them just like that, without a reason. They are way too long, I can’t afford reading 60 pages, I have other tasks to complete. But in general it reads well, it is written in a very professional language though.”

Case D: “Those judgments have, let’s call it, Byzantine style. They are scattered and very formal. Too much description and lengthiness. It is just too much so it is understandable that judges have issues with it.”

Judge V: “I must confess that I tried reading it and I gave up. I could not see how it could affect my own practice. Those rules were so general and abstract. Maybe I was unlucky and did not come across a case that I could apply in my down-to-earth reality?”

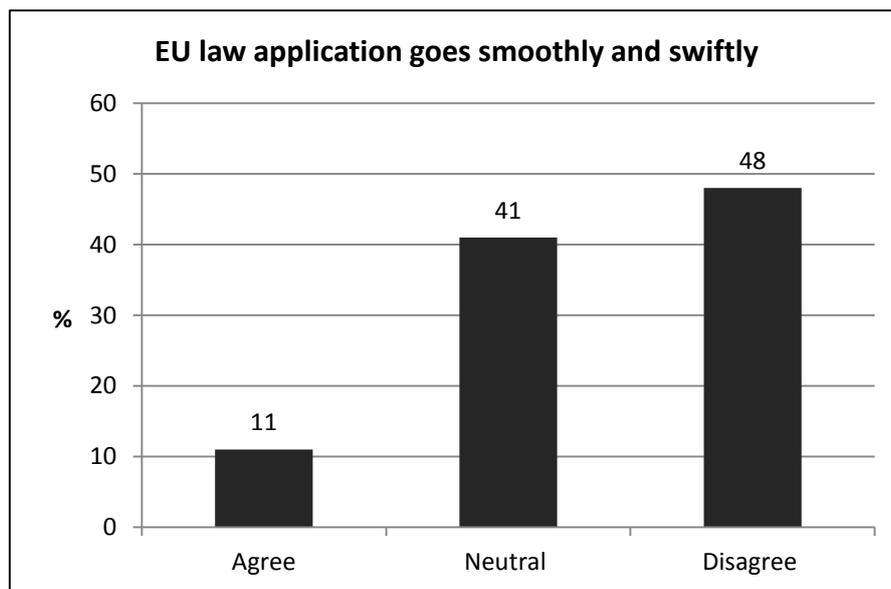
Box 16

The problem of different understanding of legal definitions and terms used in EU law sources was also tested in the questionnaire. As discussed in Chapter 3, the process of implementation of private law *acquis* has taken various forms.⁸⁶⁹ It follows that some of the respective EU directives have been integrated in either the Civil Code or in distinct statutory acts or are partly regulated in the Code and partly in separate legal acts. Next to that, those provisions which were implemented in the extra-codical mode were often faithfully and literally reproduced, which implies that the legal concepts and terminology used in the original EU legal instruments were often copied and pasted in the national legislation. In that context, in the present study the judges were asked to assess whether the terminology which introduces specific EU legal concepts easily fits in the national legal system.⁸⁷⁰ Only a limited number of judges which

⁸⁶⁹ See section 5.1 of Chapter 3.

⁸⁷⁰ On the problem of the difficulties attached to translating legal language see Lindroos-Hovinheimo (2007), pp.367-383. As the author observes: “the terms possess special meanings in the legal context and only the use of

amounted to a mere 15 percent of the group agreed with the foregoing motion.⁸⁷¹ Such a finding renders the claims with regard to incoherent and incohesive transposition and implementation of the EU *acquis* even stronger but is also adds up to the discussion concerning the universalism of EU private law regulation. Eventually, only 11 percent of the judges were of the opinion that the process of application of EU law proceeds swiftly and smoothly.



n=298

In light of the foregoing data it may be concluded that the entire process of application of EU law, proceeding from searching and finding the relevant provisions and their interpretations provided by the Court of Justice, through interpreting and understanding thereof up to employing them in a specific case amounts, in the opinion of the respondents, to a time consuming, laborious and troublesome process. This becomes much more significant if read in the context of the daily functioning of the national courts and in particular in the light of the congestion which is so vividly present in the everyday practice of the courts. In addition to that,

certain words can produce a certain legal effect. However, the terms at language-specific, even legal system-specific, and thus may hinder successful transportation of a text into another language.” See also Paunio (2007), pp.385-402 on the issue of different meanings of legal concepts in different legal traditions.

⁸⁷¹ 43 percent took a neutral stance and 42 percent disagreed; n=289.

the relatively negligible occurrence of EU law aspects implies that the processes of its application remain very exceptional and in consequence perplexing each time an EU law issues occurs. Put differently, so long as EU law does not become a common element of adjudication its application will remain an incommodious aspect thereof.

5. Preliminary conclusions

This chapter has brought the quantitative and qualitative results concerning the functioning of Polish civil judges as EU law judges together into one analytic frame, thereby attempted to bridge the gap between the formal obligations and expectations imposed on national judiciaries by EU law and the manner the judges work with EU law on the ground and experience it in their daily practice. In fact, the present chapter has considered the phenomenon of judicial behaviour but it has not touched upon the way judges reach their final decisions. Put differently, the issue of judicial decision-making has not been explored, it has only been looked into the problems which national judges may come across in their daily practice and factors which may possibly influence the way judges operate in the context of EU law. In that sense the scope of the present analysis has been much broader and pragmatic and pertained to various aspects of daily judicial practice reflected through a social prism. Put differently, the aspects of judicial functioning which have been discussed in the present chapter take very much place out of the public eye and its control.

One of the most striking outcomes of the quantitative part of the research has been the relatively scant practical experience with resorting to and applying EU law. Although it may sound like a mere cliché but the data suggests that a direct experience with EU law is the paramount determinant in the process of learning and consequently in the process of applying EU law. Some concepts of EU law, including the most pivotal systemic tenets thereof which constitute the core of the functioning of national judge as EU law judge, remain meaningless and abstract notions to many of the judges due to the lack of any practical experience with them. By and large, the limited knowledge of EU law together with a very scant experience with the application of EU law result in a viscous circle situation. As the data seems to suggest, due to the limited and scattered knowledge of EU law many judges are unable to see the relevance of

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EU law for the daily practice whereby they are simply not confronted with EU law cases. This lack of cases, in turn, does not allow to broaden and consolidate the knowledge of EU law. Finally, it should be observed that those judges who have some experience with resorting to and applying EU law find the whole process rather troublesome and laborious. With everything considered, the empirical findings put in question the feasibility of the expectations which are put on the national judges by EU law .

Chapter 5

Engagement, Passivity or Resistance? Study of Legal Consciousness

1. Introduction: methodological challenges

Chapter 1 indicated that one of the ultimate objectives of the present study is to contribute to the Legal Consciousness discourse. To recall, “the study of legal consciousness traces the ways in which law is experienced and interpreted by specific individuals as they engage, avoid, or resists the law and legal meaning.”⁸⁷² One of constitutive theories in this field has been established by Ewick and Silbey who constructed three varieties of legal consciousness. As it was mentioned in Chapter 1 those are: *conformity* before the law, *resistance* against the law and *engagement* with the law.⁸⁷³

The original theoretical and at the same time methodological assumption of the present study was to explore and assess the three embodiments of legal consciousness through the use of six vignettes which were included in the questionnaire and which were supposed to test the particular forms of legal consciousness.⁸⁷⁴ The vignettes revolved around, generally speaking, the issue of supremacy of EU law. It was assumed that the manner the judges would approach the hypothetical issues would allow to classify them as either being *with*, *before* or *against* EU law. The vignettes delivered absorbing but at the same time somewhat puzzling results which went much beyond the initial theoretical assumptions. The explanations provided by the judges to their choices of a specific answer showed that multifarious legal and extra-legal factors might have played a role in the way they proceeded with the respective hypothetical case. More importantly, the remarks illustrated that the reasons which prompted a judge to

⁸⁷² International encyclopedia of social and behavioral sciences (2001), p.8626.

⁸⁷³ Ewick&Silbey (1998), pp.45-49. See section 2.2. of Chapter 1.

⁸⁷⁴ See section 2.2 of Chapter 1.

choose a particular answer might be different from those presumed at the beginning of the study. Additionally, the in-depth interviews conducted among Polish civil judges provided further threads to the whole discourse. They also emphasized the intricate aspect which partly emerged in the anchoring vignettes, that is the interferences between institutional capacity of a judge and her personal capacity.⁸⁷⁵ The later perspective focuses on an individual judge, i.e. her views, attitudes, opinions and motivations which however might not necessarily reflect how the judge would proceed with a specific legal issue in practice. This is because the law and its institutions, rules and standards but also the judiciary as organisation naturally constitute constraints to the judge. In that sense, it can be observed that “in making decisions and engaging in activities, judges will be acting in an institutional, and not a personal capacity.”⁸⁷⁶ Finding a proper balance between those two dimensions proved, therefore, to be a challenging enterprise.

In addition to the foregoing, the personal testimonies proved that confining the discourse on the functioning of national courts as decentralized EU courts to answering the question whether judges conform to the principle of supremacy of EU law is not satisfactory an approach, neither for seeing how national courts function as decentralized EU courts, nor for assessing the varieties of legal consciousness among the national judges. The conducted interviews disclosed that knowing whether a judge unconditionally or conditionally conforms or not to the principle of supremacy of EU law does not suffice to establish how a national judge experiences and constructs the legality of European Union law. The manner the anchoring vignettes were constructed did not take into consideration the fact that for a national judge there is an entire process of arriving at the point whether EU law could be at stake at all to the dispute at issue. In the opinion of the author and in the light of the qualitative data, this process preceding the ultimate application of EU law is decisive to the final assessment of the form of legal consciousness. Finally, the significant number of judges who did not take a definite stance towards the vignettes and admitted not to know how to proceed with EU law issues again gave room for manifold interpretations which do not easily fit the *with – before – against* categories. By and large, the analysis of the responses which were given by judges

⁸⁷⁵ On the perspectives on judicial activities see Bell (2006), pp.3-6.

⁸⁷⁶ Bell (2006), p.9.

revealed that the study of legal consciousness is much more nuanced than initially anticipated. All the foregoing implied that the final assessment of accounts of legal consciousness had to be treated with much caution and prudence. By and large, this study verifies Nielsen who claims that only in-depth interviews technique allows to capture “the more complex and subtle character of legal consciousness.”⁸⁷⁷

The preceding inventory of arguments speaks in favor of qualitative and ethnographic methodology for the purpose of legal consciousness studies, it is not however aimed at discrediting the use of vignettes. Conversely, the vignettes have proven to offer an invaluable and exquisite set of data which enabled to complement the qualitative data, explore some of the elements of legal consciousness and to detect potential factors which may bear on the manner judges make decisions. The results delivered by the vignettes are therefore included in the subsequent analysis and are followed by the qualitative exploration of legal consciousness which allows to conceptualize and to define the varieties thereof.

2. Results of the vignettes

The six vignettes comprised various hypothetical cases in which EU law was at stake. Each set of two vignettes was designed in a manner that would allow to visualize to what extent judges:

- unconditionally conform to EU and the principle of its supremacy (2.1.);
- condition the application of EU law on other factors (2.2.);
- reject EU law and the principle of supremacy (2.3.).

In addition to choosing one of the options the judges were asked to reason their choice. The explanations provided by approximately 25 percent of the group provided invaluable insights into the problem which, as it has been already indicated, entailed the necessity to alter some theoretical assumptions underpinning the study.⁸⁷⁸ In the following section each set of

⁸⁷⁷ Nielsen (2000), p.1057.

⁸⁷⁸ The number of remarks differed between the vignettes and oscillated between 50 (vignettes 6) and 74 (vignette 2).

vignettes is considered separately. At times the analysis is enriched by a simple cross tabulation of the answers to the vignettes with other selected variables.

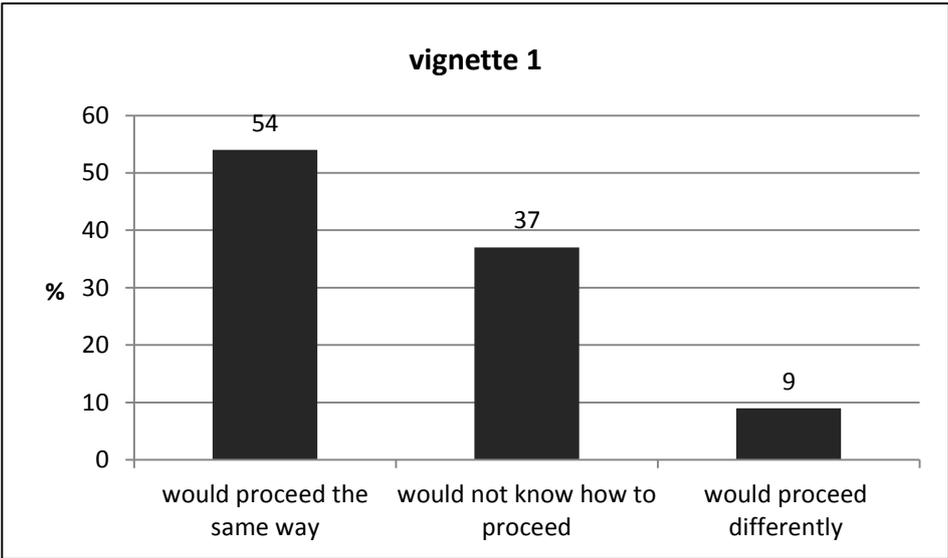
2.1. Unconditional conformity with the supremacy of EU law

In two vignettes the judges were confronted with a case in which the hypothetical judge unconditionally complied with the expectations which are put on her by means of EU law and the principle of supremacy of EU law.

Vignette 1

In its recent judgment the ECJ has ruled that a certain national regulation is in conflict with European Union law. You have to judge over a case whereby this national regulation stands central. However, the national legislator has so far not undertaken any action to change the respective national provisions. You do not agree with the interpretation by the Court of Justice but you apply this interpretation to the case pending before you because you are of the opinion that EU law should take precedence over national law.

The judges took the following stances to the vignette:



n=285

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A cross tabulation between the way the judges proceeded with the vignette and the way they assessed their knowledge of EU law seems to suggest that those who assessed their knowledge as very (good) were more likely to proceed the same way as the hypothetical judge and unconditionally accept the principle of supremacy of EU law.

	Would proceed the same way	Would not know how to proceed	Would proceed differently	Totals
knowledge				
(very) good	30	8	1	39
moderate	69	40	7	116
(very) poor	49	51	17	117
Totals	148	99	25	272

Table1

The results show that 54 percent of the group would unconditionally apply the judgment of the Court of Justice and thereby conform to the principle of supremacy but as much as 37 percent would not know how they would proceed in the respective situation. The remarks provided to this vignette delivered interesting insights into the reasons of the particular choices. Those which belong to the supporters of the principle of supremacy referred in most instances to the rule of legality and the authority of EU law, effectiveness of EU law, uniformity and coherence of the EU legal system and jurisprudence, lack of discretionary powers in that regard or simply the binding force of EU law and the obligation to observe the primary role of EU law. Expressed differently, the supporter revealed a legalistic, hierarchical approach to the legal system in which EU law takes a supreme position. Those who would proceed differently based their opinion on, *inter alia*, the fact that the interpretations of EU law by the ECJ are not binding on a national judge, national law should prevail and take precedence over EU law, a judgment in which the judge would resort to EU law would be quashed by a higher instance national court, the manner of interpreting the law is in discretionary powers of the court and warrants the independence thereof, the instances of incompliance should be eliminated by the legislator. Finally, those who did not know how to proceed claimed that they would have to know the factual and legal circumstances of the respective case to make the decision, it is

necessary to adjudicate in the way which is clear for the parties to the dispute, it is up to the parties and the agreement between them to decide about the legal relationships between them and whether they were aware of the incompliance of national provisions with EU law. Many of those who were not certain how to behave referred to the lack of any experience with such an issue and/or the lack of knowledge of EU law which did not allow them to take a definite position in such an abstract case.⁸⁷⁹ The remarks have also illustrated how some misunderstandings with regard to the position of EU in the national legal order and the role of the Court's precedent influenced the decisions the judges made in the hypothetical case.

Judge 8 who would probably proceed in a different way: "If my view of the respective legal provisions applicable to the case in question differs from the one presented by the ECJ then I will pass the judgment in accordance with my own view since I am bound by EU law but not by interpretations provided by the ECJ."

Judge 25 who would not know how to proceed: "I would have to know more details about this case. The ECJ is however just a court which interprets EU law, if my interpretation was different then I would stick to it."

Judge 35 who would probably proceed in a different way: "I do not agree that EU law takes precedence over national law."

Judge 53 who would not know how to proceed: "I think that I have to adjudicate in a way which is clear to the parties. Different judgments, based on different legal provisions may hamper a proper reception of the law by persons who are mostly concerned, that is the parties themselves."

Judge 82 who would definitely proceed in the same way: "I find it necessary to ensure the uniformity of jurisprudence."

Judge 91 who would definitely proceed in the same way: "A judge is obliged to apply legal norms even if she does not agree with them."

Judge 93 who would definitely proceed in the same way: "A judge is bound by the constitution and statutes. Since the constitution provides for primacy of EU law then a judge is obliged to apply that law first. The Court of Justice has the competence to interpret that law."

Judge 101 who would probably proceed in the same way: "Since we are a member of the EU and we are bound by its legal norms then we have to submit to specific principles."

Judge 145 who would not know how to proceed: "It would all depend on the circumstances of

⁸⁷⁹ Also, further analysis has shown that as much as 81 percent of the group who did not know how to proceed declared to have deal with a maximum of 3 cases in which EU law played a role in the preceding 12 months. The foregoing seems to suggest that those with less practical experience with resorting and applying EU law were more likely to take an ambivalent stance to the vignette.

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the case in question, the way national provisions regulate the issue, the agreement between the parties about the legal relationships between them before the dispute arose, and whether the parties were conscious of the incompliance of the national legal norm with EU norm.”

Judge 151 who would not know how to proceed: “When deciding a case a judge always has to take into consideration the specific factual circumstances of the case.”

Judge 148 who would probably proceed in the same way: “The principle of supremacy of EU law applies and binds”

Judge 211 who would not know how to proceed: “I have not dealt with such a problem yet so I do not have an opinion about it.”

Judge 214 who would probably proceed in the same way: “I think that the ECJ in its interpretations goes beyond its competences and EU law is too broad but I have to keep in mind the principle of the uniformity of the legal system.”

Judge 220 who would probably proceed in the same way: “EU law takes precedence over national law but the way a court interprets the law is in its discretionary powers and warrants the independence of the court. And that is what matters most in my opinion.”

Judge 231 who would probably proceed in a different way: “It depends on the subject matter of the Court’s ruling but in principle I think that instances of incompliance should be eliminated by the legislator. One should remember that in judicial cases we deal with a systems of norms which should not be put into question each time ECJ decides something else.”

Judge 275 who would probably proceed in a different way: “I think that in such a situation I should decide the case on the basis of national provisions.”

Judge 297 who would probably proceed in the same way: “It is the consequence of the principle of supremacy of EU law”, similarly Judges 303, 311, 316, 330,345, 366, 367.

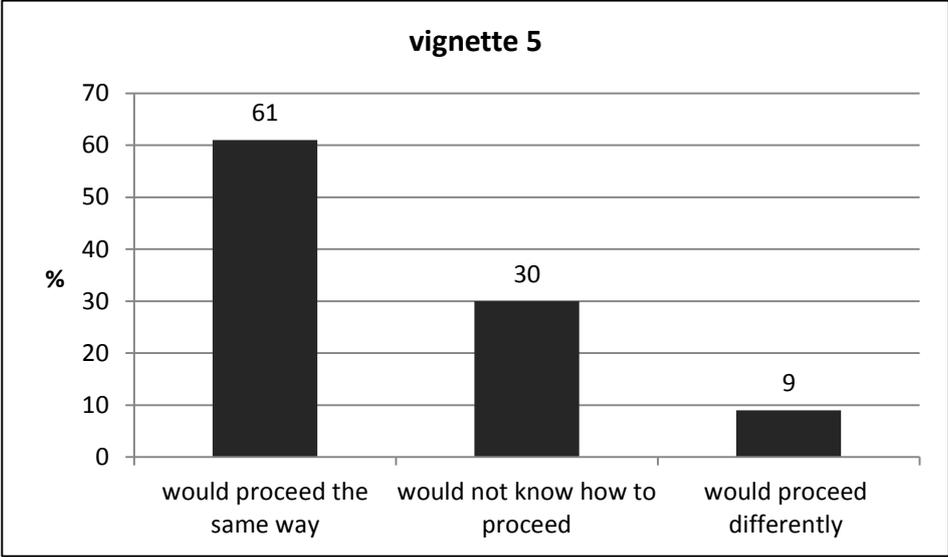
Judge 329 who would probably proceed in the same way: “If the national constitution was at stake I would choose for the constitution.

Box 1

Vignette 5

You are uncertain whether particular national provisions are in compliance with an EU directive. As you believe it is your duty to apply European law and ensure the effectiveness of EU law you refer a preliminary question to the ECJ concerning the interpretation of the directive. The ECJ rules that the national regulation is in conflict with the directive. Consequently, you set aside the national provisions and follow the ruling of the ECJ.

The judges took the following stances to the vignette:



n=285

In this case the distribution of answers resembles the preceding vignette. There are slightly more judges who would resort to the preliminary ruling procedure and, consequently, would unconditionally apply EU law which resulted in fewer judges which would not know how they would proceed. A cross tabulation between the manner judges proceeded with the vignette and the way their assessed their knowledge of EU presents as follows.

	Would proceed the same way	Would not know how to proceed	Would proceed differently	Totals
knowledge				
(very) good	27	7	1	35
moderate	70	34	9	114
(very) poor	63	41	14	117
Totals	160	82	24	266

Table 2

Similarly to the foregoing hypothetical case, the judges who would unconditionally apply EU law explained their choices by referring to the principle of primacy of EU law and the binding force of EU law and the authority of the European Court of Justice. Those who would decide differently referred to the lack of time to engage with the preliminary ruling procedure and the primary role of national law for their practice. Likewise, judges who did not know which

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option to choose, pointed to the necessity of knowing the legal and factual circumstances, the position of the parties and their lack of knowledge of EU law.

Judge 15 who would definitely proceed in the same way: “My decision would be based on the principle of supremacy of EU law and the binding consequences of ECJ’s judgments.”

Judge 25 who would probably proceed in the same way: “I am afraid of sending any question to so-called wise men in this world such as the Supreme Court, Constitutional Tribunal or the ECJ. You have to wait long for their decisions, you must take pains to write it in a right form which is more important than a right substance and eventually they will send you back something like “we refuse to make a decision”. Despite those concerns, if I was really sure that I was right and had time to write such a “dissertation” then I would refer a question.”

Judge 35 who would not know how to proceed: “It would all depend on the position of the parties in that regard.”

Judge 43 who would definitely proceed in a different way: “I do not have time for that.”

Judge 66 who would probably proceed in the same way: “For the uniformity of the legal system of the Union.”

Judge 80 who would probably proceed in a different way: “Because I apply national law if I adjudicate in Poland.”

Judge 93 who would probably proceed in a different way: “The preliminary ruling procedure takes too long. If it was possible, EU law should be applied directly.”

Judge 104 who would definitely proceed in the same way: “I think that if a court decided to send a question then it must comply with the judgment”, similarly Judge No 145.

Judge 232 who would definitely proceed in the same way: “The judgment of the ECJ is binding on me”, similarly Judges No 266, 364.

Judge 275 who would probably proceed in a different way: “I would apply national law.”

Judge 297 who would probably proceed in the same way: “I think that the judgment of the Court would be binding on me. The problem is that so far I have not dealt with such an issue, neither have I considered such a problem in theory. I guess I would proceed in a same way as with a preliminary question to the Constitutional Tribunal.”

Judge 303 who would probably proceed in the same way: “I cannot take a decision without a detailed analysis of the files of the case.”

Judge 347 who would probably proceed in the same way: “First I would consult with other judges in my environment whether there is indeed a case of in compliance of national law with EU law. If other judges agreed that indeed there is in compliance I would refer a question to the ECJ.”

Judge 367 who would definitely proceed in the same way: “I would not refer a question if I did not want to apply the judgment later on.”

Judge 373 who would definitely proceed in the same way: “Primacy!”

Box 2

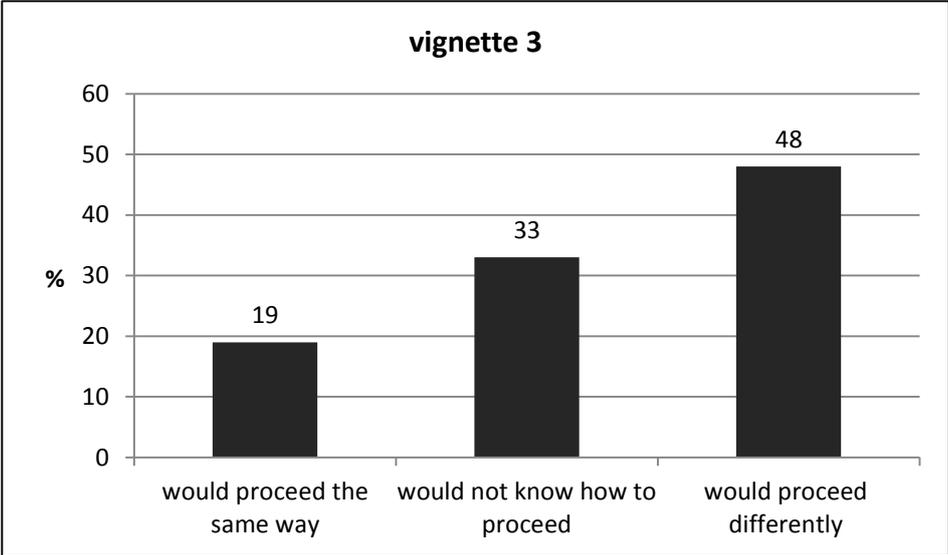
2.2. Conditional conformity with EU law

The following two vignettes were constructed in a manner that seemingly gave the respondents a choice between national and EU law. The claims of the parties to the proceedings or own conviction that particular provisions could offer a better solution would determine the way the judge proceeds with a specific issue. From the results gained in this set of vignettes, the distribution of answers and the remarks shared by the judges it stems that those were the most perplexing hypothetical cases.

Vignette 3

You are presiding over a case where national and EU law provisions can apply. Both parties to the dispute are of the opinion that national law regulates the issue way in a satisfactory way and therefore you are not referring to EU law in the respective case. In a similar dispute you decide to resort to EU law because the parties to the proceedings wish so. You are of the opinion that it does not matter what kind of rules are applied, as long as the dispute is settled.

The judges took the following stances to the vignette:



n=285

From the vignette it followed that nearly half of the group would proceed in a different way but as much as 19 percent would take a stance similar to the one presented by the hypothetical judge. The proportion of hesitant judges was again considerably high and amounted to 33

percent. From the explanations provided for the respective choices it followed that the reasons which would determine the conditional approach to EU law boiled down to, *inter alia*, the nature of civil law relationships which are, in the opinion of the judges, agreements between the parties and their will to regulate the relationships between them. However, the judges very often stipulated that from the vignette it did not follow whether there was an instance of in compliance between national and EU law; in such a case the priority would often go to EU law. Judges being on the opposite front pointed to the primary role of EU law and the necessity to apply it *ex officio* but predominantly they emphasized the fact that it is not for the parties to the proceedings to decide which law will be applied and underlined their obligation to ensure the consistency of jurisprudence. The necessity to generate coherence and consistency which implies that it is not permitted to decide differently in similar cases would, therefore, be the most important factor determining the choice of a specific answer. The undecided judges again pointed to the fact of the lack of in compliance between national and EU law, the lack of knowledge of factual and legal circumstances of the case and the lack of knowledge of EU law and experience with it. This vignette again underlined the problem of the role of a judge in the application of EU law and the evident discrepancy between those judges who reckon that they are obliged to apply EU law *ex officio* and those who will adopt a passive approach in that regard.

Judge 15 who would definitely proceed in the same way: “EU law, in case of collision with national law, is applicable when the parties refer to that collision and base their claims on it.”

Judge 25 who would definitely proceed in a different way: “ Everyone in Poland is bound by the same law, it is up to the court to what extent the matter in question is regulated by EU law and by national law (EU law takes precedence but it leaves it up to the Member State to decide about more detailed issues). Everyone going to the court in Poland must be sure that his dispute will be decided in the same way as other disputes were similar claims are at issue. Another thing is that I do not always realize that some aspects are regulated by EU law...”

Judge 42 who would probably proceed in the same way: “Civil law is first of all an agreement between the parties. It is the will of the parties how to regulate the relationship between them and which law should be applicable to it. If there is an agreement between them I will apply the law both parties agree upon.”

Judge 53 who would definitely proceed in a different way: “EU law takes precedence over national law. If Polish law provides for possibility of deciding the case on the basis of EU law then EU law should be equally applied to all cases falling into the same category. It is not up to the parties to choose the law applicable.”

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Judge 77 who would probably proceed in the same way: “The will of the parties (it’s their dispute) and respect for their wills are the most decisive factors here, in the limits of the law of course.”

Judge 83 who would definitely proceed in a different way: “Jurisprudence requires uniformity and the obligation to apply proper legal norms rests on the court.”

Judge 93 who would definitely proceed in a different way: “A proper application of the binding law is the obligation of the courts; not the procedural opportunism.”

Judge 101 who would probably proceed in the same way: “First of all, I would simply not look for EU law provisions.”

Judge 107 who would probably proceed in a different way: “Since the national provisions were not incompatible with EU law provisions, then referring to EU law, next to referring to national law, would only enhance the legitimacy of the passed judgment.”

Judge 145 who would probably proceed in the same way: “If both parties are conscious of the differences between national and EU law and the consequences thereof, and if they want me to decide the case on the basis of one of the legal systems then I would accept their argument.”

Judge 156 who would definitely proceed in a different way: “A judge should, in principle, apply the binding law *ex officio*.”

Judge 170 who would definitely proceed in a different way: “It does not matter whether the parties refer to EU law because I have to apply it *ex officio*.”

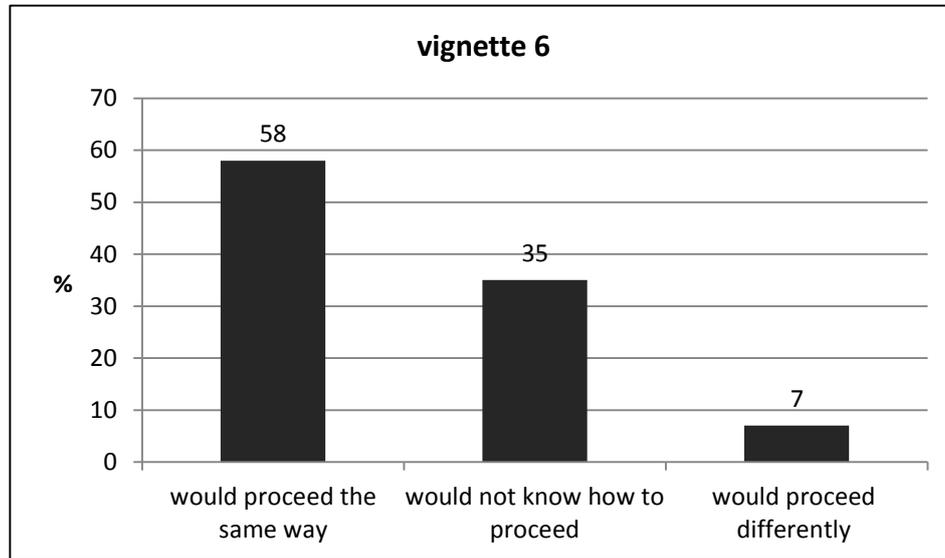
Judge 364 who would not know how to proceed: “It depends on whether national law was colliding with EU law. In case of collision the EU law provisions would take precedence.”

Box 3

Vignette 6

You have to decide in a case to which both European and national rules can apply. You consider both sources and decide to apply European Union rules to this case, because those rules offer a better solution to the dispute.

The judges took the following stances to the vignette:



n=285

In the present vignette a predominant part of the group preferred to proceed in a manner similar to the hypothetical judge. The remarks judges shared in this case showed that those who agreed with the choice of the hypothetical judge pointed to the fact that EU law was more advantageous and to the personal conviction of the rightness of such solution. Some pointed to the fact that EU law takes precedence so it has to be applied. Similarly to the previous vignette several judges pointed to the fact that it is ambiguous whether there is incompatibility between national and EU law. In that sense, it has again become visible again that the relevance of EU law is seen through the prism of a clear incompatibility between both sources of law.

Judge 15 who would not know how to proceed: "It is impossible to say what the term *better solution* means and I need to know whether there is incompatibility between the national and EU legal provision."

Judge 25 who would definitely proceed in a different way: "What does it mean a "better solution"? For one party it is better for other party worse, I may not give preference to one of the parties. In the end, EU law takes precedence so I will apply it."

Judge 33 who would definitely proceed in a different way: "If I apply EU law then I would do it in all cases and not just this one, due to the principle of supremacy of EU law."

Judge 35 who would not know how to proceed: "That depends on whether the principle of equality of the parties was observed."

Judge 42 who would probably proceed in the same way: “Provisions of national and EU law are tools to the judge’s disposal which help her to take a proper, in her opinion, decision.”

Judge 83 who would not know how to proceed: “My knowledge of EU law is not sufficient to take a position.”

Judge 145 who would probably proceed in the same way: “It all depends on the legal agreement between the parties before the dispute occurred and whether the parties were aware of the incoherence between the norms. If there were no agreements as to the law applicable then I will apply EU provisions which offer a better solution.”

Judge 225 who would definitely proceed in the same way: “We apply EU law if it is more advantageous.”

Judge 275 who would probably proceed in a different way: “I would apply national law.”

Judge 329 who would not know how to proceed: “EU law takes precedence so it does not matter whether it is more or less rational than national law.”

Judge 346 who would definitely proceed in a different way: “I apply EU law first not because the parties are better off but because I have to.”

Judge 359 who would probably proceed in the same way: “In the name of justice and rightness.”

Judge 366 who would not know how to proceed: “Everything depends on the scope and kind of claims made.”

Judge No 372 who would not know how to proceed: “Everything depends on the concrete factual circumstances of the case.”

Judge 375 who would definitely proceed in a different way: “I would apply EU law because it takes precedence and not because it offers a better solution.”, similarly 376,

Box 4

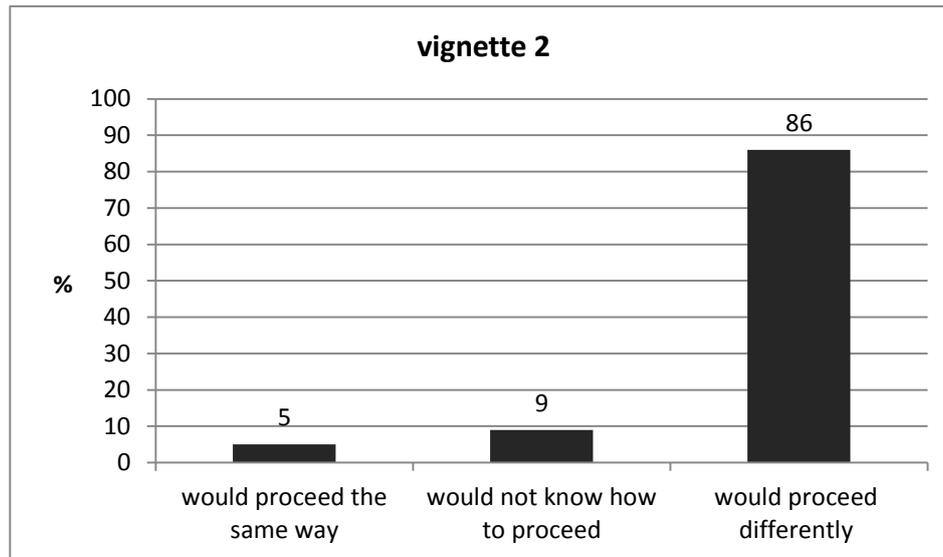
2.3. Rejection of EU law

The final set of vignettes was aimed at examining to what extent national judges reject EU law and the principle of supremacy thereof. The results gained from the vignettes seem straightforward: there are relatively few judges who would in general reject EU law. The analysis of the remarks shared to the vignettes provided however various insights into the problem.

Vignette 2

In a dispute pending before you, one of the parties draws your attention to the EU legal character of the case. You decide, however, not to pay attention to this aspect, as you do not think you are responsible for the application of EU law.

The judges took the following stances to the vignette:



n=285

The results clearly show that an overwhelming number of judges would proceed in a different way than the hypothetical judge. Nonetheless, the remarks provided to the vignette have illustrated that the reasons which prompted the judges to chose another option are not only underpinned by the fact that EU law constitutes a part of the national legal order and takes a supreme position and therefore cannot be disregarded. Frequently and overwhelmingly the judges pointed to the fact the claims made the parties may not be ignored and must be given a proper consideration. Interestingly, vignette 2 is the only vignette where the ratio of undecided judges is much lower and does not exceed 10 percent. The remarks that go along with this vignette firmly support the findings included in the previous chapter: if the parties refer to EU law, judges will not shun their responsibility following from EU law and will consider such a point. To reiterate, at present the claimants and their representative play the paramount role in the process of mainstreaming EU law into the daily practice of Polish civil courts. The foregoing does not yet imply that the judge will correctly proceed with an EU law issue since

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she might lack EU law knowledge, experience and/or appropriate skills to make a proper decision.

Judge 8 who would definitely proceed in a different way: "It is necessary to find and become acquainted with the legal act the parties wish to rely on. Then I will decide whether it is applicable to the case in question."

Judge 13 who would definitely proceed in a different way: "It is my obligation to examine the case including the arguments and claims of the parties."

Judge 27 who would definitely proceed in a different way: "EU law should be seen and treated as a part of the national legal order."

Judge 53 who would definitely proceed in a different way: "In a situation when a party wants to rely on EU law and such a claim is justified then undoubtedly it would be necessary to apply EU law."

Judge 77 who would definitely proceed in a different way "The case must be decided in accordance with the law and not an arbitrary opinion of the judge."

Judge 80 who would proceed in the same way: "I'd rather apply Polish law because I live in Poland."

Judge 82 who would definitely proceed in a different way: "EU legal norms are binding and I cannot disregard them."

Judge 91 who would definitely proceed in a different way: "The claim of the necessity of applying EU law obliges me to consider such a possibility."

Judge 93 who would definitely proceed in a different way: "A court is responsible for a proper application of binding legal norms, also EU legal norms."

Judge 104 who would definitely proceed in a different way: "If the party brings such a claim then we are not allowed to ignore it. You must make a decision whether EU law should be applied or not."

Judge 148 who would definitely proceed in a different way: "Since the 1st of May 2004 such a way of thinking is not acceptable and shows a lack of elementary knowledge of the consequences of Poland's accession to the EU."

Judge 210 who would probably proceed in a different way: "Because it is necessary to examine all the circumstances of the cases, both the factual and legal ones."

Judge 231 who would probably proceed in a different way: "I would consider whether EU law provisions should be applied but one should not forget that the claims and views of the parties are not binding on the court."

Judge 245 who would definitely proceed in a different way: "I would definitely analyze the EU law provisions the parties refer to."

Judge 265 who would definitely proceed in a different way: "As a national judge I am obliged to apply EU law because it takes precedence over national law."

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Judge 266 who would definitely proceed in a different way: “I would draw attention to this aspect. I would not be able to pass the judgment without knowing the regulation in question.”

Judge 275 who would definitely proceed in the same way: “Indeed, I don’t think that I’m responsible for the application of EU law.”

Judge 297 who would definitely proceed in a different way: “I am of the opinion that a judge should always consider whether EU law might be applicable to the case.”

Judge 325 who would definitely proceed in a different way “If I decided not to apply EU law provisions then I would do so not because I think that I am not responsible for applying EU law but because in a specific case EU law would not be applicable.”

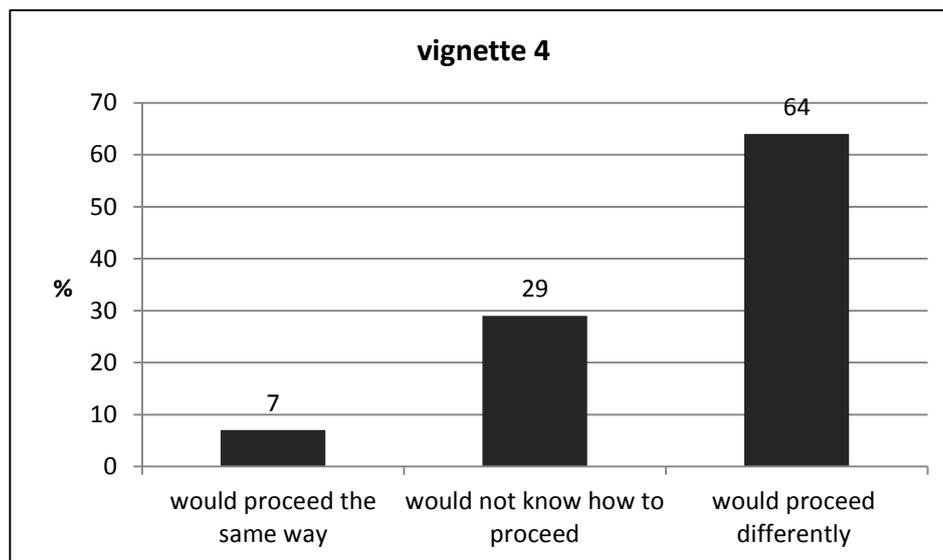
Judge 359 who would definitely proceed in another way: “I always have to consider legal provisions which may constitute basis for the decisions, regardless of their source. Especially when the party wishes to rely on it.”

Box 5

Vignette 4:

The European Court of Justice renders a ruling in line with which specific national provisions are in conflict with EU law. You preside over a case in which those national provisions constitute the legal basis for the judgment. You are familiar with the judgment of the Court but you do not refer to it in the respective dispute. You are of the opinion that a national judge has to apply the law which is enshrined in the national civil code and national statutes and not the case-law of the ECJ.

The judges took the following stances to the vignette:



n=285

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The respective vignette prompted somewhat more confusion among the judges. Although the number of judges who would proceed in the same way is not much higher than in the previously discussed vignette, the amount of those who would not know how to proceed is evidently higher.⁸⁸⁰ A cross tabulation between the manner judges proceeded with the vignette and the way they assessed their knowledge of EU law looks as follows.

	Would proceed the same way	Would not know how to proceed	Would proceed differently	Totals
knowledge				
(very) good	2	6	27	35
moderate	7	35	80	114
(very) poor	11	40	63	114
Totals	20	81	170	263

Table 3

In fact, this hypothetical case is a reversed vignette from the unconditional conformity set. As the reader will notice the distribution of answers also resembles those from the first set. In that sense, those who would unconditionally conform to EU law oscillate around 60 percent of the population and approximately 30 percent does not know how to proceed with the case. The number of those who reject EU law oscillates around 7 percent. This vignette and the remarks provided to it seem to support the finding that the precedential value of the jurisprudence of the European Court of Justice as a legal source is a perplexing issue for the Polish civil judges.

Judge 15 who would definitely proceed in a different way: “The principle of supremacy of EU law.”

Judge 42 who would probably proceed in a different way “I would get familiar with the judgment of the ECJ, analyze and refer to it but it does not imply that I will agree with it and apply it.”

Judge 43 who would definitely proceed in the same way: “I do not know many judgments of the ECJ.”

⁸⁸⁰ Further analysis has shown that 75 percent of the group which did not know how to proceed dealt with a maximum of 3 cases where EU law played a role in the preceding 12 months.

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Judge 53 who would probably proceed in the same way: “The law must be comprehensive to everyone. If the national norm does not regulate the issue in a way which complies with the ruling of the ECJ then it is necessary to first change the national law so the respective decision of the court could be observed.”

Judge 66 who would probably proceed in a different way: “The interpretation of national law should take into consideration the judgments of the Court of Justice.”

Judge 77 who would definitely proceed in a different way: “A judge can choose between both legal systems, i.e. national and European. The systems are namely parallel. However, the judgments of the ECJ create individual and specific rules which are applicable only you specific circumstances and as such cannot be applied directly to other cases. EU material law is yet another story.”

Judge 93 who would definitely proceed in a different way: “The system of legal sources clearly indicates which rules are applicable in case of collision.”

Judge 170 who would definitely proceed in a different way: “I am bound by the judgments of the ECJ.”

Judge 172 who would definitely proceed in a different way: “It is necessary to resort to EU law because it takes precedence over national law.”

Judge 231 who would probably proceed in the same way: “I am of the opinion that substantive civil matters do not fall under the principle of supremacy of EU law.”

Judge 247 who would definitely proceed in a different way: “EU law is binding and takes precedence”, similarly, Judges No 232, 241, 311, 316, 335, 359.

Judge 275 who would definitely proceed in the same way: “I think that I am obliged to apply the norms enshrined in national law.”

Judge 291 who would not know how to proceed “Specific factual circumstances of the cases would determine my own stance.”

Judge 329 who would probably proceed in a different way: “Interpreting EU law is the task of the ECJ and EU law takes precedence over national law. Except our constitution.”

Judge 346 who would definitely proceed in a different way: “I refer to the judgment of the ECJ and I am looking for a legal norm which would be in line with the arguments of the Court.”

Judge 364 who would probably proceed in a different way: “Since national law was not in compliance with EU law then you must take that into account. However, everything depends on specific circumstances of the case in questions.”

Box 6

The foregoing analysis confirms and complements the findings which were included in the previous chapter. It occurs that the majority of judges adopts a legalistic and hierarchical approach to law by accepting the supreme position of the legal order of the European Union

over the national legal order. It has also become evident that the ratio of judges who directly reject the principle of supremacy and the relevance of EU law for their daily practice and reckon that national law is the supreme law is relatively low. Nonetheless, the vignettes show that a considerable number of judges would condition the application of EU law on other factors such as circumstances of the case, equality of the parties, the nature of the civil law dispute, coherence and consistency of the line of jurisprudence. In addition to that, the notions of rightness and justness of judicial decisions were sporadically mentioned. The analysis of the vignettes again indicates that the supremacy of EU law is a principle which is not absolute, does not receive straightforward response and is frequently misinterpreted. Finally, a considerable group of judges admitted that their insufficient knowledge of EU law or the lack of experience with the application thereof rendered making a decision in the hypothetical cases impossible. Likewise, the abstractness of the vignettes impeded selecting a concrete answer.

All in all, in line with the results from the vignettes four general types of judges could be distinguished. The overwhelming number would belong to the group which unconditionally complies with the supreme position of the law of the European Union. The second group could be characterized as those who in general conform to EU law and respect the relevance of it for their daily practice but in each case they would condition the application of it on other factors. Finally, a very limited in number group of judges clearly favors national law by assigning a supreme position to it and disregarding EU law. Eventually, the remarks shared with regard to the vignettes allow to establish a fourth group of judges whose deficiencies in knowledge of EU law and the mechanisms of its application and/or the lack of experience with EU law does not enable them to take a definite position towards EU law. Interestingly though, those judges are aware of their ignorance in the area and straightforwardly admit that. With regard to this group it is difficult to forestall the way they would proceed with EU law issues. Undoubtedly any engagement within EU law discourse would require from them a thorough process of getting familiarized with EU material law but foremost the principles of EU law and its application. Finally, similarly to the previous chapter, the vignettes visualized that many misconceptions with regard to EU law and its

application are present among the Polish judges. Those undoubtedly bear on the way judges proceed with EU law related issues.

3. Personal testimonies

The preceding overview explores the way judges would behave when confronted with a concrete EU law problem which has already emerged in a dispute before them. The results provided to the vignettes enabled to examine what stance the judges take towards the principle of supremacy of EU law and the role Union's law play in the legal system. Nonetheless, as it has been argued in the introductory section of the present chapter, the way a judge proceeds with specific EU law issue which has already occurred before her reflects only a part of the whole process of judicial application of EU law. Only the in-depth interviews illustrated that the final assessment of the varieties of legal consciousness among the Polish must take into account the process in which national judges get to the point whether EU law could at all be relevant to the dispute at hand. The vignettes only signaled the matters attached to the judicial application of EU law the judges might be critical about. In turn, the personal testimonies allowed to see how the knowledge of and experiences with EU law may affect the form of legal consciousness. Moreover, the interviews made it possible to assess how significant EU law is for the judges and what importance they attach to it. By means of information provided in the testimonies it has been established that there are three general schemes in the manner judges approach EU law and understand and participate in the process of constructing the legality of EU law. Hereafter these schemes are referred to as: *engagement*, *passive formalism* and *criticism*. As it will be illustrated, those three embodiments of legal consciousness only partly overlap with the forms presented by Ewick and Silbey. In addition, the issue of EU law rejecters is discussed. This part of the study is of ethnographical nature and may therefore seem somewhat discursive. Such an exercise is however necessary to accurately reflect the nuanced variations of legal consciousness.

3.1. Conformity and engagement with EU law: activists

The pattern of legal consciousness which is referred to as conformity and engagement rests predominantly on the own willingness of the judge to engage with EU law of her own motion and openness to the legal order of the European Union. Judges who revealed this form of consciousness are very positive, not to say enthusiastic, about EU law, they evidently assign the primary position in the legal order to it and they frequently refer and resort to it in their own practice. Put differently those are judges who can truly be assigned a label of guardians of EU law.

Judge E – a 55-years-old male second instance employment and social security judge claims that EU law has become an axiomatic part of his job and he applies it actually whenever the case allows. In the opinion of the judge there are no trails where some elements of EU law would not be touched upon. He has been applying EU law from the moment Poland entered the EU but some elements of it occurred even before Poland joined the Union. The nature of EU law applied by E varies between directives, regulations, case law of the European Court of Justice but also soft law of the Union which the judge frequently refers to and interprets. E thinks that such a frequent occurrence of EU law is a natural corollary of the fact that the area of labour and social security law is so highly harmonized and the original source of national rules may simply not be ignored. Importantly, the judge will not wait for the parties to the proceedings to bring an issue of EU law before the court. Likewise, judge R who is a 30-years-old female judge adjudicating in the first instance civil court claims that approximately 10 to 15 percent of the cases she presides over touch upon EU law. The matters she has dealt with so far concerned mostly the issues of consumer protection, abusive clauses in contracts, competition, incorrect implementation of EU directives and their interpretations and the application of the Regulation on European Order on Payment Procedure. The judge states that it is impossible to disregard EU law:

“We have to directly refer to the sources of EU law. If I did not directly refer to the sources, for instance the directives on consumer contracts and case-law of the ECJ concerning this area, then I would not know how to apply the respective rules. I cannot imagine that some judges pretend this is not binding on us!”

Judge O, approximately 45-years-old judge of first and second instance civil and commercial chambers claims that the area of intellectual property and commercial law that she mostly adjudicates in entails a constant application of EU law. “It is just the peculiarity of this field”, she reckons. The judge refers to the jurisprudence of the Court of Justice in virtually each case she presides over. Often she resorts to the original language version of case-law of the Court and translates it on her own since, as she claims, the translations are of an outrageous quality or they are non-existent at all. She reckons that there is no national jurisprudence in the area and the doctrine is developed to a very limited extent so it is necessary to resort to other sources of law.

R thinks that the number of problems concerning EU law is growing. It follows from the fact that EU law encroaches on increasingly more areas of national law and the fact that the results of transposition and implementations processes are not always satisfactory. She claims that the way several EU directives are implemented is flagrant:

“They directly, thoughtlessly transposed the directive into our own legal system. They even did not read it beforehand. It’s just a collection of formulas and legal terms which altogether make up a statute but do not make sense so long you don’t consult the source directly and the case-law of the ECJ on that. Otherwise there is no chance you can correctly solve it. I do not understand how a judge can apply the law without referring to its sources and origin.”

The judges are of the opinion that professional representatives are rather poor with regard to EU law. Judge E claims that he has to “enlighten them how it works” and R reckons that there are very few ambitious advocates who refer to EU law but in most cases they do not realize the potency it has. In consequence, in most instances the finding out that EU law is relevant and applicable is very much dependent on the court and its own initiative to deepen the problem. O thinks that in present circumstances the professional legal representatives of the parties are of utmost importance for the process of mainstreaming of EU law into the judicial practice of other Polish civil courts but the knowledge of EU law among the representatives is unfortunately very poor.

A significant experience with EU law does not yet imply that the application of EU law has become automatic in all cases for the respective judges. They admit to have problems with particular issues of EU law. Judge E claims that even though issues such as direct effect and

supremacy are already well “judged upon” and do not trigger off any controversies or problems, the application of EU law is not always straightforward. In his opinion, there are some interpretative problems and aspects which are not that clear in the Polish legal order and due to local circumstances might be interpreted differently. The judge refers to, for instance, the issue of the emanation of the state which does not translate so easily in the local circumstances. Likewise, judge R says that the principles of supremacy and direct effect are fully accepted and applied but it does not imply that the application of EU law is easy and straightforward. In the opinion of R it requires much effort and deliberations, mostly because EU provisions can be interpreted in various ways so all pros and cons must be considered in order to choose a correct solution. The judge admits that EU law demands switching over to other judicial tools and methods.

The judges are very much in favour of the preliminary ruling procedure, although they admit that the institutional context and procedural economy could hinder their own engagement with the mechanism. In case of E it would be the lack of access to the translated jurisprudence of the ECJ. Later on he also reveals that referring a question requires much time, work and efforts. In that sense, a direct interpretation and application of EU law might be a better solution.

“You must gather all the arguments, facts, all the pros and cons yourself. You must read the literature, the case-law, get acquainted with the doctrine. It all is very time consuming. Do you realize how many judgments and their reasoning I will write in the meantime? Moreover, once you have done it all, you may venture to interpret the matter at stake on your own and resolve the issue without involving the ECJ. It is simply easier.”

Judge O claims that she would be very much willing to refer a preliminary question but the length of the procedure definitely works to its disadvantage. In her particular case referring one question would imply staying half of other cases and that would be too hazardous for both the parties and the judge herself. Judge R does not have any reservations with regard to the mechanism. Even though she finds the procedure somewhat long she does not think it would dishearten her from referring a question if such a necessity occurred in her own practice.

All three judges claim to have a good or very good knowledge of EU law in the area of their expertise and admit to be in need of constant training in this regard. Not surprisingly,

only in case of judge R the issues of EU law constituted part of the legal studies. Many of the postgraduate trainings were followed of pure personal interests, some of them abroad and there are even situation when judges themselves cover the costs of the trainings. Two older judges admitted that they were learning EU law “on the spot” because the disputes they were presiding over required engagement with the EU law.

There is a difference in the attitude judges take towards the possibility of further harmonization of EU law. In that sense, E goes as far as to say:

“I know I am different from my colleagues in that regard but I think that everything should be regulated by EU law only.(...) I am definitely part of the European legal order but it would be even better if national law could disappear completely. I really feel I am an EU judge and that I constitute part of the European legal order but as for me I could become an EU judge only. I don't trust national law and it is often of a very bad quality. I would applaud a common European code of labour law (...) I have never developed any attachment to any law. I was not given the chance to do that, everything has been changing so much in the course of the decades. But look, this new, European system, so many nations, so many countries can function with it. So why shouldn't I say that it is good? So go ahead, harmonize it all! ”

Judge O and R are more restrained in that respect and express some reservations as to the process of over-regulation done by the European Union. Judge O reckons that the fact that Polish judges do not know EU law has mostly roots in the nature of that law which is too extensive and too detailed.

All three judges are enthusiastic about the European Union, open borders, foreign contacts, economic grow. They also admit to be personally attached to the EU and the processes of integration, Judge R say:

“I am an optimist and I see EU in a very positive way. I appreciate the freedom it gives us to travel, to meet people from abroad. I am curious of the world.”

Judge O admits:

“Yes, I very much feel I'm a part of the EU legal order. But it is very much my personal attitude, how shall I put it... I am simply not that much “Polish” in that respect (...) I very much appreciate foreign contacts and I use foreign languages to make it all even easier.”

Judge E says:

“From the beginning I was very pro-European, even though I actually did not know what it meant. EU should become a super state with Brussels functioning as its management centre. I would be happier then. I do not have any reservations to the law of the EU and the Union itself. Of course there are some problems attached to the judicial application of EU law such as the lack of translations of case-law of the ECJ but further problems can have roots in my own laziness only (...)

Judge E also regrets his knowledge of foreign languages is limited. He calls it a serious handicap which does not allow him to resort of EU law sources in other languages and does not allow to exchange contacts with foreign judges.

The present examples shows that own initiative, openness, engagement and ambition but also the feeling of being responsible for ensuring the effectiveness of EU law determine the way the judge engage with and apply EU law. The judges fully accept the authority and legitimacy of EU law and perceive it as an integral part of the national legal order. The features of enthusiasm and own initiative together with a good knowledge of EU law and the mechanisms of its application are sine qua non of this embodiment of legal consciousness. Furthermore, a very open attitude to foreign influences and foreigners, the feeling of being a part of a common European legal order seem indispensable. Finally, elements of distrust to the national legal order, the national legislator and his legislative function and the quality of the legislative work it performs are traceable. All judges claim EU law has become an axiomatic part of the national legal order. Moreover, all the judges are of the opinion that it is often up to a judge to resort to EU law own willingness to engage with EU law. They go so far as to say that resorting to EU law requires courage and stepping out of line. As R claims, a judge must be willing to go beyond a literal interpretation of the provisions she applies but this task requires, in the opinion of R, much more work, effort and courage.

“The judges are very often afraid to step out of line, to decide in the way which differs from the rest, to bring new elements into the dispute. They are also afraid of the higher instance which may quash their judgments (...) They fear to speak out because they are think they will make fools of themselves (...) I know I have to apply EU law, it is an obligation which was put on me so I fulfil this function as well as possible. The workload here is huge but I manage. Frequently, we do not have enough time to deepen the knowledge of EU law but without continuous training you can never function properly. If you really want you will always find your way to achieve it (...)”

Interestingly, all three judges emphasized their own “exceptionality” with regard to their attitude to the judicial application of EU law. They also claimed to be those who other judges ask for advice concerning EU law issues.

The preceding inventory of arguments and pictures of the way judges construct the legality of EU law indicates that the described judges would to some extent reflect the variety of legal consciousness which is classified as *with the law*. Thus, this embodiment rests on the notion of engagement. In that sense, the judges are *with EU law* which becomes “enframed” in everyday practice, becomes a natural part of it. For this category judges the national and EU legal orders evidently intertwine, correlate and complement each other. The judges utilize EU law not only because they think it is an obligation resting on them but also because they find it interesting or better in terms of quality. They are committed to EU law but they are also committed to making good legal policy and reading and interpreting the law well which implies that they devote their best effort to “get decisions right, however they may define right.”⁸⁸¹ What is more, the fact of resorting to EU law would, in their views, reflect their progressive thinking, worldliness and the openness to the outside world. At the same time they feel it is their obligation to consult EU law. Nonetheless, an insufficient access to the sources or interpretative doubts attached to EU law may pose some constraints to the judge. Openness, good knowledge of EU law, courage, initiative, ambition, motivation and commitment and devotion are the capacities which prompt the judge to resort to EU law also in cases in which seemingly there is no such necessity. By doing so they not only deepen their knowledge of EU law even more but they also gain increasingly more experience which makes the application of EU law nearly a normal, everyday judicial activity.

3.2. Conformity and passivity towards EU law: formalists

The subsequent variety of legal consciousness is based on conforming with EU law but at the same time a rather passive or indifferent attitude towards it. Judges belonging to this group will accept the supreme position of EU law, they will see it as a majestic and distinct legal

⁸⁸¹ See Baum (2007), pp.15 and 18.

order but at the same time as a somewhat abstract and irrelevant aspect of adjudication. In that sense, EU will constitute an element which they will most instances engage with only if it is really necessary, i.e. parties to the dispute will claim that EU law is at stake, EU regulation ought to be applied in the case. In this group a clear border line between those judges who have an insufficient knowledge of EU law and those who have significant knowledge of EU law can be drawn. In the former group quite a common feature would be a feeling of frustration attached to the lack of knowledge of EU law and the methods of its application and sometimes a feeling of anxiety and insecurity with regard to EU law. Many of those will display diverse misconceptions and misunderstandings with regard to EU law. On the opposite front, there are those who are essentially prepared to solve EU law issues but yet they either claim that the parties should bring those issues to the attention of the court, they do not find time to engage with EU law discourse on their own or they admit that it is better not to stand out. All the judges in the group indicated the problem of the lack of time. Some referred to the workload as horrible and threatening, others as to overwhelming and enormous. The judges reckon that there is no time to deepen the knowledge of national law, leaving apart the European, and consequently there is no room to reach for EU law and legal solutions enshrined therein. They work under the pressure of time in order to solve as many cases as possible in a possibly shortest time. The operational context does not leave much space for self-education and this in turn leads to gaps in the knowledge of EU law.

Many of the judges in the group shared the opinion that EU law becomes only relevant when there are instances of incompatibility between national and EU law. Those, in turn, are virtually impossible because in many instances the national legislator copied EU directives to the national legal order and it is useless to question the way the legislator implemented EU law and look any further than national law. Judge M – a male 45-years-old civil and employment first instance judge says:

“During one of the EU law trainings we were asked to write a hypothetical preliminary question. So I consulted EU law sources but I couldn’t find instances of incompatibility between national and EU law. In my opinion incompatibility is just impossible.”

Judge C – a female 32-years-old first instance civil chamber judge – believes that it is sufficient to refer to the national law since it corresponds with EU law, there are no controversies between both sources of law which would imply the necessity of resorting to EU law. Similarly Judge Z – a female 35-years-old first instance employment chamber judge says:

“There are very few cases where EU could play a role. If we don’t have to then we do not resort to European law. If the parties do not refer to EU law and there are no doubts in national law why shall you bother and resort to EU law and EU directives? (...) Here we mostly make use of national law. And that’s enough for us. “

Consequently, judges categorized as conforming but passive with regard to EU law will have a scant experience with the application thereof. As for instance Judge G who is a 40-years-old first instance judge adjudicating in civil law area and who has dealt with one case where EU law was at stake. The lack of cross-border aspects is, in the opinion of the judge, the reason why EU law does not come before the court. He reckons that even the consumer protection cases do not touch upon EU law since there are no cross-border elements in them. Moreover, the judge points to the parties which, as he reckons, should be responsible for bringing an EU law aspect to the knowledge of the judge. With regard to this issue, an evidently contradictory and incoherent approach is visible. Judges often admit that it is their role to know the law, including EU law, and apply the law of their own motion and yet they push the responsibility of pointing out that EU law could be at stake to the parties. Judge Y – a male second instance civil chamber judge – also blames it on the passivity of the parties.

“One of the reasons why EU law does not occur in the courts is the fact that parties do not signal it. Certainly in our system we have the iura novit curia principle and I guess also the ECJ is of the opinion that EU law should be applied ex officio. Anyway, attorneys are totally ignorant of EU law and are incapable of pointing out that EU law could be applicable. Even if they refer to EU law then in a very general way, for instance that the national provisions originate from a directive but further they cannot even say what that means in practice. So, it is obviously the role of the judge to know that EU law could be at stake but that’s all in theory. Since we don’t know EU law we must rely on the parties to show us its relevance (...).”

Similarly judge Z says:

“If the representatives of the parties pull this out then of course you must scrutinize it, check it whether indeed it makes some sense. But they do it very rarely because they simply do not know EU law. We even have here advocates who state that they are legal practitioners in Poland and that they know Polish law only.”

The foregoing discussion is not aimed at implying that the judges would disregard the principle of supremacy of EU law. Conversely, the judges belonging to this group will reiterate that EU law takes precedence over national law, i.e. they take a legalistic and hierarchical stance to law. The judges will simply obey the EU rule just because it is the binding law. For them the rules of EU law legitimate, regardless of their source or content.⁸⁸² Nonetheless, the foregoing points out that the judge will not easily engage with EU law of her own motion. The lack of any engagement with EU law sources, on the one hand, and the fact that the parties rarely bring the issues of EU law to the courts’ attention, on the other hand, result in a situation when EU law and its supremacy remains a theoretical and abstract concept.

In the opinion of the judges, time constraints attached to the managing of considerable case-load is the biggest obstacle to refer to EU law or to deepen the knowledge of it. Some will observe that resorting to EU law may see a sort extracurricular activity which is just a waste of time when national law is directly at the disposal of the judge. Judge G clearly points to the national law as the law which is readily available to a judge.

“I assume that the local law which is directly at our disposal, in our reach should be applied first. If I want to look any further than national law then time constraints will anyway not allow me to do that.”

Furthermore, he observes that the EU law discourse is something that seems more sophisticated than the usual daily practice.

“I would love to reach for EU law, especially civil law because I think that it is of a very good quality and the case-law in this realm is excellent. But I am just a simple judge, a public clerk who cannot afford spending time on these higher class activities”.

⁸⁸² See Friedman (1977), p.139 on the concept of legitimacy and the reasons why people obey the law.

The examples also show how the ignorance of EU law influences the way judges deal with EU law issues. Judge I who is 35-years-old male judge and adjudicates in a first instance civil court admits to be a total ignorant in the area of EU law. He says that he is aware of the principles of EU law such as supremacy and direct effect and he claims to conform to them but he admits not to know what they mean in practice since he has so far dealt with one case in which an element of EU law occurred. His example shows how the unfamiliarity with distinct legal interpretation methods makes adjudicating in EU cases a very intricate task.

“So far I have dealt with one case. They wanted to rely on EU law, on this, you know, the Treaty and the freedom of movement of employees, that’s the way you call it, right? Their claims were totally not adequate to the legal provisions they wanted to rely on though. I just literally interpreted this provision of the Treaty and in my opinion it had nothing to do with the claim so I rejected the argument “

Judge I admits that EU law remains a totally remote abstract aspect of adjudicating. Therefore he does not see himself as an EU judge and has a rather indifferent attitude to it. A possible resort to and a subsequent application of EU is made totally conditional upon the parties to the dispute. The fact of ignorance in EU law area would also mean that the judge would in no case be willing to refer a question to the ECJ. Similarly, Judge D – a 50-years-old female judge of first instance civil court - has virtually no experience with the application of EU law, except one reference to the case-law of the ECJ. In a similar vein Judges J, K M, U and S have no or very scant experience with the application of EU law and express the feeling of anticipation with regard to EU law. However, many admitted that it is possible that they unconsciously disregard aspects of EU law due to either a lack of knowledge of EU law or a lack of experience with it. Judge U – a female 50-years-old employment chamber judge says:

“They threatened us with EU law before we joined the Union. They said there would be a tide of EU law cases coming but it has proven to be totally false (...) Of course it might be that EU law issues escape our attention. Difficult to say (...)”

Judge S who has dealt with one EU law case so far, claims that the parties do to resort to EU law and the judges are not capable of knowing everything. She thinks that she might even not

be aware that EU law could be at stake in her disputes and she does not have enough time to sound the problem.

“In principle it is not difficult to find the sources of EU law, for instance EU directives. If you really want you will find (...) Of course we apply the implementing provisions but the parties do not claim that EU law could be incorrectly implemented. And frankly, we also do not know whether it is correctly implemented (...) So yes, of course we apply the implementing provisions but obviously we do not check whether in fact the implementation is correct (...) I must admit I would never engage with scrutinizing whether the implementation is correct of my own motion.”

Jude W – a 38-years-old female civil chamber judge in the capital – admits that the lack of time hinders any engagement with EU law. She also discloses a clear aversion to reversal by the appeal court. In the opinion of Judge W the higher instance courts will quash the cases in which EU law is referred to. She says:

“All first instance judges are afraid of the appellate court. They will anyway quash your case where you resort to EU law. And each reversal of your judicial decision will have a negative bearing on your promotion. So it is better not to distinguish oneself, not to dare them, not to step out of line.”

In a similar vein, judge N observes that claims based on EU law, even if they are accepted by a court of first instance will be quashed by a court of higher instance.

“So it follows that even if you, as a judge of first instance court, apply those EU law provisions then second instance will reject it anyway. That’s my experience so far. So in my opinion you must train them all in EU law, not only first instance judges!”

Despite all, judges belonging to this group expect that EU law will sooner or later become a usual part of many proceedings. The feeling of anticipation with regard to EU law was clearly traceable. As I reckons:

“Those young people learn EU law as a regular part of their legal training. You can see, they know much more and it is not foreign law for them. It is something you can advance your claims with. Recently I have for instance learnt that an individual may claim compensation for his holiday if he is not satisfied with it and that he may rely on EU law so you see, it is there but we just must know that. I do realize we must start preparing.”

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As a matter of fact, the judges set their hopes in the new generation of legal practitioners which are definitely better in the issues of EU law and will very likely refer to EU law on a more frequent basis. As Judge D observes:

“It is unavoidable. They do not have that mental barrier. The young ones are more courageous.”

Judges in this group take different stances towards the preliminary ruling procedure. All of regard it as an important mechanism but most of them find it a rather an abstract and vague one. Judge N claims that the preliminary ruling procedure remains rather ambiguous mechanism.

“In my daily practice, I would not know how I could employ it. I would be willing to employ it, definitely, because I like all sorts of novelties but it would require sound studies about the how and why on my part so I would know how to apply it and not to make a fool of myself.”

According to Judge G the preliminary ruling procedure is a dead institution and will remain a dead institution in Poland for some time. As such it is a great mechanism but it is rather complex and not very clear. In the opinion of the judge, ready-made reference templates should be made available which could greatly facilitate referring questions to the ECJ.

“Every judge is afraid of one thing, that he will make a fool of himself, that he won't know how to proceed, that everyone will see how incapable he is. In that sense, such a template or alike system would offer a helping hand to judges. Preliminary ruling procedure is namely one of those factors which can virtually bring Poland and the judiciary to the European Union.”

In the opinion of Judge S there has been no necessity of resorting to the preliminary ruling procedure yet but the length of the procedure was seen by her as a hindering obstacle. Judge S would be afraid that the parties to the proceedings could even use the fact that she employed the procedure against her to claim compensation for prolonging the proceedings. Moreover, she does not think that she would ever need a helping hand from any institution.

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“I will sort it out on my own. So far it has never happened that I would not be capable of finding answers to some legal issues. If you do your best you will always manage to find a solution.”

Judge C is reluctant about resorting to the mechanism:

“I don’t think I would make use of it. First if all I would have to find incompatibility between national and EU law to even think about such a possibility. Then the waiting time is rather disheartening. To my knowledge our own law is adjusted to EU law. And lastly there is a system of state liability in damages for prolonging the proceedings. And even though such a prolonging would be only indirectly caused by me but theoretically I do not know how the appellate court would react if the parties had to wait 18 months. In such a context I think I should take into consideration the legitimacy of such a preliminary reference, so I’d rather try to resolve the problem on my own.”

The most occurring criticism with regard to the European Union is the fact of overregulation and ambiguity of legislation. Few of the judges think that the amount of EU regulation (and regulation as such) is just the necessity of the present time. Most of the group was however of the opinion that the overregulation becomes absurd and damaging. Judge G thinks that the amount of EU law has become frightening. In his opinion, it strives to regulate all areas of life including those which should never be touched upon by the law. In the opinion of Judge G EU law does not fulfill the conditions of a common sense. He reckons that EU law became illogical since it tries to regulate real facts. Judge S admits that she is not aware how much law the Union “produces”. It has become so much and so detailed that she cannot embrace and define it. Judge J – 45-years-old female civil and commercial chamber judge without any experience with EU law – observes that:

“Everything is so new and there is so much of it that I, we, can hardly embrace it. The amount of it is just scary! There is so much of it that I would have to read it again and again in order to grasp it and learn it.”

Likewise, Judge C reckons:

“The amount of EU law is horrible and it recalls of the common law system where you need to know particular cases. I see the same with regard to the ECJ where there is such an amount of categories, sorts of cases but you cannot see any

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system in it. It is just a chaos. I just don't know anymore. I have a feeling that I cannot comprehend the whole system."

Despite of all, the judges in the present group are evidently pro-European. The EU is associated with open borders, free travelling and the economical gain and yet the passive judges mostly do not associate themselves with the EU judiciary.

As it has been mentioned, the level of knowledge in this group may vary considerable from those who have a rather unsatisfactory level of knowledge to those who will have a considerable knowledge of EU law. Judge G assessed his EU law knowledge as good since he followed several postgraduate courses in EU law, is familiar with the sources and case-law and the literature on the subject. He also admits that he is very interested in it and tries to deepen the knowledge whenever he can. He claims he wanted to be well prepared in case a dispute with EU law occurs. Similarly Judges D, Y and M state to have followed several various EU courses including those abroad and to be well prepared to apply EU law or to refer a preliminary question to European Court of Justice. In contrast to that, Judge I calls himself a laic and ignorant in the area of EU law and judge S states that one week before Poland joined the European Union each judge was hastily following an EU law course but furthermore there was no opportunity to substantially broaden the knowledge of EU law. Judge N is frustrated about the lack of access to a proper, thorough training, the fact that authorities are not interested in disseminating the knowledge of EU law and the workload which does not allow her to deepen the knowledge of EU law.

The shortages in knowledge of EU law, the general lack of experience with EU law the distinctiveness of EU law make the whole processes of its application difficult. Judge L – a female 35-years-old first instance commercial chamber judge who has some experience with the application of EU regulations observes:

"Couple of times I have applied the European Payment Order. The problem was that I had no idea how to proceed with it and nobody could give me a helping hand with it. I phoned the Ministry, I phoned various courts across the country and finally I found someone who had some experience. You know, the fact that EU law requires from us a different way of thinking and reasoning but also a different manner of reading and speaking is very troublesome. In fact they ask us to switch to another adjudication language. I have read the Regulation several times and

each time I am learning it from the start(...) you know it is perplexing, but I do it because it's my obligation. ”

With everything considered, this construct of legal consciousness shares many features with the *before the law* form. In that sense, judges find themselves *before EU law* which is seen as a distinct and removed from the normal (national) legal order. EU law is therefore considered as something different, something exceptional and authoritative and yet objective and impartial. In that regard, EU law is a “distinctive institutional phenomenon”.⁸⁸³ The judges belonging to this group do not discuss the place of EU law in the entire legal order, they just accept but at the same time they mostly adopt a passive attitude towards it. In that sense they are loyal to it because that is their understanding of legality and the rule of law. However, due to the lack of or a scant experience with it, EU law remains a dead letter, is not a living law. Similarly, the judges belonging to his group may express frustration, insecurity and uncertainty because they feel powerless in the face of the scope and enormity of EU law which often goes in hand with their deficiencies in EU law knowledge. The clear time-constraints the judges are confronted with render the engagement with EU law virtually impossible. In that sense, the institutional framework considerably bears on the willingness of judges to resort to EU law, consult it and engage with it. Passive judges will very likely rely on heuristics while their decision-making, such an exercise speeds up the process of finding solutions to the disputes in situations when an exhaustive search is impractical due to the time-constraints. Finally, this embodiment of legal consciousness illustrates how the social context may bear on the way judges adopt a passive attitude towards EU law. Nonetheless, once confronted with EU law issue in practice, judges belonging to this group will endeavour to solve the issue as properly and duly as they can so a proper consideration will be given to the EU law argument and if necessary a supreme position will be given to it. Finally, judges expressing this form of legal consciousness admit that resorting to EU law requires peculiar motivation, intellectual twist and ambition but also special judicial methodology since resorting to and applying EU law is not an ordinary judicial practice but something more intricate, subtle and sophisticated.

⁸⁸³ Ewick&Slibey (1998), p.106.

3.3. Conditional conformity and reservations towards EU law: critics

The preceding form of legal consciousness is based on the conforming but at the same passive attitude towards EU law. The premises of the legal consciousness variety which will be examined in the present section will to some extent overlap with the features of the foregoing form of legal consciousness. Nonetheless, several distinct characteristics thereof support creating a separate category. The most significant hallmark of this variety which distinguishes it from the preceding one is the fact that the judges often do not accept the absolute primacy of EU law. Second, the judges belonging to this group express many reservations as to the legal system of the European Union and its legitimacy but foremost as to the role and position of the European Court of Justice and a judge-made legal order. In that sense, the judges disclose the feelings of distrust to EU authority and cynicism about its legitimacy.⁸⁸⁴ Those reservations, in turn, may in some instances bear on the way judges apply EU law. Furthermore, the complexity of a multi-level system and the implications thereof for the daily judicial practice may prompt judges to shun EU law, to try to omit it or disregard provided that there is room for exercising discretionary powers. With regard to the level of EU knowledge presented by the judges it might be observed that all of them expressed some concerns with regard to it but in general the level of knowledge could be assessed as moderate or good.

Judge H is a male 40-years-old first instance employment and social security judge with quite a considerable experience with the application of EU law. In his practice EU directives and regulations are frequently at stake but foremost the jurisprudence of the ECJ plays an important role. The judge claims that the parties sometimes refer to EU law but many of them refer to the Treaty in general.

“In principle the more general rules you refer to, the worse advocate you are. Look, for instance they refer to gender equality, Art.141 EC Treaty and then still you need to get down to the national provisions and judge in accordance with the national provisions. Possibly you may refer to some jurisprudence. So the rule is general and

⁸⁸⁴ See Nielsen (2000), p.1083 who distinguishes distrust to authority/cynicism about law paradigm as one of the legal consciousness embodiments.

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then you have a problem. I do not want any power and general rules, I prefer a concrete and detailed provision to a concrete situation. I do not have time to rack my brain about any provision, I want to solve the problem at once. The more general rule then you must start interpreting it in conformity with EU law or with the constitution but in the meantime I could solve many other problems (...) General provisions give us power, maybe some judges want that power? I do not."

Judge X is a male 35-years-old civil chamber judge who claims that the parties sometimes refer to EU law but it is in the end useless since EU law is implemented. Similarly, Judge F - a 40-years-old male first instance judge in employment and civil matters with a scant experience with EU law explains that in a recent dispute the legal representative referred to the Sales Directive which forced the judge to refer to EU law but in this case EU provisions were ideally pasted into the national legal system so in the end it was not necessary to refer to it at all. The judge is of the opinion that the jurisprudence of the Court of Justice seems to play the most important role in the judicial application of EU law but the judge himself does not resort to it for the translated case-law is not the original version thereof and may be taken out of context

Judge V – a 38-years-old male first instance civil chamber judge refers to the impracticality of EU and its little bearing for the daily judicial practice, he observes:

"There were some claims by the legal representatives that EU law could be at stake but in the end those always proved to be trivial arguments found somewhere on the internet. Those were no specific provisions but some general rules, for instance an EC Treaty article which establishes some general rule but you know, those never apply to the case."

Judge A – a male 35-years-old first instance civil chamber judge – admits that he never embarked on scrutinizing whether EU law is properly implemented:

"I've never dealt with such a problem where I would have to set aside national law. If I knew that there was incompliance I would set aside national law provided that the solution was better for the party (...) If you can rule on the basis of national law why would you bother to look further? No, I don't feel any need to look further and it would moreover terribly prolong the reasoning."

The judges point to the fact of complexity of the system, overlaps and distinctiveness of EU law as those aspects which render the issue much more perplexing. In that sense, EU law

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becomes a substantial burden put on the shoulders of the judge which jeopardize the normal, daily functioning. EU law is thus seen through the perspective of additional and perplexing work. Judge H says:

“The problem is not with EU law as such but with all those inter-systems collisions. Because those systems overlap but in practice it does not work as smooth as you would think. EU law yes, but how to use it in a particular case? Is the local government it the emanation of the state or not? Is it horizontal or vertical situation? And then all that jurisprudence! And then all the work time regulations and the results thereof. So I had to read and read and read it all. Luckily I could suspend other cases and I spend my time on reading it all. I had an assistant who was searching for the jurisprudence in Polish. There are no translations and I do not know what to do! Finally after all those efforts I could give a judgment.” Further on he adds: *“It all costs too much time and effort so you do it only when you really cannot avoid it. So everyone avoids it.”*

Judge X observes:

“EU law is something next to the normal daily functioning. It is very exceptional (...) In principle it is integral with the national legal order, in practice totally distinct from it (...) National law is a priority for me because I know it. And if we want to apply EU law then we look for possible conflicts with EU law so you evidently look for distinctiveness, don't you?”

Judge F points to the complexity of the precedential system which seems one of the most hindering obstacles in the application of EU law.

“They say that we are approaching a common law system where a precedent is more important and judge made law takes precedence over statutory law. But our legal culture, customs and habits must change first! It is different from what we know, difficult in reception, difficult in application but probably sooner or later we will look differently at this. So far it is just simply something totally different from what we have been doing so far (...)”

Similarly, Judge V reckons:

“EU law means more complexity in my daily work, the necessity to reach for other sources of law. Those are no reasons which would make me happy (...) for me EU law is not a natural thing, it is not an integral part of the legal order.”

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As it has already been indicated, an incoherent approach to the principle of supremacy is noticeable within this embodiment of legal consciousness. Judge F illustrates how a recent problem concerning the interpretation of provisions implementing EU directive on collective redundancies despite of discrepancies between national and EU law prompted him to choose for a national solution of the problem because it was more favourable for the party. He observes:

“That’s the way our legal system works. Our provisions have to be interpreted in a way which would be as favorable as possible for employees. So there were some differences between national and EU law and I chose for our own codical guideline.”

Importantly, in the opinion of the judges, the national Constitution takes absolute primacy and plays a paramount role. Judge X says it in a straightforward way:

“In my view as a national judge, the national constitution takes precedence. In my system it is absolutely a superior legal act.”

Similarly, Judge V and A are of the opinion that the national constitution takes precedence. In the opinion of V it follows from the constitution itself and Judge A thinks that there are no legal reasons which would legitimize the supreme position of EU law. What is more, the judges express many various reservations as to the role the European Court of Justice and its jurisprudence play in the in the entire legal system. In that sense, many of them discredit the precedent of the Court if they do not agree with the Court’s line of reasoning. The notions of rightness, justness, rationality and reasonableness may be used to support the stance the judge takes towards a particular judgment of the Court. Some of the judges might question the authority of the Court in general and the binding force attached to its precedent. Judge X is of the opinion that:

“The ECJ plays an opinion-forming role. I assume that those are just people and they make mistakes like other people so you cannot take the jurisprudence of the Court unconditionally, cannot take it for granted. We all have our brains and we can think on our own and the fact that some wise men with huge experience decided something does not mean they decided it correctly. I might as well decide something else even in a similar case. Moral reasons for instance could make me decided in a

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different way. The application of law must make sense and rest on moral premises and not only follow a rigid letter of law.”

Further he adds:

“They may explain specific provisions but the way they interpret the law and their commentary are not binding on me (...) Anyway, it never happened to me that I would have to apply an ECJ judgment. I am just a first instance judge, over here the ECJ has no bearing.”

Judges H and A are very critical of the European Court of Justice, its judicial activism and the methodological tools used by the Court.

“In my opinion the Court goes too far in its jurisprudence. No one can control them and they do what they want. The only way they can be criticized is through the media. They think they have power and finally it goes to their heads and they create politics. There are no checks and balances there, the only emergency brake is the self-limitation and self-restrain. So long they were creating institutional law it was fine. But at present it starts to become absurd, it touches upon a normal citizen in an absurd way. When you start employing the dynamic way of interpretation you abandon the most basic and general function the law plays in society They do have to realize how they can influence lives of simple citizens and do not forget that the conditions are different in France, on Malta or in Poland and that all the countries might have their own visions how the things should go. (...)”

Judge A disapproves of deriving legal rules from legal vacuum and the idea of the judge-made law. In the opinion of A, the court should apply the law, not engage with processes of making it. In that sense, he has little trust into the whole system.

“I dislike this manner of adjudicating where they create legal rules and principles in situations where there is no legal basis for it. The ECJ makes law and that is alien to my way of perceiving the role law plays in general. A court applies the law, it mustn't make the law. I know the arguments of the Court why they do it but I do not agree with them. So you suddenly discover that there is something which in fact is not there.”

Judge X and H argue that if they do not agree with the judgments of the Court they will try to find a way to omit it. Judge X says

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“(...) so there is a flood of good judgments and a flood of wrong judgments (...) so if I did not agree with any of the judgments of the Court I would simply not apply it.”

Judge H admits that:

“My negative attitude to the ECJ may of course have bearing on the way I will apply the jurisprudence of the ECJ. We try to establish one line of jurisprudence and to avoid some absurd situations. So if I think that the ECJ went too far then I will apply another interpretation or will wink at it if it does not fit my opinion. The law is not sacred. You can omit it, pass it over in silence, wink at it. There is always a solution. For me the most important is that people will not be aggrieved.”

A critical and cynical attitude becomes also visible with regard to the amount of EU regulation. The judges are of the opinion that the scope of regulation has become absurd and hazardous. Judge X goes so far as to call in a nonsense approach:

“The scope of EU law is very wrong. Too much of law is never good anyway. A man is not capable of embracing it all. They look for rules in simple, idiotic situations. They multiply regulations which pervert the logical approach to a normal human functioning. Look how complex it all got! If you need a staff of experts who after a long period of searching are not able to find a solution to one legal issue. Even don't say a proper solution but any solution then it is an utter nonsense.”

In addition to the above, the judges also take a rather critical or skeptical stance towards the preliminary ruling procedure. The complexity of the procedure which is seen as an additional burden, the lack of time to engage with it determine the unwillingness to employ it. As H observes, the mechanism does not fit the daily reality of first instance courts:

“If it was really necessary and there would be no way to avoid it then I would refer a question, for instance the party asked me to do it and it is clear that it was necessary to ask. Moreover, technically it is too long, too difficult. I don't have the knowledge to do it. First I would have to master the issue so I would not discredit myself. But if I master the issue, why shall I still refer a question? Waste of my effort which could be utilized in another way.”

Judge X claims:

“I would not be willing to employ it because I don't have time. I would need a couple of days which I simply do not have. If you are bored you may play with that

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stuff but for me it would be just an additional, unnecessary burden (...) even if the parties wanted it then they would first have to guarantee that I have time to do it.”

Likewise, judge F would be reluctant to employ the procedure. The length of the mechanism would play a dominant role in that regard.

“I need to constantly explain each case which I suspend. And of course the parties are waiting. They are to decide whether they want it. If they ask me to send a question then I would do it. But I even would have a problem if only one of the parties wanted me to send a question because I could expect that it want to prolong the proceedings.”

Regardless of the foregoing arguments and opinions, the judges do not perceive the Union as a wrong or harmful formation. They admit that the underpinning ideas of integrating, open borders and free movement are noble and attractive and the country and citizens do profit therefrom. However, that idea has been somewhat perverted in the course of time and the system has become untransparent, complex and overmuch expanded.

The foregoing analysis shows how a critical approach to EU law and the jurisprudence of the European Court of Justice and the complexity of the mechanisms of application of EU law may dishearten the judges from resorting to it and employing it in the daily practice. In that sense, the judges are at times opposing EU law, trying to omit it or resist it. In that sense, the present embodiment shares some components with the *against the law* legal consciousness. One of the situations of resistance would be a deliberate omission of EU law aspect due to the lack of time to consider this point in a detail. Another would be ignoring EU because the solution it would provide would be seen as unjust or unreasonable. However, those instances of *omissions* would take place exceptionally and only in situations when the judge could exercise some discretionary powers, for instances specific factual circumstances of the case could be used as a ground not to apply the precedent of the ECJ or the issue leaves some room for different interpretation. In that sense, the judicial discretion becomes a capacity used by a judge to advance his own, better solution to the problem. All in all, in most situations, the judges would still conform to EU law since, in the end, they are subordinate to the principle of supremacy of EU law and they are aware of it. At the same time, the judges belonging to this group will very likely reject the notion of absolute primacy of EU law. The

national constitution is considered the paramount source of law. They also might express cynical opinions with regard to the legitimacy of EU law and the authority of the European Court of Justice. With everything considered, it may be claimed though that the similarly to the preceding form of legal consciousness the judges belonging to this group will perceive EU law as a distinct and discrete legal order which however clashes with the national legal order. The distinctiveness of EU legal order and the complexity of judicial application thereof will be given as a ground legitimizing the attempts to evade the engagement with EU law. Contrary to the passive formalists, the critics do not take EU law and its place in the entire legal system for granted. They discuss it, express their critical and cynical points with regard to it and sometimes distrust and contest it.

3.4. EU law rejecters?

As the anchoring vignettes have illustrated the number of judges who would reject EU law in its entirety and the principle of its supremacy is very limited, but they do exist. Vignettes No 2 showed that there are 5 percent of judges who would totally reject the relevance of EU law for their daily practice. Nonetheless, the qualitative part of the study proved that there are several methodological impediments which make tracing judges who entirely reject EU law a very perplexing task. The simple reason that those judges do not want to disclose themselves renders the whole exercise excessively difficult. Rejecting EU law means opposing the rule of law and that is at evident variance with the role of a judge in the legal system. And even though during the interviews some judges mentioned that they personally know other judges who are “totally resistant to EU law” it was yet nearly impossible to detect them throughout the qualitative part of the study. In one of the interviews a statement was made: “I do not apply EU law and I have never done so. We simply do not apply EU law here, only national law so I have nothing to say about it and it is useless to talk about it”, further the judge refused to proceed with the interview. This evidently does not allow to establish the components of cultural schemes which would determine this form of legal consciousness. In that sense, the ‘rejecting’ form of legal consciousness remains a very elusive one, is not sufficiently supported by the qualitative evidence and from the methodological point of view remains a

troublesome issue. By and large, it could be put forward that the instances of a complete rejection of EU law would be of a very exceptional nature.

4. Preliminary conclusions

The present chapter has gone beyond the normative framework as established at the outset of this study and explored how diversely particular judges respond to EU law and the role it plays in both the legal order and the daily judicial functioning whereby it allowed to see the distinct ways in which the judges construct the EU law legality. From the present chapter it stems that the question why EU law occupies more space in practice of some judges than others may be better answered by incorporating the insights from legal consciousness theories. It has become evident that diverse schemes of legal consciousness may be distinguished among the judges and distinct characteristics are attached to each. Every embodiment reflects various explanations for any legal action (or a lack thereof) with regard to EU law and allows to situate the judge in different angles to EU law.

The short summary of the varieties of legal consciousness as encountered among judges demonstrates that the features judges belonging to a particular group share overlap only partially with the models created by Ewick and Silbey. At the same time, the core of each form of consciousness remains the same and rests on either *conformity*, *engagement* or *resistance* premise. Next to reflecting the knowledge and experience, legal consciousness also mirrors the objectives, purposes and available resources and social schemes.⁸⁸⁵ By doing so it provides us with a much more nuanced and colorful picture of the functioning of national judiciaries in the European capacity.

The constructs of legal consciousness presented in the foregoing sections are not aimed at being rigid and clear-cut. The presence and operation of EU law in the daily practice of national judges manifests itself in distinct manners and forms. Some judges may reflect mixed forms of legal consciousness depending on the factual and legal background of the case, claims of the parties or time constrains. It is necessary to reiterate the finding of Ewick

⁸⁸⁵ Ewick&Silbey (1998), p.53.

and Silbey that pure forms thereof are difficult to come across.⁸⁸⁶ Indeed, legal consciousness is not a steady and rigid phenomenon. It is emergent and moving and evolves with the knowledge and experiences. Legal consciousness is therefore neither fixed, stable, unitary or consistent. It is something local, contextual, pluralistic, filled with conflicts and contradictions.⁸⁸⁷ Also, the role EU law plays in the practice of national courts is indeterminate and it leaves quite some margin of discretion to the national judge. Quite a number of judges reveal mixed forms of consciousness which, as has been illustrated, are manifested through, *inter alia*, an inconsistent approach towards the principle of supremacy or the preliminary ruling procedure. Sometime judges may also express contradictory legal consciousness. Those findings are however entirely in line with the theory of Ewick and Silbey who claim that “legal consciousness is not a permanent (...) aspect of a person’s identity or life, although it may end up being empirically stable.”⁸⁸⁸ In that sense, a judge who is very much passive and anticipating with regard to EU law may, arguably, become *with* or *resistant* to EU law with the lapse of time. The gained experience with the application of EU law may namely enlighten the judge of the potential might EU law may entail and offer to the judge. Knowing how to utilize EU law may, in turn, increasingly encourage the judge to resort to it. Conversely, adverse experiences with EU law (time consuming, perplexing) might also discourage a judge from resorting to it in the future and might, arguably, cause attempts at omitting or avoiding it.

⁸⁸⁶ This fact has also been acknowledged by Ewick&Silbey (1998), p.45 who noted that one person may display three forms of legal consciousness depending on the situation he found himself in.

⁸⁸⁷ As Ewick&Silbey (1998), p.50 observed “a person may express, through words and actions, a multifaceted and possibly contradictory consciousness. As we use the term, then, legal consciousness is neither fixed nor necessarily consistent; rather, it is plural and variable across contexts, and it often expresses and contains contradictions.”

⁸⁸⁸ *Ibid*, p.50.

Chapter 6

Germany, the Netherlands and Poland in Comparative Perspective

1. Introduction

The findings presented in the preceding chapters provide a novel picture of the functioning of national civil judges as EU judges but the results thereof are country specific and may, therefore, neither be stretched to other Member States nor can they be used to draw more general conclusions which might have a wider validity. It seems therefore plausible to juxtapose selected results of the present study with the outcomes of another corresponding research. Such a cross-national comparison across legal traditions leads to fresh, arresting insights and a deeper understanding of issues that are of central concern in different countries. It also allows to construct a somewhat more enhanced and complete picture of the situation within the European Union and the range of problems attached to the functioning of national judges as EU judges. The foregoing observation is not aimed at implying that by comparing several EU Member States a total and comprehensive picture of the situation across the EU can be drawn.⁸⁸⁹ It is necessary to acknowledge that the jurisdictions of all Member States would have to be included in this study in order to provide a complete picture of the present situation in the European Union. Nonetheless, a comparative analysis allows to identify common phenomena, that is to say general patterns (or a lack thereof) in adjudication across the juxtaposed countries. Finally, the purpose of this comparative exercise is to see whether

⁸⁸⁹ The methodological problem of insufficient representation is inherently attached to comparative studies and frequently it is downplayed. For methodological problems of using a questionnaire in comparative studies see Schultz (2009), pp.173-184.

there are significant differences between the Old and the New Member States in the way their judiciaries function as EU judges.⁸⁹⁰

As mentioned in Chapter 1, the present study exploits the results which follow from a parallel empirical research for the Netherlands and the German federal state of North Rhine-Westphalia (HiiL Report). The concerned project rested on virtually the same theoretical premises, research design and method as the present study. It should yet be underscored that the execution of the survey and the process of analysis took a slightly different form in each of the respective Member States.⁸⁹¹ It is also important to note that the relevant project for Germany and the Netherlands is of a descriptive character, i.e. it illustrates the results stemming from the empirical survey without too much looking for the possible grounds, causes and explanations underpinning the state of affairs. Hence, the analysis included in this chapter focuses predominantly on the process of comparing the empirical evidence without too much touching upon the potential reasons of the situation found in the respective countries. In that sense, the subsequent section will focus on the general findings concerning the knowledge of, experiences with and attitudes toward EU law. Put differently, the general approach employed in Chapter 4 is followed but the analysis is conducted at a more aggregate level, i.e. it discusses the general trends which are common in the concerned countries. The comparative exercise is necessarily preceded by a general introduction to the German and Dutch legal system in which a special focus is put on the aspects of the organization of the judiciary, sources of law and the position and role of the judges in the entire system of the rights' enforcement. Such a descriptive enterprise is essential to capture a more comprehensive view of the respective jurisdictions and the context in which national judges operate.⁸⁹² It is also necessary to illuminate some of the empirical findings.

⁸⁹⁰ See General Introduction for the background of the assumption that there might be differences between the Old and New Member States in the manner their judiciaries function in the context of EU law.

⁸⁹¹ See section 4.4 of Chapter 1 for the differences.

⁸⁹² De Cruz (1999), p.229.

2. Legal and judiciary systems in Germany and the Netherlands

2.1. General overview of the court systems

Due to its federal structure, decentralization and far-reaching specialization, the German court system can be classified as a rather complex one.⁸⁹³ The judiciary is independent of the executive and the legislative branches and judges are subject only to the law.⁸⁹⁴ The judicial power in Germany is vested in judges and at the federal level is exercised by the Federal Constitutional Court and other federal courts provided for in the Basic Law such as the Federal Administrative Court (*Bundesverwaltungsgericht*), the Federal Finance Court (*Bundesfinanzhof*), the Federal Labor Court (*Bundesarbeitsgericht*), and the Federal Social Court (*Bundessozialgericht*)⁸⁹⁵. At the state level the administration of justice is exercised by the courts of the respective Land.⁸⁹⁶ Next to the Federal Constitutional Court, nearly each Land has its own constitutional court⁸⁹⁷ which adjudicates disputes between land public bodies and resolves issues of constitutionality of Land legislation with the Land constitution (*Landesverfassung*).⁸⁹⁸ Each Land has also its own structure of courts of ordinary jurisdiction which consists of the District Courts (*Amtsgerichte*), Regional Courts (*Landgerichte*) and Higher Regional Courts (*Oberlandesgerichte* and *Kammergericht* for the state of Berlin⁸⁹⁹)

⁸⁹³ For a comprehensive diagram of the German judiciary system see the European Judicial atlas to be found at: http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/org_justice_ger_en.pdf (last accessed 15 March 2011). See also Foster (1993), pp.39-47.

⁸⁹⁴ See Art.97(1) of the Basic Law of the Federal Republic of Germany and the fourth chapter, section 25 of the German Judiciary Act (*Deutsches Richtergesetz – DriG*) in the version published on 19 April 1972, *Bundesgesetzblatt*, Part I p.713 with later amendments.

⁸⁹⁵ Art 95(1) of the Basic Law of the Federal Republic of Germany.

⁸⁹⁶ Art.92 of the Basic Law of the Federal Republic of Germany. The German Basic Law refers to the *Land* and *Länder* in the official English version of the document. In the academic writing both notions, i.e. Land and state are used interchangeably.

⁸⁹⁷ *Verfassungsgerichtshof, Staatsgerichtshof or Landesverfassungsgerichte.*

⁸⁹⁸ Each Land has its own constitution. On the role of Land constitutions see Gunlicks (1998).

⁸⁹⁹ The name *Kammergericht* has historic reasons and relates exclusively to the Higher Regional Court in Berlin.

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being state courts of general jurisdiction.⁹⁰⁰ The Organization of the Courts Act (*Gerichtsverfassungsgesetz* - GVG) is the cardinal piece of legislation for the courts.⁹⁰¹

In a similar vein, the judicial power in the Netherlands is vested in judges who are independent and impartial. The Dutch judiciary is less complex than the German one and it is administrated in three instances and consists of 19 district courts (*rechtbank*)⁹⁰², 5 appeal courts (*gerechtshof*) and the Supreme Court (*Hoge Raad*).⁹⁰³ There are five units of jurisdiction (*ressorten*) which are headed by appeal courts.⁹⁰⁴ The district courts are divided into divisions, which may be civil, administrative, criminal or local/county (*sector kanton*). Courts of appeal are divided into civil, criminal or fiscal divisions. The Council for the Judiciary (*Raad voor de Rechtspraak*) supports the courts in the execution of their tasks.⁹⁰⁵ Next to the ordinary jurisdiction, there are also the Central Appeals Tribunal which is an appellate court for legal areas pertaining to social security and the civil service and the Trade and Industry Appeals Tribunal, also known as Administrative High Court for Trade and Industry, which is a specialized administrative court that rules on disputes in the area of social-economic administrative law.⁹⁰⁶

⁹⁰⁰ In North Rhine-Westphalia there are 3 Higher Regional Courts in Cologne, Düsseldorf and Hamm, 19 Regional Courts and 130 District Courts. Next to that there are 30 labour courts and 3 labour regional courts, see Dyrch et al (2007), p.217.

⁹⁰¹ The Organization of the Courts Act (*Gerichtsverfassungsgesetz*) Federal Law Gazette I p.1077 with later amendments. It is also referred to as the Constitution of the Courts Act and it dates back to 1879. For a broad overview of the organization and structure of the German judicial system see Murray&Stürner (2004), pp.37-68.

⁹⁰² Each district court constitutes a so-called *arrondissement*.

⁹⁰³ See art. 2 of Wet op de Rechterlijke Organisatie (Wet RO).

⁹⁰⁴ Located in Amsterdam, Arnhem, Den Haag, Leeuwarden and Den Bosch. Since 23 November 2009 there are, however, plans to reform the judicial architecture in the Netherlands which foresee a reduction of the number of district courts to ten and a reduction of units of jurisdiction to four. At the beginning of September 2011 the new legislative proposal was submitted at the Dutch House of Representatives (*Tweede Kamer*). For more see <http://www.rechtspraak.nl/Recht-In-Nederland/ThemaDossiers/herziening-gerechtigde-kaart-nederland/Pages/default.aspx> (last accessed 21 November 2011).

⁹⁰⁵ The created in 2002 Council for the Judiciary is part of the judiciary system but it does not perform judicial tasks as such. Its tasks are operational in nature and pertain to, *inter alia*, allocation of budgets, supervision of financial management, personnel policy, ICT and housing. The Council also promotes quality within the judiciary system, advises on new legislation which has implications for the system of judiciary, see website at: www.rechtspraak.nl (last accessed 15 March 2011). Next to the Council for the Judiciary, the Minister of Justice is responsible for the proper functioning of the judicial system and he can be held accountable to the parliament. Ministry of Justice ensures that the judiciary receives sufficient financial resources to execute its tasks properly. He can also draft legislation when this is deemed necessary to the better administration of justice.

⁹⁰⁶ Cases of an administrative nature are settled in a slightly different institutional and procedural framework which consists of administrative revision of the administrative order by the administrative body which issued it, judicial review of the administrative act in question by the administrative divisions of the District Court and an

Civil disputes in Germany are heard by the civil courts which are part of ordinary courts and the employment courts. Employment courts have jurisdiction only in respect of civil disputes which are strictly connected with an employment relationships. There are 667 District Courts in Germany which hear cases involving minor criminal offenses or small civil suits. The District Courts have jurisdiction in civil disputes if the value of the dispute does not exceed EUR 5000 and if the Regional Court does not have exclusive jurisdiction.⁹⁰⁷ These courts also carry out routine legal functions, such as for instance probate. Disputes at the district level are heard by one judge sitting alone.⁹⁰⁸ There are 116 Regional Courts which have jurisdiction in respect of all civil disputes which are not allocated to the District Courts. Regional Courts also function as courts of appeal for decisions from the local courts and are first instance courts for most major civil and criminal matters. These are in particular disputes with a disputed value of more than EUR 5000. Regional Courts are divided into two sections, one for civil cases and the other for criminal cases. The two sections consist of panels of judges who specialize in particular types of cases. The disputes are heard either by a single judge or by a panel of three judges.⁹⁰⁹ There are 24 Higher Regional Courts which primarily review points of law raised in appeals from the lower courts.⁹¹⁰ Similarly to the Regional Courts, Higher Regional Courts are divided into panels of judges with particular legal specialization. Disputes at Higher Regional Courts are heard either by a judge sitting alone or a chamber of three judges. Specialized courts deal with five distinct subject areas: administrative, labor, social, fiscal, and patent law. In that sense, labor courts also function on three levels and address disputes over, *inter alia*, collective bargaining agreements and working conditions.⁹¹¹

appeal to the judicial division of the Council of State (*afdeling Bestuursrechtspraak van de Raad van State*). In that sense the Dutch Supreme Court does not fulfill any judicial role with regard to administrative jurisdiction.

⁹⁰⁷ See section 23 (1) of the German Judiciary Act.

⁹⁰⁸ In criminal cases the judge is assisted by lay judges.

⁹⁰⁹ For more details about the competency of single judges and judicial panels in District and Regional Courts and the assignment of cases thereto see Rühl (2005), pp.912-914.

⁹¹⁰ For cases originating in local courts, this is therefore the final appeal.

⁹¹¹ Likewise, social courts, organized at three levels, adjudicate cases relating to the system of social insurance, which includes unemployment compensation, workers' compensation, and social security payments. Finance, or fiscal, courts hear only tax-related cases and exist on two levels. Administrative courts consist of local administrative courts, higher administrative courts, and the Federal Administrative Court. Finally, a single

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In the Netherlands, in accordance with recently amended Code of Civil Procedure, judges in local (*kanton*) divisions who hear civil cases sit alone and preside over simple cases which may pertain to (minor) civil issues such as, *inter alia*, money claims up to EUR 25 000 and leasing of residential and business premises, landlords, tenants, rent or employment, including pay claims and cancellation of contracts of employment, consumer contracts and consumer credits without further financial limitation.⁹¹² Other disputes in private law are handled in the civil divisions of district courts. Such cases relate to, *inter alia*, financial disputes with more than EUR 25 000 at stake, bankruptcies, inheritance disputes or family law aspects. Civil divisions are usually formed by a single judge in relatively simple disputes (*enkelvoudig*). The treatment of a complex case (*meervoudig*) is handled by a chamber of three judges.⁹¹³ Judges in appeal courts are divided into chambers consisting of three members, who jointly settle a dispute. The Supreme Court functions as a cassation court.⁹¹⁴ In principle, each first instance judgment may be appealed to. There are however several exceptions to that rule, e.g. cases concerning claims smaller than EUR 1750 may not be appealed.⁹¹⁵ An appeal is scrutinized on both the points of facts and the points of law.

Federal Patents Court in Munich adjudicates disputes relating to industrial property rights. The Federal Patent Court deals with issues attached to granting, denial or withdrawal of industrial property rights. It is a court of first instance in cases relating to declaration of nullity of a patent and as a court of second instance against the decisions of the German Patent and Trade Mark Office, for more see Hock (2009).

⁹¹² See art.93 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering – Rv*). Importantly, the Code of Civil Procedure was amended in May 2011 by *Wet tot wijziging van de wet op de rechterlijke indeling, het Wetboek van Burgelijke Rechtsvordering en enkele andere wetten naar aanleiding van de evaluatie van de modernisering van de rechterlijke organisatie en in verband met de regeling van het klachrecht inzake gedragingen van rechtelijke ambtenaren*, *Staatstblad* 2011 255 which came to force as of 1 July 2011. At the time of the empirical research the competences of *kanton* judges were more limited as they concerned money claims up to 5 000 EUR and did not include disputes concerning consumer credits and contracts. For a detailed list of the cases which belonged to competences of *kanton* judges before the concerned amendment see Meijknecht (2007), pp.17-19 and Van der Torre (2007), pp.29-32, Jongbloed (2008), p.94.

⁹¹³ See art.15-16 of the Dutch Code of Civil Procedure for the classification of cases as simple (*enkelvoudig*) which are heard by a single judge and complex (*meervoudig*) which are heard by a chamber of three judges and Ernses (2009), pp.19-23.

⁹¹⁴ On the outline of the judicial architecture in the Netherlands see Ijzermans (2004), pp.62-64.

⁹¹⁵ See art.332 para 1 of the Dutch Code of Civil Procedure. See also Meijknecht (2007), p.80; Meijknecht (2009), pp.36-38; Jongbloed (2008), p.98.

2.2. Main features of judicial communities

The legal status of German Land judges is regulated by the German Judiciary Act and separate Land laws.⁹¹⁶ Judges (*Richter*) are professionally trained, follow a distinct career path and are, in principle, appointed for life.⁹¹⁷ The system of education and training of judges is uniform and a person qualified for a judicial office is automatically qualified for other legal professions.⁹¹⁸ At the end of their university legal education, graduates must pass the First State Examination (*Erstes juristisches Staatsexamen*) which is organised by the Ministry of Justice of the respective Land before they can continue on to a two years long apprenticeship/preparatory training (*Vorbereitungsdienst/Referendariat*) that provides them with broad training in the legal profession.⁹¹⁹ Subsequently they are expected to pass the Second State Examination (*Zweites juristisches Staatsexamen*) that qualifies them to practice law. At that point, the individual can choose either to become an attorney (*Rechtsanwalt*) or a prosecutor or to seek a career on a judicial position. The examination results are the most crucial factor for employment within the judiciary. In some states the candidates are also interviewed.⁹²⁰ Newly appointed judges are subject to a probationary period which takes a minimum of three and a maximum of five years.⁹²¹ After the probation period a judge will be appointed as judge for lifetime. Germany has one of the highest rates of judges per number of inhabitants in the European Union which amounts to 24,5 judge per 100 000 citizens which is only slightly lower than the Polish index.⁹²² The absolute number of professional judges in Germany sitting in courts (at all levels) accounted to 20 131 in year 2007.⁹²³

⁹¹⁶ See Art.98(3) of the Basic Law of the Federal Republic of Germany.

⁹¹⁷ This does to imply that a judge cannot be revoked or dismissed from her office, see sections 19, 21 and 24 of the German Judiciary Act. For instance, judicial service may be terminated if the respective judge is sentenced to at least one year's imprisonment for a criminal offence with intent, see section 24 of the German Judiciary Act. Other legal professions are: attorney (*Rechtsanwalt*), notary (*Notar*) and state prosecutor (*Staatsanwalt*). It is claimed that judicial service enjoys a very high reputation in Germany and the judges have a unique status, are entitled to distinct privileges, see Murray&Stürner (2004), pp.7 and 71.

⁹¹⁸ See Böttcher (2004), p.1321.

⁹¹⁹ For the contents of the preparatory training see Section 5b of the German Judiciary Act.

⁹²⁰ See Böttcher (2004), p.13

⁹²¹ See German Judiciary Act, section 12. See also Böttcher (2004), p.13.

⁹²² From Jean (2010), p.9. The rate for Poland is 25,9 judge per 100 000 inhabitants.

⁹²³ See report by CEPEJ, *Scheme for evaluating judicial systems 2007. Country: Germany*, to be found at: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2008/germany_en.pdf (last accessed 3 May 2011). In

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The Dutch judiciary consists of professional judges (*rechters* or *raadsheren* in appellate courts). The judiciary is part of the public service and judges are therefore civil servants (*ambtenaren* or more specifically *rechtelijke ambtenaren*) and they fall under the general law for civil servants.⁹²⁴ The foregoing does not imply that judges should be put in the same category as other civil servants which are employed by central public authorities. In many respects judges constitute a special group thereof.⁹²⁵ Dutch graduates possessing the title of Master of Laws (*Mester in de rechten* or *mr.*) with a so-called *civil effect*⁹²⁶ may apply for judicial training (*rechtelijk ambtenaar in opleiding – RAIO-opleiding*) which, in principle, lasts six years. The selection procedure consists of analytical/cognitive test, personal interview, psychological assessment and eventually the final interview with a special selection committee (*Selectiecommissie rechterlijke macht - SRM*).⁹²⁷ The internal training involves theoretical studying and courses of different length and practical preparations which take place within different sectors of courts, the public prosecutor's office and outside the judiciary.⁹²⁸ After a successful training and if deemed suitable for the position, the candidate will be nominated an assistant to a judge (*gerechtsauditeur*) at a court and later she will be nominated a judge. One may also become a judge if she is graduated in law and has a minimum of six years of legal experience and is approved by the SRM in the course of

2009 there were 7 957,8 judges working at District Courts, 4 948,87 judges working at Regional Courts and 1 800,79 judges working at Higher Regional Courts, statistics to be found at the website of the federal Ministry of Justice:

http://www.bundesjustizamt.de/cln_115/nn_1634386/DE/Themen/Justizstatistik/Personal/Personal_20__node.html?__nnn=true (last accessed 3 May 2011). Female judges are clearly underrepresented and constitute approximately 41 percent of judges at the district level, 35 percent at the regional level and 28 percent at higher regional level (own calculation). In 2007 there were 3651 judges working at the courts of ordinary jurisdiction and 212 judges working at labour courts in the state of North Rhine-Westphalia, see HiiL Report, p. 20. There is no data available as to the number of judges working in the civil sector only.

⁹²⁴ See Bovend'Eert&Kortman (2008), p.155. See the Act on Civil Servants (*Ambtenarenwet – AW*) of 12 December 1929 with amendments.

⁹²⁵ From Bovend'Eert&Kortman (2008), p.155.

⁹²⁶ In Dutch *civil effect* which implies that the graduate has followed and passed specified courses such as for instance civil law and procedure, criminal law and procedure and administrative law and procedure.

⁹²⁷ For the specific requirements which must be met by the candidates in order too be allowed to the judicial training see <http://www.werkenbijderechtspraak.nl/LoopbaanmogelijkhedenRAIO.aspx> (last accessed 15 March 2011).

⁹²⁸ See the brochure *Rechtspraak* (2004), p.14.

selection procedure.⁹²⁹ There are also so-called deputy/replacement judges (*rechter plaatsvervanger* or *onbezoldigd raadsheer*) who work on a judicial position on a part-time basis but have regular permanent employment contracts elsewhere, for instance in law firms.⁹³⁰ In accordance with the rotation policy, judges are expected to transfer approximately every three or four years to a different sector of the court, this practice is based on the assumption that judges are supposed to be capable of judging all kinds of disputes.⁹³¹ The Netherlands have relatively low rate of judges per number of inhabitants which accounts to 13.3 judge per 100 000 citizens. The absolute number of judges amounted to 2 176 in 2008.⁹³²

The vocational training of judges in Germany is conducted by the German Judicial Academy (*Deutsche Richterakademie* – DRA) which possess training venues in Trier and Wustrau. In addition, the Academy of European Law (*Europäische Rechtsakademie* - ERA), which has its main venue in Trier, provides trainings in Trier and several other European cities such as for instance Brussels, Warsaw or Budapest.⁹³³ The ERA trainings are not aimed exclusively at German judges but also legal professionals from other countries. As observed by Bell, the culture of the judiciary in Germany was traditionally referred to as to that of a “bureaucratic elite”.⁹³⁴ Moreover, the court system and its operation belongs to the Land matters and judges are recruited and subsequently appointed by particular *Länder* whereby the judges are perceived as land civil servants and predominantly have a professional career of a

⁹²⁹ For more details see Bovend’Eert&Kortman (2008), p.161 and Ijzermans (2004), pp.69-70.

⁹³⁰ Deputy judges have the same judicial powers as “regular” judges and are rewarded for each hearing they participate in. In order to become a deputy judge, the candidate must have a minimum of 6 years for the position of *rechter plaatsvervanger* and a minimum of 10 years for the position of *onbezoldigd raadsheer*. The candidates must also be approved by the SRM. For more details check www.rechtspraak.nl (last accessed 27 April 2011).

⁹³¹ See Jongbloed (2008), p.101.

⁹³² CEPEJ (2010), p.117. Next to that there were 900 deputy judges.

⁹³³ The German Judicial Academy is Germany's leading institution for training judges from all branches of jurisdiction including public prosecutors and from all parts of the country, see website at: <http://www.deutsche-richterakademie.de> (last accessed 5 March 2011). The ERA, in turn, has begun work in Trier in 1992 and is a public foundation. Initially the founding patrons were the Grand Duchy of Luxembourg, the Land of Rhineland-Palatinate and the City of Trier. In the course of time, the majority of EU Member States has joined the foundation. The academy organizes conferences, seminars, study visits, language courses and other training projects, many of them multilingual. ERA enables legal practitioners such as judges, lawyers in private practice, business and public administration, academics and others to gain a wider and deeper knowledge of the diverse aspects of European law, see website at: www.era.int (last accessed 10 March 2011).

⁹³⁴ Bell (2006), p.108.

regional character.⁹³⁵ In that sense, professional education and judicial career trajectory may vary between judges of particular Länder. Judicial performance and the allocation of cases are assessed in accordance with benchmarks for the judicial workload (*Pensenschlüssel*) which are set by the Ministers of Justice from both the Länder and the Federation.⁹³⁶ Caseload discharge rate, reversal rate and to some extent peer evaluation constitute the base for periodical appraisal.⁹³⁷ “A common legal education, a deep commitment to constitutional values, judicial independence and subordination to the law” are listed as four main features which determine the nature of the German legal culture.⁹³⁸

The judicial vocational training in the Netherlands is conducted by the Dutch Training and Study Centre for the Judiciary (*Opleidingsinstituut van de Rechterlijke Organisatie – SSR*) with venues in Utrecht and Zutphen.⁹³⁹ To guarantee the expertise of judges and the supporting staff, a national standard with regard to permanent education has been set up which currently obliges to follow 30 hours of training yearly.⁹⁴⁰ The courts performance is assessed taking into consideration five performance areas which are: impartiality and integrity, expertise, treatment of litigants and defendants, legal unity and speed and promptness of the court/sector in question.⁹⁴¹ Individual judicial performance is assessed on the basis of regular performance appraisals.⁹⁴²

⁹³⁵ Ibid, pp.110-111. The Land Ministry of Justice is responsible for the system of recruitment examinations, the judicial traineeship and it also decides on the number of available judicial posts. The Ministry is also responsible for technical matters such as court buildings, equipment or the judicial offices staff. In that sense, the organization, administration and policy of the courts are rather extensively controlled by the Land Ministry of Justice. The labour courts, in turn, will be supervised and administrated by the Land Ministry of labour.

⁹³⁶ See Böttcher (2004), p.1325. In accordance with the benchmarks, a local court judge is expected to hear approximately 600 cases, a regional court judge 140 cases and a higher regional court 70 cases. The standards are lower for family law judges.

⁹³⁷ See Langbein (1985), p.850. See also Schneider (2005), p.130 who describes the promotion system in German labour courts. The author claims that “(...) promotion decisions are strongly influenced by formalized performance appraisals assessing the judge’s past performance and potential. The ability to cope with the caseload and to write sound decisions are central among the criteria rated in these appraisals (...)” Hence, it occurs that judges with a higher reversal rate have lower chances for promotion.

⁹³⁸ From Bell (2006), p.169.

⁹³⁹ See the website at www.ssr.nl (last accessed 15 March 2011).

⁹⁴⁰ See Rechtspraak (2008), p.7. The permanent education is achieved by following courses and skills training workshops. The concerned judges and her superior decided yearly how the permanent education expectations should be fulfilled.

⁹⁴¹ From Rechtspraak (2008), p.8.

⁹⁴² See art.46a of the Law on legal position of the officers of justice (*Wet rechtspositie rechterlijke ambtenaren - Wrra*) of 29 November 1996, repealed as of 1 July 2010 and replaced by art.37b of the *Besluit rechtspositie*

2.3. Sources of law

Germany and the Netherlands belong to the group of civil law traditions based on Roman law.⁹⁴³ The written sources of domestic law in Germany include the Constitution (*Grundgesetz* – Basic Law), statutes (*Gesetz*) and executive laws/regulations (*Verordnungen*) of the Federation, the Ministries of the Federation and the *Länder* and other rules or laws (*Satzungen*). In addition to this, there are unwritten sources of law, which are the general principles enshrined in international law, customary law (*Gewohnheitsrecht*) which includes all general public practice recognized as binding and in particular situations case law.⁹⁴⁴ Due to the federal structure of the state, the different sources of law duplicate each other to a certain extent both at the Federal level and at the level of the individual *Länder*.⁹⁴⁵ The Basic Law is placed at the apex of the legal sources hierarchy whereby each legal provision must be constitutional both in form and substance.⁹⁴⁶ Legislation, executive power and case law are particularly bound by fundamental human rights, which in accordance with article 1(3) of the

rechterlijke ambtenaren (Brra). See also Bovend'Eert&Kortman (2008), pp.177-178. The courts' performance and workload are measured in accordance with the so-called *Lamicie system* which divides cases into 49 different categories. Every category is subsequently assigned a specific amount of minutes which are needed in order to handle a specific case, for more see Der Torre et al (2007), pp.147-148.

⁹⁴³ In Germany some references to Germanic law can be found. Criminal law and civil law in Germany are codified at the national level in the criminal code (*Strafgesetzbuch*) and the civil code (*Bürgerliches Gesetzbuch* - BGB) respectively. The civil code is divided into five books: the general part, obligations, property, family, and inheritance. The civil law system in the Netherlands was originally classified as Romanistic. However, German legal influences have recently gained some floor in the process of re-codification of the Dutch Civil Code (*Burgelijk Wetboek* – BW), see Taekema (2004), p.18. The Dutch Civil Code is divided into seven books: rights of individuals, legal entities, rights of assets, succession, the law of property, contracts and obligations.

⁹⁴⁴ Formally, the system of precedence does not exist in Germany. Only the case-law of the Federal Constitutional Court has precedential value. Cases do have binding authority over the parties, but not on the future cases. Cases of higher courts do, however, have persuasive value for lower courts judges. For more on the problem of bindingness of precedent in Germany check Alexy&Dreier (1997), pp.17-64.

⁹⁴⁵ The relationship between the laws at the Federal and *Länder* level is governed by Article 31 of the Basic Law which provides that where Federal and Land law are colliding then the Federal law prevails. In accordance with Article 70(1) of the Basic Law the *Länder* have the right to legislate insofar as the Basic Law does not confer legislative power on the Federation. In line with Article 70(2) of the Basic Law the division of authority between the Federation and the *Länder* is governed by the provisions of the Basic Law respecting exclusive and concurrent legislative powers.

⁹⁴⁶ See Foster (1993), p.51.

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Basic Law are directly applicable.⁹⁴⁷ Importantly, the fundamental principles enshrined in the Basic Law may not be subject to amendment or any change.⁹⁴⁸ The Federal Constitutional Court is responsible for constitutional matters and has the power of judicial review. It acts as the highest legal authority and ensures that legislative and judicial practice conforms to the Basic Law.⁹⁴⁹ The decisions of the Federal Constitutional Court are to be obeyed by the lower courts since they have a binding value.⁹⁵⁰

In the Netherlands, the sources of enacted law include: treaties which also comprise of international law, the constitution (*Grondwet*), statutes (*wetten*) enacted by the Parliament and regulatory acts/ordinances (*algemene maatregelen van bestuur*). Similarly to Germany, the Netherlands do not have the system of precedent. The lower courts do, however, follow the decisions of the Supreme Court (*Hoge Raad*).⁹⁵¹ Next to the written sources of law and case-law, customary law and general principles of law are classified as sources of law. The Netherlands does not know the institution of the constitutional judicial review since, in contrast to Germany and Poland, it does not have a constitutional court.

The German Basic Law explicitly refers to the European Union in Article 23 thereof.⁹⁵² The general rules of international law occupy the space between the Basic Law and other laws. Article 25 of the Basic Law explicitly states that these are a component of Federal

⁹⁴⁷ Fundamental rights can be invoked by affected individuals before the courts, ultimately by lodging a constitutional appeal before the Federal Constitutional Court (*Bundesverfassungsgericht*).

⁹⁴⁸ So called eternity clause, *Ewigkeitsgarantie* or *Ewigkeitsklausel*. Likewise, amendments to this Basic Law affecting the division of the Federation into Länder and their participation on principle in the legislative process are inadmissible.

⁹⁴⁹ See Art.93 of the Basic Law of the Federal Republic of Germany on specific competences of the Constitutional Court. The Federal Constitutional Court is the ‘final arbiter’ with regard to the constitutional requirements which are put on constitutional, governmental, legislative and judicial bodies, see Bell (2006), p.109.

⁹⁵⁰ See art.31 of the Federal Constitutional Court Act (*Bundesverfassungsgerichts-Gesetz, BVerfGG*) in the version published on 12 March 1951, Federal Law Gazette I p.243 with later amendments which reads: “(...) the decisions of the Federal Constitutional Court shall be binding upon Federal and Land constitutional organs as well as on all courts and authorities.”

⁹⁵¹ See Taekema, *Introducing Dutch law* [in] Taekema (2004), p.22. In that sense, the case-law of the Supreme Court has an authoritative force.

⁹⁵² The first paragraph of Article 23 reads: “With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, are subject to paragraphs (2) and (3) of Article 79.”

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Law, that they take precedence over such laws and that they directly create rights and duties for residents of Germany. Nonetheless, the relationship between German constitutional law and the law of the European Union and consequently between the German Federal Constitutional Court and the European Court of Justice is marked by a permanent tension of varying intensity attached to the *Kompetenz-Kompetenz* issue.⁹⁵³ Not much shall be said here with regard to this problem as the issue is thoroughly addressed in the academic writing⁹⁵⁴, it shall however be recalled that according to the jurisprudence of the Federal Constitutional Court there are reservations to the process of integration within the European Union since there are constitutional limits to supremacy of EU law.⁹⁵⁵

In contrast to Germany, the Dutch Constitution does not at all refer to the European Union and its law. The Netherlands belong to the monistic countries, i.e. in situations where an international treaty is ratified by the national parliament and published it automatically becomes a binding source of law.⁹⁵⁶ In accordance with article 94 of the Dutch Constitution international treaties take precedence over all other sources of law in case of conflict.⁹⁵⁷ In addition, Art. 93 of the Dutch Constitution explicitly states that international law rules have direct effect in the national legal order after their publication.⁹⁵⁸ The absolute primacy of international law over other sources of law distinguishes the Netherlands from the group of

⁹⁵³ Basically speaking, the *Kompetenz-Kompetenz* discourse relates to the issue of the transfer of competences of the Federal Republic of Germany to the level of the European Union and the limits to the participation of the German state in the EU but also the allocation of competences between the German Constitutional Court and the ECJ. The German Constitutional Court established three forms of review of EU legal acts. In its Solange I judgment of 1974 reserved for itself the competence to scrutinize whether an EU legal act complies with the fundamental rights as enshrined in the Basic Law. In its Maastricht decision of 1993 it claimed to have the final competence to decide whether EU legal acts do not transgress the limits of the EU to act. In its Lisbon judgment of 2009 it claimed to have the competence to scrutinize whether Union's legal acts are in line with the constitutional identity of the Basic Law. For a detailed analysis see Payandeh (2011), pp.9-38.

⁹⁵⁴ See for instance Kokott, *Report on Germany* [in] Slaughter et al (1998), pp.77-131, Mayer (2003); Ziller (2010), pp.53-76; Fischer-Lescano (2010); Makowski (1995), pp.155-179; Meessen (1993), pp.511-530; Kumm (1999), pp.351-386; Dyeve (2011), pp.346-361; Payandeh (2011), pp.9-38.

⁹⁵⁵ For the respective judgments of the German Constitutional Court see note 945.

⁹⁵⁶ Monism gained the status of the leading doctrine in 1906 when the Dutch Supreme Court spoke against the doctrine of transformation of international law into the national legal system. See Claes&De Witte, *Report on the Netherlands* [in] Slaughter et al (1998), p.172.

⁹⁵⁷ Art. 94 of the Dutch Constitution reads: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions."

⁹⁵⁸ Art.93 of the Dutch Constitution reads "Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published."

the three Member States. In line with the foregoing, even though the national judges do not have the power of (constitutional) judicial review of statutes⁹⁵⁹ they have the competence to declare national statutes inapplicable if the latter are considered at variance with rules of international law.⁹⁶⁰ With everything considered, it is claimed that, in contrast to many other Member States, the Netherlands have not experienced any major problems with the acceptance and accommodation of the principle of supremacy and direct effect of EU law into the national constitutional framework.⁹⁶¹

2.4. Role of the judge in a civil dispute

The role of the judge in a civil procedure in Germany can be described as a rather strong and active one.⁹⁶² Even though the principles of party control (*Dispositionsgundsatz*) and the principle of party presentation (*Verhandlungsgundsatz*)⁹⁶³ implies that the parties initiate the procedure, determine the subject-matter and are responsible for gathering and presenting the facts to the judge, it is the judge who is expected to ask questions and discuss the legal and factual grounds of the case with the parties⁹⁶⁴, provide instructions to the parties, formally control the proceeding and assess the legal aspects of the case of her own motion.⁹⁶⁵ The judge is not limited by the motions put forward by the parties and has the full authority in relation to

⁹⁵⁹ Which is explicitly stated in Art.120 of the Dutch Constitution which reads: “The judges do not enter into review of the constitutionality of statutes and treaties.”

⁹⁶⁰ See Taekema, *Introducing Dutch law* [in] Taekema (2004), p.21.

⁹⁶¹ See Claes&De Witte, *Report on the Netherlands* [in] Slaughter et al (1998), p.182 where the authors claim that “the case law of the ECJ, so far, has always fitted into the Dutch system: the principle of direct effect, supremacy, interpretation of national law as in *Marleasing*, or even *Francovich* have never required the judges to re-arrange national law in a dramatic way. It all fits into the system of the Dutch Constitution and Dutch judges have accepted the doctrine of the European Court on those matters as the governing law.” As the authors claim elsewhere, “the prevailing attitude towards international and European law is one of striking receptivity in principle, combined with cautious pragmatism in the application”, see p.188. The authors also point to the “internationalist attitude” of the Netherlands and a lack of sovereignty issue in the whole discourse.

⁹⁶² Oberhammer&Domej (2005), p.300. A civil judge has not always had such a strong position. Originally the litigation was mostly in hands of the parties to the dispute but this has gradually changed in the course of the twentieth century, see Beier (1997), pp.68-69. As it is claimed elsewhere, the judges play a stronger role in civil proceedings in Germany than in other legal systems, see Rühl (2005), p.915.

⁹⁶³ See Stadler&Hau (2005), p.365.

⁹⁶⁴ The judge is also expected to point out to the parties those legal aspects of the cases which are overpassed by the parties.

⁹⁶⁵ See section 139 of the German Code of Civil Procedure (*Zivilprozessordnung*). For an overview of the judge’s responsibilities in civil proceedings see Murray&Stürner (2004), pp.164-177.

the legal questions in the dispute (*iura novit curia*). Expressed differently, it is fully up to the judge to find, assess and apply the relevant provisions, be it of a domestic or international nature.⁹⁶⁶

In the Netherlands, the powers of a judge in a civil proceeding are somewhat weaker and rest on two principles, i.e. passiveness of the judge (*lijdelijkheid van de rechter*) and the autonomy of the parties to the dispute (*partijautonomie*).⁹⁶⁷ It is a general rule though that a judge is supposed to apply binding law. The parties may base their claims on specific legal provisions but it is still up to the judge to *ex officio* (*ambtshalve*) choose and apply the correct legal basis, also in situations when international law is applicable.⁹⁶⁸ Put differently, the judge is passive with regard to the fact-finding but active with regard to the applicable law. Consequently, if a judge fails to point the correct legal basis her decision will likely be overruled by the court of higher instance.⁹⁶⁹ This rule has, however, limited application in practice as it is narrowed by several other principles such as for instance *audi alteram partem*⁹⁷⁰ or the rule providing that if the parties ask the judge to rule on a basis of a specific legal provision, then the judge is obliged to observe such a request.⁹⁷¹ From among the three respective Member States the Dutch civil judge seems to have the weakest and most passive position in the procedure whereas the German one seems to be assigned the most active role. It should yet not be forgotten that the functioning of civil judges in all three Member States is

⁹⁶⁶ See Oberhammer&Domej (2005), pp.303-304.

⁹⁶⁷ See Verkerk (2005), p.281. In accordance with articles 23 and 24 the Dutch Code of Civil Procedure a judge is expected to decide on each issue which was put forward by the parties to the proceeding and the decision should be based only on the motions put forward by the parties. Jongbloed argues that “It is the consequence of substantive private law that the subjects of rights have the freedom to determine their own legal position. Realizing this freedom in a civil procedure requires party autonomy too. The extent of the court’s ‘passiveness’ mirrors this party autonomy in litigation. Both concepts constitute the weight that keeps the relationship between the court and parties in balance.”, see Jongbloed (2005), p.86.

⁹⁶⁸ See Verkerk (2005), p.288. See art.25 of the Dutch Code of Civil Procedure in accordance with which judges are expected to raise legal grounds which are not pointed out by the parties *ex officio* (*de rechter vult ambtshalve de rechtsgronden aan*). See also Meijknecht (2009), p.70 and Vriesendorp (1981).

⁹⁶⁹ See Verkerk (2005), p.288.

⁹⁷⁰ Meaning that the parties have the right to reflect upon the legal provision chosen by the judge which they did not put forward themselves. This rule is aimed at preventing the parties from being surprised by the choice of legal ground by the judge and finds support in the jurisprudence of the Dutch Supreme Court. See Verkerk (2005), p.289.

⁹⁷¹ See Verkerk (2005), p.289. Elsewhere, it is argued that the task of a judge in a civil dispute is a difficult one since she must find an adequate balance between being passive and active at the same time, between deciding on the legal basis but at the same time sticking to the facts and evidence which are brought up by the parties, see for instance Vriesendorp (1981), p.1.

based on the *iura novit curia principle* which implies that the process of assessment of the legal grounds and the application of the law is an exclusive competence of the judge.

3. Comparative empirical analysis between Germany, the Netherlands and Poland

3.1. Knowledge of EU law

The assessment of general knowledge of EU law among the civil judges in Germany and the Netherlands brought straightforward results. Similarly to their Polish counterparts, the German and Dutch judges admitted that their knowledge of EU law is considerably weaker than that of national law. 20 percent of German and Dutch judges declared to be well informed with regard to the developments in EU law.⁹⁷² Likewise, only 12 percent of Dutch and German judges assessed their knowledge of EU law as (very) good which is virtually the same as in Poland.⁹⁷³ It is evident that in all three countries, it is a minority of the judges which reckons that their knowledge of EU law is sound.⁹⁷⁴

The Polish judges considered themselves more knowledgeable of situations in which they are supposed to refer a preliminary question to the European Court of Justice than their German and Dutch counterparts. Whereas 57 percent of Polish civil judges were of such an opinion, 39 percent of Dutch and German judges reckoned so.⁹⁷⁵ The Polish judges also seem to be more aware of the manner a preliminary question ought to be asked. Whereas 41 percent of the Polish judges thought it was clear how to refer a preliminary question, only 16 percent of German and 32 percent of Dutch counterparts were of a similar opinion.⁹⁷⁶ The foregoing findings may indeed come as a surprise. The fact that the basics of the preliminary ruling

⁹⁷² See HiiL Report, p.48. 23 percent of Polish judges stated to be well informed about the developments in EU law.

⁹⁷³ 91 percent of Dutch and German judges assessed their knowledge of national law as good or very good, see HiiL Report, p.49. With regard to Poland it was 92 percent of the group.

⁹⁷⁴ See also Wind (2010), p.1053 from which it follows that similar situation is present in Sweden.

⁹⁷⁵ See HiiL Report, p.52 for the results for Germany and the Netherlands. 35,5 percent of the German and Dutch group declared that it is not clear to them when to refer a question.

⁹⁷⁶ See HiiL Report, pp.54-55 with regard to Germany and the Netherlands.

procedure constituted a necessary part of the trainings the Polish judges underwent shortly before joining the Union may, arguably, explain the results. This would also go in line with the findings concerning the tool of harmonious interpretation which, in turn, seems not to have been given a proper consideration during the judicial training in Poland. Indeed, the German and Dutch judges are evidently more knowledgeable of the rules pertaining to the principle of harmonious interpretation, i.e. whereas 57 percent of the German and Dutch judges declared to know the rules of harmonious interpretation, only 18 percent of the Polish judges reckoned so.⁹⁷⁷

It follows from the data that more German and Dutch than Polish judges gained sufficient knowledge of EU law during their legal studies.⁹⁷⁸ This finding does not come as a surprise taking into consideration the length of the EU membership in the respective countries and the fact that university EU law courses became available in Poland only in the last 15 years. Nonetheless, the number in the respective Old Member States which amounted to approximately 19 percent seems to be surprisingly low taking into consideration that both countries are the founding members of the European Union. The conclusion following from the respective results is straightforward, i.e. so far the university educational systems have in most cases failed to provide their graduates and future judges with sufficient knowledge of EU law. At the same time the Polish judges are the most eager to broaden their knowledge of EU law. 91 percent thereof declared to be in need of broadening their EU law knowledge, 74 percent of Dutch judges were of such an opinion and 64 percent of German judges reckoned so.⁹⁷⁹ Importantly, in all three countries the number of judges who never seek information about EU law amounted to 3 percent only.⁹⁸⁰

The methods of acquiring EU law knowledge differ substantially between the countries. Whereas many Polish judges turn to external and to a lesser extent internal EU law courses, German judges predominantly make use of online databases and very rarely resort to

⁹⁷⁷ See HiiL Report, p.57 with regard to Germany and the Netherlands.

⁹⁷⁸ As illustrated chapter 4, in Poland only 5 percent of the group stated that they gained sufficient knowledge of EU law during their legal studies. In the Netherlands and Germany this number accounted to nearly 19 percent, see HiiL Report, p.58.

⁹⁷⁹ See HiiL Report, p.61 with regard to the situation in Germany and the Netherlands.

⁹⁸⁰ HiiL Report, p.57.

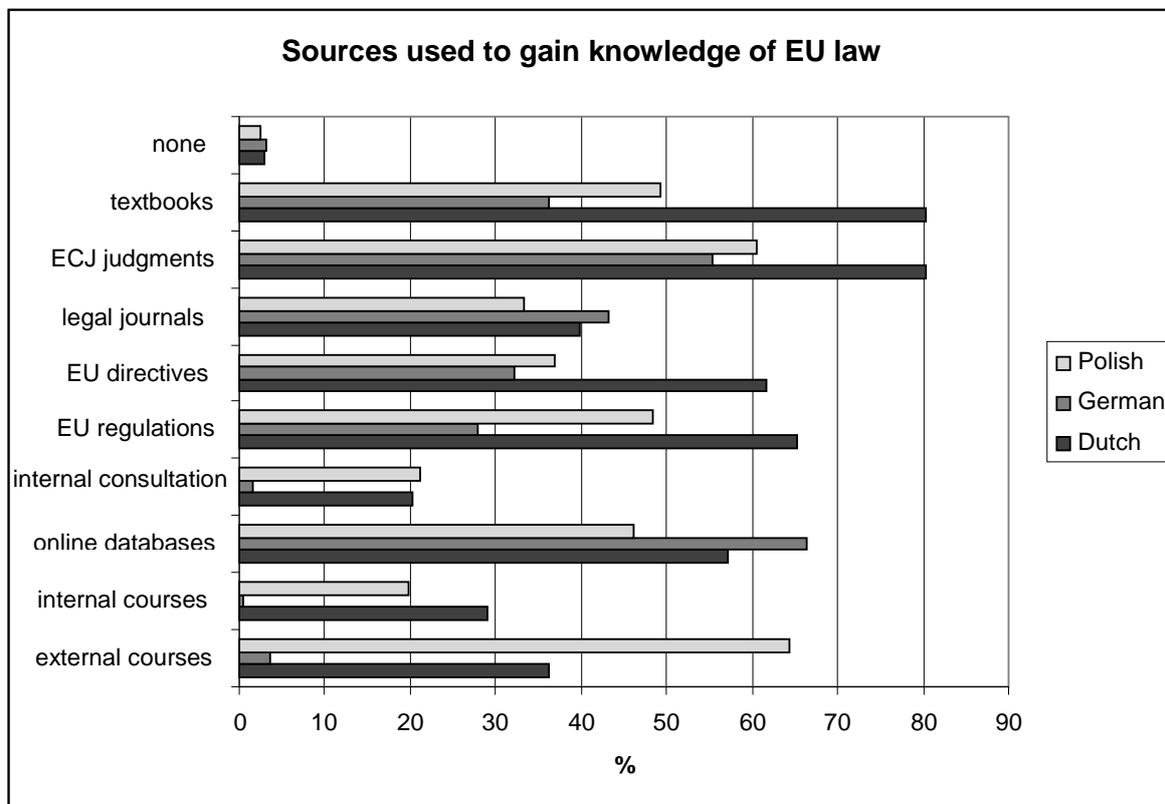
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EU law trainings.⁹⁸¹ The Dutch judges seem to be the most open to all kind of sources of EU law knowledge, some make use of external and legal courses but the overwhelming majority uses legal handbooks and online databases. The Dutch judges are also clearly the most eager in consulting direct sources of EU law such as EU directives and regulations, the number slightly exceeded 60 percent and doubled the numbers for Germany.⁹⁸² In all three countries judges frequently resort to the judgments of the European Court of Justice. 60 percent of the Polish and 55 percent of the German judges declared to resort to the judgments. The Dutch judges evidently have the lead in that respect, i.e. slightly more than 80 percent declared to resort to the jurisprudence of the ECJ.⁹⁸³ The results clearly visualize quite a considerable difference between the two Old Member States in that respect.

⁹⁸¹ Only 1 percent of the German judges resort to internal courses and 4 percent to external courses, see HiiL Report pp.59-60. Nearly 80 percent of German judges did not attend any course in EU law in the last 12 months. From the qualitative interviews it has also followed that German judges are rather sceptical about and critical of the available training facilities.

⁹⁸² See HiiL Report, p.59 with regard to the situation in Germany.

⁹⁸³ See HiiL Report, p.59 with regard to the results for Germany and the Netherlands.



n Poland = 312, Germany = 190, Netherlands = 138

In both Poland and the Netherlands 64 percent of judges were of the opinion that EU law courses should be obligatory for judges. The number is considerably lower for Germany where only 36 percent reckoned so.⁹⁸⁴

By and large, the results for the respective countries carry several significant implications. First of all, even though there are differences between the three Member States, the prevailing trend is that the majority of national civil judiciaries seems to be inadequately equipped with EU law knowledge and frequently they are not certain of the obligations which EU law imposes on them.⁹⁸⁵ In that regard, many of the judges experience the feelings of insecurity with regard to EU law and the lack of general overview of EU law.⁹⁸⁶ Moreover, it should be observed that in all three countries the judges admit to be aware of their EU law

⁹⁸⁴ See HiiL Report, p.62 with regard to the results for Germany.

⁹⁸⁵ See HiiL report, p.87 with regard to the results for Germany and the Netherlands.

⁹⁸⁶ See HiiL Report, pp.83-84 with regard to the results for Germany and the Netherlands.

knowledge deficiencies and evidently feel the need to broaden and enhance their knowledge of EU law.⁹⁸⁷ Importantly, the length of the membership does seem to significantly influence the way the judges assess their familiarity with EU law. The empirical evidence also indicates that the level of EU law knowledge seems to go hand in hand with the practical experiences with the application thereof a concerned judge has.⁹⁸⁸ In that sense, judges who are more frequently exposed to EU law and apply it on a more frequent basis seem to possess better knowledge thereof. It should yet be underscored that this may again result in a vicious circle situation. An improper level of knowledge of EU law renders it difficult to see the potential relevance thereof in a specific case which results in (inadvertent) non-application. The lack of experience makes it, in turn, difficult to broaden and consolidate the knowledge of EU law. By and large, the problem of knowledge of EU law among the national judges is of a multi-dimensional character and does not originate in one single cause. Therefore, it should always be assessed in the light of the nature of the cases a judge deals with, the workload she is confronted with, the access to a proper EU law training and other sources of EU law.

3.2. Attitudes towards the EU and its legal order

With regard to the attitudes judges have towards EU law and the process of integration within the European Union, the results following from both studies are strikingly similar, i.e. the overwhelming majority of the Polish, German and Dutch judges are apparently pro-European and have a positive picture of the Union. 96 percent of the German and Dutch group are of the opinion that the membership in the EU is favourable for their countries which very much resembles the results for Poland where the rate amounted to 94 percent. Likewise, 89 percent of the Polish group and 86 percent of the Dutch and German group had a positive image of the Union.⁹⁸⁹

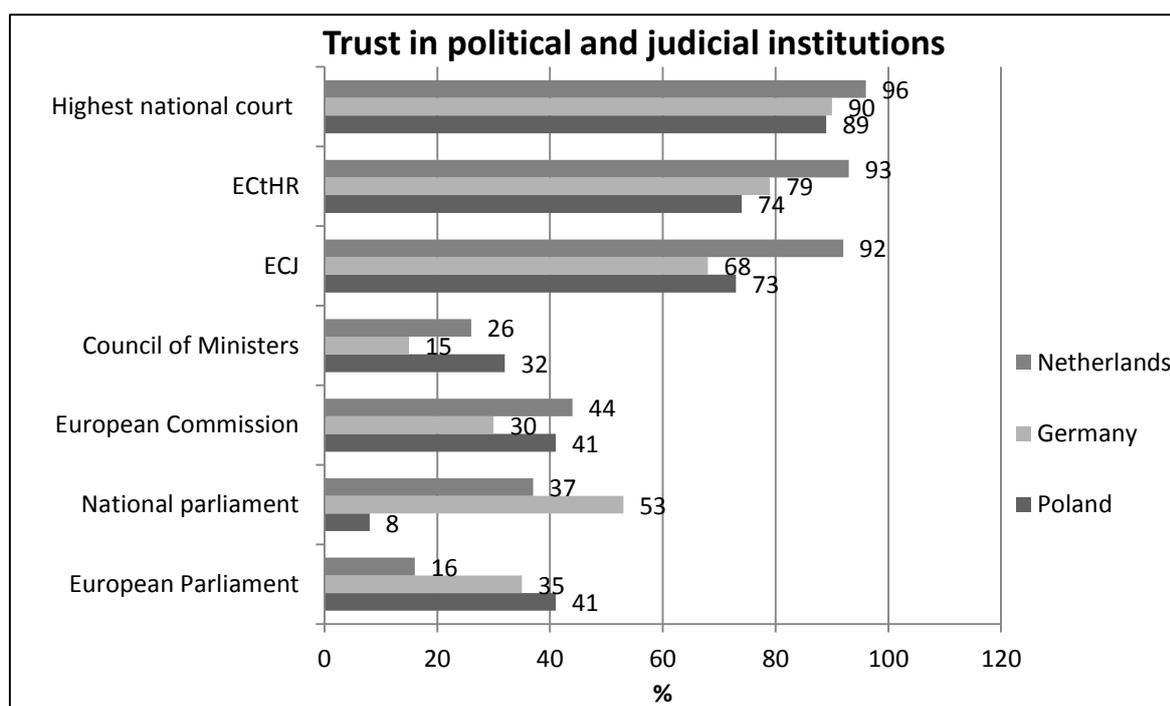
⁹⁸⁷ See HiiL Report, p.84 with regard to the situation in Germany and the Netherlands.

⁹⁸⁸ See HiiL Report, p.84 with regard to the situation in Germany and the Netherlands.

⁹⁸⁹ See HiiL Report, p.65 with regard to the results for Germany and the Netherlands. From the Eurobarometer (2010), p.130 it follows that 80 percent of the citizens in the Netherlands and 64 percent of the citizens of Germany support the membership of their country in the European Union. The Dutch citizens are evidently the most EU-enthusiastic in that respect. Likewise, 76 percent of the Dutch and 58 percent of the German respondents found that their country benefited from the membership in the Union, see *ibid*, pp.134-135. Also, 52

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This positive image of the European Union as such does not seem to translate into a high level of confidence in its institutions though. The survey delivered very absorbing results with regard to the level of trust to national and transnational political and judicial bodies which are compiled in the following chart.⁹⁹⁰ Those in turn trigger interesting questions as to the way the functioning of EU law institutions is legitimized in the respective countries. From among the respective countries, clearly the Dutch judges place the most confidence in the European Court of Justice and German judges represent the lowest level of trust in the EU political bodies and the highest level of trust in the national parliament.⁹⁹¹ Conversely, the Polish judges have evidently the lowest level of trust into the national political institutions which is much below the level of trust in the Union’s political institutions.



n Poland = 292, Germany = 136, Netherlands = 133

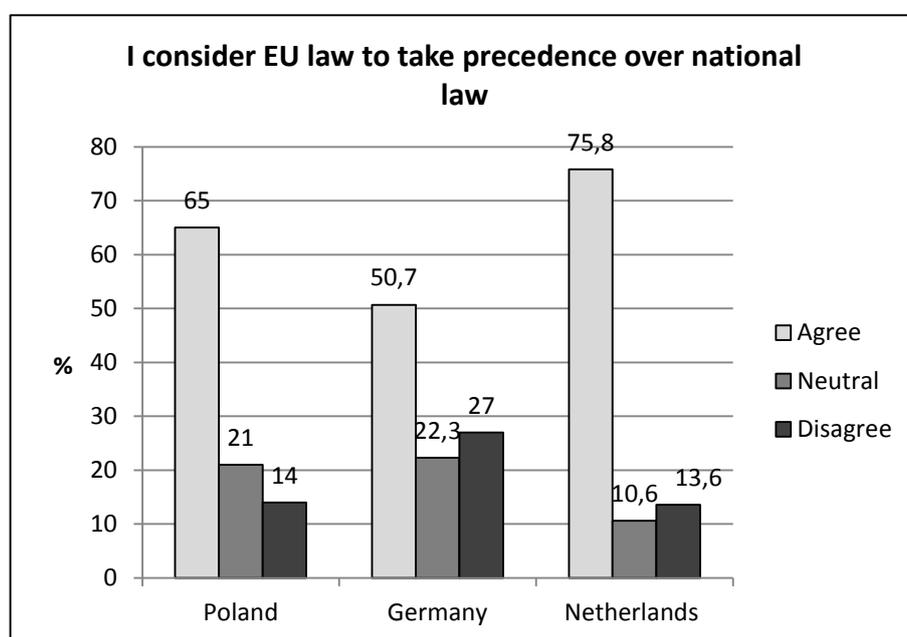
percent of the Dutch and 48 percent of the German respondents declared to have a positive image of the Union, see *ibid*, p.175.

⁹⁹⁰ The notion of the highest national court is referred to as to the German Constitutional Court, the Polish Supreme Court and the Dutch Supreme Court.

⁹⁹¹ See HiiL Report, p.66.

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Significant and arresting findings stem from the data concerning the attitudes judges in the three countries take toward the principle of supremacy of EU law. The tenet gains the most and the least support in, respectively, the Netherlands and Germany.⁹⁹² It follows that 76 percent of the Dutch, 65 percent of the Polish and 51 percent of the German judges perceive EU law as the law taking precedence over national law. German judges are clearly the most rejective of the principle of supremacy of EU law. The following graph illustrates the distribution of the answers.



n Poland = 289, Germany = 130, Netherlands = 132

The subsequent results visualize that the national judiciaries are not consequent in the way the principle is comprehended and interpreted. It has occurred that 62 percent of the Dutch judges were of the opinion that they should follow the ruling of the ECJ if it was in conflict with a judgment of the national supreme court and only 36 percent of the German judges were in

⁹⁹² Ibid, p.69.

favour of such an approach.⁹⁹³ The Polish judges can once more be placed in between both groups as 50 percent of them would follow the ECJ, not the national highest court, if the judgments of both were in conflict. The foregoing shows that in all three countries there exists discrepancy between the number of judges who declare to support the principle of supremacy and those who would follow the judgment of the ECJ even if in conflict with a national judgment (with the latter group being evidently smaller than the former). The foregoing finding, in turn, induces rather perplexing questions as to the nature of the principle of supremacy of EU law itself and the boundaries thereof. The principle seems to be burdened with a sort of dichotomy or, as put by Craig and De Búrca, it reveals “a bi-dimensional character”.⁹⁹⁴

The majority of the judges in the surveyed Member States see themselves as a part of the legal order of the European Union, i.e. 68 percent of the Polish and 65 percent of the German and Dutch judges reckoned so.⁹⁹⁵ Also, 66 percent of the Dutch, 79 percent of the Polish and 52 percent of the German find the application of EU law an important task of the national judge.⁹⁹⁶ Likewise, 90 percent of the Dutch, 83 percent of the Polish and 75 percent of the German judges are of the opinion that the uniform application of EU law across the Union is important.⁹⁹⁷ By and large, it might be put forward that the majority of the national judges reflect a favourable disposition towards the law of the Union and the judicial tasks which are assigned to it. Yet, it is clear that those are the Dutch and German judges who, respectively, take the most and the least EU law ‘friendly’ stance.

The way judges approach their obligations stemming from EU and more precisely from the principle of supremacy of EU law seems to reflect the principles underpinning the national constitutional framework they operate in and the national legal tradition. As already mentioned, the Netherlands have not experienced any major problems with the acceptance and accommodation of the principle of supremacy and direct effect of EU law into the national

⁹⁹³ Ibid, p.72. Furthermore, 16,7 percent of the Dutch and 48,5 percent of the German and 22 percent of the Polish judges would follow national supreme court. The remaining part of the group expressed neutral stance towards the problem indicating that the Polish group was the most ambivalent in that regard.

⁹⁹⁴ From Craig&De Burca (2008), p.377.

⁹⁹⁵ See HiiL Report, pp.67-68 with regard to the results for Germany and the Netherlands.

⁹⁹⁶ Ibid, p.68 with regard to the results for Germany and the Netherlands.

⁹⁹⁷ Ibid, pp.68 and 70 with regard to the results for Germany and the Netherlands.

constitutional framework⁹⁹⁸ and this seems to be mirrored in the results of the present empirical study. The Dutch judges are the most supportive of the EU legal order, they do not express any major reservations with regard to it and they are open to EU legal sources. Conversely, the previous discussion⁹⁹⁹ illustrated that there are many constitutional controversies attached to the accommodation of EU law in the German legal order and the issue of supremacy of EU law. Consequently, German judges who participated in the empirical part of the project reflect a somewhat different and more reserved approach towards the legal order of the EU and the principle of supremacy thereof. In turn, the Polish judges find themselves in between those two groups in many respects.

3.3. Experiences with EU law in the judicial practice

From the data following from the surveys it can be concluded that, even though there are differences between the respective Member States, in general the national civil judges deal with EU law in their daily practice rather sporadically. The frequency of the occurrence of EU law aspects is the lowest in Poland. Indeed, while 85 percent of the Dutch and 71 percent of the German judges did deal with at least one case in which they resorted to EU law in the course of the last 12 months, the rate for Poland amounted to 59 percent.¹⁰⁰⁰ Put differently, the Dutch judges seem to be confronted with EU law most frequently. Alternatively, it could be conjectured that the Dutch judges are the most capable of identifying the EU law relevance for a specific case¹⁰⁰¹ or, arguably, most willing to scrutinize the possible relevance of EU law for a dispute. Also, it occurs that in both Germany and the Netherlands there is a group of judges, which accounts to approximately 10 percent of the surveyed population, which somewhat more frequently deal with EU law in their daily practice.¹⁰⁰² The results for Poland do not detect such a group.

⁹⁹⁸ See section 2.3 of this chapter.

⁹⁹⁹ See section 2.3 of this chapter

¹⁰⁰⁰ See HiiL Report, pp.37-38 with regard to the results for Germany and the Netherlands.

¹⁰⁰¹ As it is put forward by the authors of the HiiL Report, p.38.

¹⁰⁰² More frequently amounts to 26 and more cases with EU law relevance yearly. See HiiL Report, pp.38-39. The report does not provide a clear explanation to that but refers to the fact of specialization, i.e. labour law

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The fact that the Dutch and German judges have a somewhat more comprehensive experience with the application of EU law than their counterparts in Poland can hardly come as a surprise taking into consideration the length of the membership in the EU of the respective countries. What has become clear though is that, irrespective of the length of the membership, private law judges in none of the countries have ever dealt with a “tide”¹⁰⁰³ of EU law cases. By and large, the relevance of EU law for the daily practice of civil courts remains somewhat scant. At the same time the data also shows that the caseload which national judges are confronted with seems to be the highest in Poland: whereas 8 percent of the Dutch and 18 percent of the German stated that their caseload exceeded 300 cases annually, 63 percent of the Polish judges dealt with more than 300 cases yearly.¹⁰⁰⁴

When examining more closely the manner judges resort to specific mechanisms of application of EU law it occurs that 62 percent of the German judges and 49 percent of the Dutch judges have been confronted with the principle of conforming interpretation and applied it in practice whereas only 22 percent of the Polish judges have ever resorted to the mechanism.¹⁰⁰⁵ It has also become evident that the Dutch judges are much more open and resort to a wider variety of techniques and sources to interpret the EU directive in question.¹⁰⁰⁶ In that regard, the Polish judges can be placed in between both groups but in their usage of different sources they more resemble the Dutch judges. All in all, the German judges seem the most reserved and limited when it comes to interpreting national law in harmony with EU directives. Not surprisingly, the Dutch and German judges have more experience with the preliminary ruling procedure as 16 percent of the Dutch and 5 percent of the German group have resorted to the mechanism in their practice at least once.¹⁰⁰⁷

judges seem to be confronted with EU law more frequently, and a group of judges who deal with cross-border judicial cooperation.

¹⁰⁰³ From Kühn&Bobek (2010), p.325.

¹⁰⁰⁴ See Hiil Report, p.38 with regard to the results for Germany and the Netherlands.

¹⁰⁰⁵ Ibid, p.41 with regard to the results for Germany and the Netherlands.

¹⁰⁰⁶ Ibid, p.42. For example, more than 80 percent of those Dutch judges who resorted to the mechanism did use the text and/or system of the directive at stake, whereas less than 20 percent of German judges did so. Likewise, approximately 23 percent of the Dutch judges used other language versions of the directive whereas the German judges, in fact, never resort to other language versions.

¹⁰⁰⁷ Ibid, p.40.

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Similarly to the Polish judges, the majority of the German and Dutch judges experience difficulties with the application of EU law in practice. The Report refers to this phenomenon as to “EU law – hard to spot, difficult to apply”.¹⁰⁰⁸ Indeed, 60 percent of the German and Dutch judges find the EU provisions difficult to find. This proportion was somewhat lower in Poland and accounted to nearly 40 percent. Importantly, 55 percent of the Dutch and 69 percent of the German judges are of the opinion that the process of application of EU law does not proceed smoothly.¹⁰⁰⁹ The proportion was again somewhat lower in Poland and amounted to 48 percent which were however accompanied by 41 percent of those who again took an indifferent stance toward the statement. In addition to that, finding relevant EU provisions seems to pose problems to judges in all three countries. 61 percent of the Polish, 78 percent of the Dutch and 65 percent of the German judges were indeed of the opinion that finding EU law provisions is a long lasting process.¹⁰¹⁰ All in all, the preceding numbers indicate that the gross majority of civil law judges do experience problems searching for, finding and eventually applying EU law. The results concerning the way judges perceive the legibility of EU legal sources such as the judgments of the ECJ and primary and secondary EU legal provisions are similar in all three countries which points to the widespread problem attached to reading and understanding the judgments of the ECJ, primary EU law but foremost the secondary EU law.¹⁰¹¹

In general, both studies expose several common patters in the way judges approach EU law and perceive its relevance for their daily practice. First of all, across the three countries judges are likely to lack adequate knowledge of EU law which implies that frequently they might be incapable of identifying the possible relevance of EU law for the pending disputes. This observation goes hand in hand with the finding which emphasizes the significance of the role the parties to the proceedings play in the process of application of EU law. Indeed, the majority of the judges believes that it is difficult to recognize when EU law becomes relevant for a specific dispute and should be applied, if the parties to the proceedings do not point this

¹⁰⁰⁸ Ibid, p.42.

¹⁰⁰⁹ Ibid, pp.25-26.

¹⁰¹⁰ Ibid, p.42 with regard to the results for Germany and the Netherlands

¹⁰¹¹ Only 9 percent of the Dutch and German were of the opinion that EU secondary law is clear, see *ibid*, p.43. In Poland, 16 percent of the group was of such an opinion.

out or wish to base their claims on EU law. The amount of judges who reckon so was very high for Germany and the Netherlands and amounted to 70 percent of the group and it was somewhat lower for Poland where it was 58 percent.¹⁰¹² By and large, the preceding results once more immensely stress the significance of the parties to the proceedings in the whole process of Europeanisation of the judicial discourse and the judicial application of EU law. Third, across the three countries the judges seem to tend to trust that the legislator fulfills its obligations to implement EU law in a proper way whereby a possible engagement with EU law sources becomes pointless.¹⁰¹³ Moreover, as the projects for Germany and the Netherlands but also for Poland illustrate, EU law is frequently perceived as too abstract and remote from the down-to-earth ordinary cases of routine nature in first instance courts which are expected to be resolved efficiently and without any undue delay or an unnecessary legal research.¹⁰¹⁴ Put differently, in view of the heavy and still growing caseloads the judges rationalize the process of adjudication¹⁰¹⁵ and aim at making as efficient as possible use of the resources which are at their disposal and aim at delivering swift and efficient solutions. The foregoing, in turn, implies that even if a judge detects the possible relevance of EU law for a pending dispute, she might not necessarily engage with the problem in order to avoid the possible delay or workload caused by the necessity of sophisticated and time-consuming legal research.¹⁰¹⁶

4. Preliminary conclusions

The foregoing discussion visualizes several significant and thorny aspects attached to the issue of the functioning of national judges in their EU capacity which are common across the three Member States. As the findings illustrate, several sets of problems are not limited to Poland

¹⁰¹² See HiiL Report, p.42 for the results for Germany and the Netherlands. Again, the lower number for Poland should be read in the light of the finding that a gross number of the judges has never dealt with EU law in practice.

¹⁰¹³ Except of those situations when EU is directly applicable, i.e. EU regulations are applied. See *ibid*, pp.39-40 in which the German and Dutch judges indicate their belief in a correct transposition of EU law.

¹⁰¹⁴ See *ibid*, pp.40 and 82 for the conclusions for Germany and the Netherlands.

¹⁰¹⁵ From Fix-Fierro (2003), p.25.

¹⁰¹⁶ See HiiL Report, p.82 for the conclusions for Germany and the Netherlands.

only but have a much broader scope. Disparities across the New and Old Member States are to be found but overall there are more parallels than differences in the way national judges function as EU judges and the problems attached to it.

The first problematic aspect attached to the functioning of national judges as EU law judges evidently relates to the issue of their familiarity with EU law and, consequently, the confidence they have with regard to their EU law competences. This problem goes along other thorny aspects which relate to the nature of EU law itself, the daily operational context or the activity of the parties to the proceedings with regard to EU law. All in all, it may be claimed that even though the intensity of the problems attached to the functioning of national courts as decentralized EU courts vary between the countries, the application of EU law yet remains a rather perplexing aspect of the daily judicial functioning for many judges not only in the New Member States.

Similarly to Poland, the proper functioning of national judiciaries in their European capacity is not dependent upon one particular factor. Numerous factors seem to influence the way judges behave in the context of EU law and there is no single, clear-cut answer to the question whether national judges are the agents of the European Union legal order. Even if the above suggests that it all ends up in a it-all-depends-situation, there are still plausible grounds to conclude that judges from one jurisdiction are quite likely to be more open to EU law, and consequently more willing to fulfill their obligations and expectations stemming from EU law than judges from another Member State. With everything considered it may be claimed that in the surveyed group, the Dutch judges seem to be the most open to and supportive of the legal order of the European Union and the Union itself. Most importantly, they are the least opposing the principle of supremacy of EU law. At the same time they also seem to be best equipped with adequate knowledge of EU law and to have the best access to the means of improvement of that knowledge. The German judges, in turn, are the most skeptical about and closed to EU law. Likewise, Germany has the highest rate of judges who do not support the principle of supremacy of EU law. Also, the stance of the Federal Constitutional Court toward EU law must bear on the way judges see their role attached to EU law. The Polish judges in many respects find themselves in between both groups. A rather scant experience with the application of EU law, the shortness of the membership and the obstacles stemming from the

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daily operational context seem to result in considerable ambivalence towards EU law and the tasks attached to it which, however, does not imply that the Polish civil judges oppose or reject EU law.

Chapter 7

National Judges as EU Law Judges: Reconciling Legal and Social Perspectives

“Compliance is at its greatest when personal advantages are highest, organizational sanctions against opposition are certain and severe, and the legitimacy of the issuing authority is acknowledged. Conversely, it will be at its minimum when the individual’s utilities all point in the direction of opposition, organization sanctions are lenient and – most important – erratic in application, and the legitimacy of the higher authority is doubtful.”

- Samuel Krislov¹⁰¹⁷

1. The theoretical model of a national judge as an EU law judge in a broader perspective

At the outset of this study it was observed that the EU legal system has developed a very particular mechanism of EU rights protection which is operative on two levels. Early on, the Treaties established a centralized, supranational EU Court - the ECJ – which has played a crucial role in advancing the process of European integration. This centralized Court has induced, through its jurisprudence, that the EU rule of law should also be protected at the decentralized level, that is to say by the national judiciaries of the Member States.

As illustrated in Chapter 2, in order for the national courts to effectively fulfill their tasks of decentralized EU courts, the ECJ has directly empowered national judges by

¹⁰¹⁷ Krislov (1965), p.136.

conferring new competences on them. As the years went by and the process of European integration deepened, the range of duties the *acquis communautaire* imposed on national judiciaries broadened. The doctrines of primacy and direct effect of EU law, indirect effect, effectiveness and the preliminary ruling procedure have become formidable instruments which allow national judges to undertake judicial actions which would normally not be permitted under national law. From the foregoing it follows that national judges of all levels and all specializations have become judges adjudicating EU law and that the process of legal integration within the EU and further development of the legal order of the Union has to a large extent become dependent on them.¹⁰¹⁸ They are the most crucial element of the judicial protection of EU rights¹⁰¹⁹ and first and very often also the last instance courts to consider the issues of EU law.¹⁰²⁰ The General Court went so far as to call national courts the EU courts of general jurisdiction¹⁰²¹ and the European Parliament concluded in a recent resolution that national judges are “the keystone of the European Union judicial system who play a central and indispensable role in the establishment of a single European legal order.”¹⁰²² The role of a national judge has been elevated “to a constitutional mission in the European context.”¹⁰²³

The foregoing reflects an arresting picture of a national judge who is familiar with the sources of EU law and applies them in her daily work. She resorts to and applies EU law *ex officio*, secures that EU law is observed by national authorities and cooperates and stays in dialogue with the ECJ through the preliminary ruling procedure. She scrutinizes the compatibility of national laws with EU law, gives effect to EU provisions which have direct effect and disregards national rules which are not compatible with EU provisions whereby she possibly acts in contradiction with national constitutions and enforces Union law against her own government. She resorts to and applies the jurisprudence of the ECJ which is for her the

¹⁰¹⁸ From Lang, *The principle of effective protection of Community law rights* [in] O’Keeffe&Bavasso (2000), p.235.

¹⁰¹⁹ In fact, the vast majority of the rights that individuals derive from EU law can be enforced in national courts only, see Lang (2008), p.77.

¹⁰²⁰ See Mik (1997), p.22.

¹⁰²¹ Case T-51/89 *Tetra Pak Rausing SA v. Commission of the European Communities* [1990] ECR II-00309, para.42.

¹⁰²² European Parliament resolution of 9 July 2008 on the role of the national judge in the European judicial system 2007/2027(INI).

¹⁰²³ From Cartabia (2007), p.41.

highest judicial authority with regard to EU law. She interprets national rules in the entire context of the European Union integration so that they comply with EU law objectives and she grants damages to individuals whose rights deriving from EU law are infringed by the Member States. She assures effective judicial review of EU law rights and secures that national procedures and remedies do not impede the effectiveness of EU law. In order to achieve all this, the national judge adopts different methodology and tools, such as for instance teleological and comparative interpretation methods. What is more, she reads EU provisions in 23 official languages of the European Union in order to compare them. All the foregoing tasks take place in the context of increasingly Europeanised national legal sources and aim at securing the fundamental principles of EU law such as its effectiveness and uniformity across all the Member States and the effective protection of the rights individuals derive from EU law. In a nutshell, all national judges are expected to be the agents of the legal order of the European Union, who actively participate in the process of legal integration within the Union and who treat the law of the Union as an integral (though supreme) part of the national legal order.

Much has been written with regard to the fulfillment of the legal expectations which are put on national judges by EU law and the application of EU law by them in their jurisprudence. Various scholars focus on the aspects of, *inter alia*, the application of EU law by the highest national courts and the stance they take towards the principle of supremacy and direct effect of EU law or the process of cooperation of various national courts with the ECJ. Even though much academic work is devoted to the discussion concerning particular (and frequently controversial) judgments of national courts in which EU law was at stake, this stream of scholarship can by no means reflect the general picture of the functioning of national judges as EU law judges and the process of Europeanisation of national courts. Indeed, little is known about the general reception of EU law by national judges of lower instance courts, the factual impact of EU law on their daily practice and the potential obstacles national judges can come across while exercising their EU law competences. What does it mean to be an EU law judge in practice? Does the theoretical model translate into the daily functioning of an ordinary first instance judge who adjudicates in the area of private law? What is the virtual reception of the legal order of the European Union among national judges

and whether/how do they fulfill the tasks assigned to them by EU law? And even more essentially: are they prepared to do so? And what are the factors which might influence judges' behaviour in the context of EU law? These and other questions of empirical nature have motivated the present study and become the focus thereof.

By applying both legal and sociological, that is quantitative and qualitative, methodology, this study investigated whether the above-mentioned model of the national judge is indeed attainable in practice of the Polish civil judiciary and whether the Polish civil judge is participating and willing to participate in the process of legal integration in the European Union. Thus, the topic has been investigated from both theoretical and personal/individual perspective of the national judge. Three *apriori* established set of problems relating to, generally speaking, the knowledge of, experiences with and the attitudes towards EU law and the Union itself were investigated in the empirical part of the study. By observing what the individual perspectives of judges on the tasks following from EU law are, it was possible to sketch a general picture of the functioning of Polish civil judges in their EU law capacity. As the subsequent discussion will illustrate, the study also contributes to the Legal Consciousness theory and enables to draw a map of the forms thereof which are present among the surveyed judges. In that sense, the study has adopted an interdisciplinary methodology and a novel theoretical approach to the problem. Through the process of comparing the evidence for Poland with selected results stemming from a parallel project for Germany and the Netherlands its findings gain a broader validity.

The following concluding observations in this chapter aim at collating the theoretical and empirical findings of the present study and at drawing a general picture of the functioning of Polish civil judges as EU law judges in practice, the reception of the legal order of the EU by them and the problems judges are confronted with in that regard. Also, the relevance of the Legal Consciousness theory and other existing legal and political science outlooks on this issue which are present in the academic writing are addressed.

2. National civil judiciary versus EU law: a multidimensional picture

2.1. Plurality of the factors influencing judicial behaviour in the context of EU law

Trivial as it may sound but one of the most cardinal conclusions stemming from the empirical exercise is that judicial behaviour cannot be explained by a single determinant. As plausibly observed by Choi and Gulati, judges do not operate in vacuum and a multitude of factors may motivate the way they behave.¹⁰²⁴ Thus, as the quantitative and especially qualitative data seem to suggest, the actual functioning of judges (as EU law judges) is affected by a broad set of factors comprising, *inter alia*, the constitutional, institutional and procedural frameworks and the operational context with its internal constraints embedded in the social construct of the judicial environment. Furthermore, the local legal culture but also personal attributes may affect the way judges function. Those, as the qualitative data seem to indicate, may go hand in hand with social psychology features such as for instance self-interest, self-presentation and self-respect. Also, such aspects as, *inter alia*, the workload and the interaction with other legal and non-legal actors may play a role in the way judges receive, approach, engage with and in consequence apply EU law.¹⁰²⁵ In that sense, the factors in play are multidimensional. Consequently, sketching the picture of the functioning of national judges as decentralized EU judges is therefore anything but straightforward. In the end one will have to agree that we must “remain mindful of the likelihood that no single theory or method will capture all of the factors at play.”¹⁰²⁶ Hence, some level of simplification and generalization with regard to the final assessment of the situation and the factors that might have an influence upon it is indispensable.¹⁰²⁷

Arguably, the national judge has never functioned in such a demanding, challenging and complex environment. In view of the multiplication of legal sources and levels which only theoretically create one coherent and sensible system the judge has to find her own way to

¹⁰²⁴ From Choi&Gulati (2004), p.321.

¹⁰²⁵ See Bell (2006), pp.29-30.

¹⁰²⁶ See Oldfather (2007), p.146

¹⁰²⁷ See Oldfather (2011), p.8.

meet the principles of legality, rule of law, effective judicial protection, transparency, consistency, constitutionality, impartiality, coherence of jurisprudence and the effectiveness of EU law, to name just a few. On top of that, she must be efficient and swift in her decision-making. The present study supports the claim made by Baum that the behaviour of individual judges may be determined by many objectives and a good legal policy might be only one of them.¹⁰²⁸ It should, however, be emphasized that a good legal policy and the rule of law are the paramount principles for national judges. Yet, it needs to be taken into account that both notions may be differently interpreted by different judges whose functioning seems, moreover, constrained by various factors which are embedded in the local legal, social and cultural environment and circumstances.

2.2. Familiarity of the judges with the legal order of the EU

From the preceding chapters it derives that a certain level of knowledge of EU law among the national judges seems a necessary pre-condition for the (proper) fulfilment of the expectations stemming from EU law. The line of the presented data and arguments reveals the vastness of deficiencies in cognizance of EU law among the civil judges of lower instance courts in Poland.

The evidence for Poland clearly suggests that many judges lack proper knowledge of material EU law and the mechanisms of its application. What is more, in many instances the judges do not realize whether, when and how EU law might be relevant for the proceedings and what the factual judicial tasks attached to EU law are. The widespread conception that EU law becomes relevant only when a cross border element appears in a dispute renders the EU law discourse in many instances virtually non-existent. What is more, a rather blurred view of the role of the ECJ and its precedent for the judicial practice definitely hinders the execution of the judge's European mandate. In that sense, it might be argued that the 'zero condition'¹⁰²⁹

¹⁰²⁸ From Baum (1997), p.24 where the author refers to a whole body of academic research into the motivations and goals of trial judges. Among those objectives one can find, *inter alia*, doing justice, disposing of caseload, creating cohesion, reducing uncertainty, promotion to a higher court, power within the courts or personal income, see p.17 therein for a partial typology of possible goals of judges.

¹⁰²⁹ See note 467.

of the application of law is not met yet: frequently the judge either does not know European Union law and the judicial tasks attached to it to a satisfactory extent or is not confident about it. This lack of confidence with regard to EU law might, in turn, induce the feelings of uncertainty or even frustration and might, in some cases, results in attempts to avoid any EU law discourse. Certainly, this observation does not apply to the whole group. Instances when a judge possesses a good or even very good knowledge of EU law are definitely present. Those are yet and still (but arguably not everlastingly) the harbingers.

The lack of adequate knowledge of substantive law of the EU, relevant case-law of the ECJ and frequently a poor level of awareness with regard to the tasks which EU law puts on national judges naturally triggers various questions. Those relate to, for instance, the actual operationalization of the task to apply EU law of a court's own motion or the preliminary ruling procedure. One will have to agree that judges are not capable of applying EU law *ex officio* in the disputes they are handling if they do not know whether and when EU law becomes relevant and could be at stake. In a similar vein, they cannot adequately engage with the preliminary ruling procedure if they are not aware of, *inter alia*, the existing ECJ's jurisprudence on the respective matter. Finally, the gaps in EU knowledge may result in situation when judges are not aware of the potential consequences of their non-compliance with EU law. In that sense, the existing enforcement mechanism embodied in the infringement procedure and the principle of state liability, which in itself is very weak, becomes a totally meaningless tool with no potency to enforce judicial behaviour that would be compliant with the EU law expectations.

Yet, it would by no means be justified to put the whole blame for the situation with regard to the knowledge of EU law among national judiciaries on the judges themselves and/or the system of university education and judicial training. The problem is clearly of a two-fold nature. On the one hand, the immensity and wideness of EU legislative activities which are, moreover, of a piecemeal character implies that EU law can, arguably, never be captured and comprehended by a simple judge of a lower instance civil court who is frequently confronted with cases of various character which may relate to sundry legal aspects. On the other hand, the broad and complex jurisprudence of the ECJ with regard to the factual obligations which are put on national judges and which are in many instances

incoherent, not straightforward or even contradictory results in a significantly blurred picture of the expectations. Hence, it does not come as a surprise that the judicial tasks flowing from EU law are frequently miscomprehended or misinterpreted. The relatively short period of EU membership and the troublesome aspect of an access to a proper EU law training only add up to the complexity of the situation. However, also the results of the twin project for Germany and the Netherlands show that the majority of the judges is not satisfied with their acquaintance with EU law and/or not confident about it. Even though the problem has a somewhat different intensification in the two respective countries than in Poland, it shows that the length of the membership in the EU does not seem to play a major role in improving the EU law competence of the judges. By and large, the familiarity of national judges with EU law remains one of the most perplexing problems attached to the functioning of the judicial architecture in the European Union. As such the present study verifies the findings of the Draft Report on the role of the national judge commissioned by the European Parliament and other studies in the field and certainly underscores the necessity to pay more attention and invest more funds and efforts to guarantee an appropriate level of knowledge of EU law among the present and future judges of both New and Old Member States.¹⁰³⁰

Finally, the fact that an overwhelming number of judges in Poland, the Netherlands and (to a somewhat lesser extent) Germany declared to be willing to broaden their knowledge of EU law should undoubtedly be taken as a positive and optimistic sign which indicates not only that the majority of the judges does not reject EU law and its place in adjudication but also that they anticipate an increasing occurrence of EU law related matters in the future. Yet, an adequate level of knowledge of EU law is a necessary but not sufficient condition for the proper functioning of national judges as EU law judges as other factors, such as, for instance, experiences with its application, attitudes or the local operational context might play an indispensable role therein.

¹⁰³⁰ Solid and constant training in European Union law throughout a judge's studies and career was indicated by slightly more than half of the judges as the best manner to tackle the problem of knowledge. 73 percent of this group reckoned that there should be more training in EU law available, see p. 41 of the Draft Report. See also studies mentioned in notes 92 and 146.

2.3. Presence of EU law in the daily judicial practice and the role of the parties therein

The aspect of knowledge of EU law goes hand in hand with the issue of the practical experiences with the application thereof. The empirical data seems to suggest that, on the one hand, the practical experience in resorting to and applying EU law seems one of the optimal manners of learning EU law. In that sense, judges learn EU law for purposes of a specific dispute due to the fact that, for instance, the parties refer to EU law or wish to base their claims there upon or an EU regulation ought to be applied. However, the idea that a judge learns EU law only for purposes of a specific case dangerously undermines the functioning of the whole system as, arguably, the judge will not be capable of noting the potential relevance of EU law in other cases. In that sense, aspects of EU law might often go unnoticed and unexplored which, in the end, seriously jeopardizes the *effet utile* of EU law and its uniform application across the Member States.

Generally speaking, it has been detected that the experiences with resorting to and applying EU law by Polish civil judges are, so far, fairly limited. Many of the civil judges see, therefore, EU law as an abstract, remote or irrelevant aspect of adjudication. This scant practical experience with the application of EU law results in considerable number of judges who simply have a very ambivalent stance towards the obligations which are put on them by means of EU law. This seems to offer a good explanation to the fact that such a high proportion of the Polish group took a neutral stance toward many motions tested in the survey and/or did not know how to proceed with the vignettes. In a similar vein, the results for the Netherlands and Germany show that, even though the judges in both countries have somewhat more comprehensive experiences with the application of EU law than their Polish counterparts, the relevance of EU law for the daily practice of a civil judge remains, by and large, rather restrained or, especially if seen in the light of the overall case-loads the judges are confronted with.

Moreover, from the figures presented in the previous chapters it has become evident, that the entire process of application of EU law, which commences with looking for and finding relevant provisions and the respective case-law of the ECJ, through the process of

interpreting thereof up to applying them in a specific case amounts to a time consuming, onerous and intricate process. Indeed, the qualitative study showed that once a judge is confronted with an EU law aspect it might, quite likely, cost her much time and effort to explore and comprehend the respective issue. This, in turn, ought to be read in the light of the daily reality of the functioning of the national courts and in particular in the light of the backlog of cases and efficiency expectations which are put on the judges. What is more, this infrequent occurrence of EU law in the daily practice implicates that its application remains exceptional and in consequence troublesome each time an EU law issues occurs. It might therefore be put forward that so long as EU law does not constitute a somewhat more widespread element of adjudication in civil courts its application will remain and perplexing aspect thereof.

This lack of experience goes parallel with the issue that in fact the private parties and their representatives are yet not very active in resorting to EU law sources and basing their claims thereupon. From both the quantitative and qualitative data it follows that the role of the litigants and foremost their professional representatives in pointing out that EU law might be at stake in a dispute seems indispensable. Also the results for Germany and the Netherlands clearly underscore the essential role of private parties in the process of Europeanization of judicial discourse. There is no doubt that without their input, engagement and willingness to resort to EU law in order to support their claims, the scope of the process of mainstreaming of EU law into the daily practice of (private law) courts in Poland and other countries will remain very restrained. Likewise, so long there are relatively few EU law cases, the knowledge of EU law among judges will remain rather limited, abstract and esoteric. Indeed, it emerges from the qualitative part of the study that when an EU law element is brought up by the parties then the judge undertakes searching for the respective EU law provisions, scrutinizing them and in consequence learning (but not necessarily applying) them. But yet, similarly to the situation present within the judiciary the whole issue boils down to the problem of the knowledge of EU law and the mechanisms of its application among attorneys and solicitors who, as a matter of fact, have learnt EU law in the exactly the same system of legal education as the judges who they stand before during the proceedings. Arguably, the knowledge of EU law is perceived by attorneys and solicitors as a very specialized and

sophisticated field of law which implies that those possessing one are predominantly concentrated in large law firms placed in major economic centres across the country.

With everything considered, the Polish civil judge frequently ends up in a vicious circle situation: parties rarely signal that EU law could be at stake and if they signal it then frequently their EU law claims are insufficiently substantiated. The limited and scattered knowledge of EU law makes it difficult for a judge to see and locate the potential relevance of EU law and that, in turn, results in the limited experience with resorting to it and applying it. This lack of experience with the application renders the process of broadening the knowledge of EU law or transforming and consolidating the already existent knowledge into its practical form excessively difficult. Likewise, the lack of experience with the application of EU law implies that each time a judge is confronted with it amounts to an effort- and, foremost, time-consuming process which very much collides with the daily backlog of cases and output expectations. Although it may sound like a mere cliché but a direct experience with the application of EU law is the paramount determinant in the process of learning, understanding and consequently in the process of applying EU law. Some concepts of EU law, including the most pivotal systemic tenets such as primacy and direct effect thereof, remain just meaningless notions to many of the judges due to the lack of any practical experience in applying them.

2.4. Approach of the judges towards the EU and its law

By no means is the foregoing passage aimed at implying that EU law operates in an EU unfriendly environment in Poland. On the contrary, it has been shown that judges are very friendly disposed towards the EU and perceive the Union's membership as a favourable development. Strikingly similar results stem from the study for Germany and the Netherlands. What is more, the EU institutions receive, in fact, more trust on part of the Polish judges than national authorities. The fact that in the three concerned countries the judges are evidently pro-European underscores the finding that personal favourable attitudes towards the Union neither seem to influence the way the judges approach their tasks following from EU law and fulfill their role of the protectors of the EU rule of law nor do they influence the manner

judges perceive EU law and its relevance for the daily judicial practice. Likewise, the favourable disposition to the Union does not need to indicate that judges will eagerly engage in the process of legal integration in the European Union. Political inclinations and personal perspectives seem to be set aside. It is the efficient resolution of conflicts and providing justice in accordance with the rule of law that are the primary objectives of the national lower court judge. This dispute resolution process takes, however, place in the local operational context which, in turn, does seem to bear on the way judges perceive and approach EU law.

In a similar vein, the pivotal for the existence of the Union's legal order principle of supremacy of EU law finds relatively much support among the judiciary and many judges declare to see EU law as an integral part of the national legal order. Parallel to that, the preliminary ruling procedure seems to gain considerable support. With regard to the stance judges take towards the principle of supremacy of EU law, it should yet not be forgotten that the Polish Constitution accepts the supreme position of EU law only over sub-constitutional legal acts. Consequently, as illustrated in Chapter 3, the absolute supremacy of EU law has been rejected by the Polish Constitutional Tribunal. This stance of the CT may, in corollary, bear on the way judges perceive the problem. It also occurs that the principle of supremacy of EU law is interpreted in a narrow manner, i.e. through the prism of an evident (linguistic) incompatibility between national and EU law sources. Since, as illustrated in Chapter 3, the transposition of EU law in the area of private law in many instances took the form of a 'copy and paste' process¹⁰³¹, many judges assume that incompatibility between EU and national provisions cannot take place. With everything considered, the acceptance of the principle of supremacy of EU law proves to be marked with different nuances and to comprise different aspects. The evident dichotomy in the way the principle of supremacy of EU law is perceived by many national judges triggers various questions as to the constitutional underpinnings of EU law itself and the virtual place it occupies in the legal sources hierarchy. One thing is certain, the tension between the stance the ECJ takes towards the principle of supremacy of EU law and the manner most of the national constitutional courts see the problem does not

¹⁰³¹ See section 5.1 of Chapter 3.

contribute to the legibility of the legal environment the judges function in.¹⁰³² As the stances are irreconcilable, the national judge, in case of potential variance of national constitutional provisions with EU law provisions, has to opt for one of the options. Such a situation should, however, be regarded as pathological and it evidently undermines the legal certainty. As there is no clear solution to the problem, many Polish judges seem to take a pragmatic stance towards the issue and assume that a situation of disagreement between the national Constitution and EU law is impossible in practice.

2.5. Operational context, efficiency and procedural economy

The preceding findings concerning the knowledge of, attitudes towards and experiences with EU law should be interpreted in the light of Posner's claim that "judges are not moral or intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines. They are all-too-human workers, responding as other workers do to the conditions of the labour market in which they work."¹⁰³³ This characterisation very much applies to the Polish civil judge and arguably any national judge of other Member States. The focus must, therefore, be on the specifics of the daily functioning of a Polish civil judge and the impact thereof on her functioning in the context of EU law.

Chapter 3 illustrates that, with the exception of the perplexing issue of the absolute primacy of EU law, the legal constitutional and institutional frameworks in Poland do not, in principle, establish any serious obstacles to the fulfilment of the expectations which are put on national judges by means of EU law. At the same time though, the legal order does not foresee any clear and straightforward rules which would regulate the issue of judicial application of EU law. As a matter of fact, neither the Constitution nor the procedural rules explicitly mention EU legal order and the role and place thereof in the national legal system. In that

¹⁰³² See Avbelj (2011), pp.760-761 who claims that the necessity of choosing between the models by a judge "(...) entails uncertainty for the holders of rights and duties under EU law. Moreover, it is also detrimental for the judicial authority, if jurisprudence is torn between two visions of the integration's legal structure, so that one judgment swings in that, another into the opposite direction; or that the same judgment mixes both models (...)"

¹⁰³³ From Posner (2008), p.7. See also Oldfather (2007), p.127 who refers to "myth about the non-human-ness of judges."

sense, the judicial tasks attached to EU law are communicated implicitly and many rules apply by analogy. This lack of an explicit solution does not seem to create a sufficiently clear legal framework for the national judges.

In addition to the above, the empirical data also suggests that it is the operational context the judges function in, which may pose obstacles to the fulfilment of the EU law expectations. It occurs that the (most average) Polish civil judge suffers from time constraints having their roots in a significant workload and backlog of cases. The empirical research revealed a very down-to-earth reality where a judge works as swift as possible to decide her cases with justifiable dispatch and in consequence she will resort to the law which is directly at her disposal and which she knows relatively well, that is the national law. In that sense, any *ex officio* engagement with consulting EU law or looking for EU law relevance might be seen by many of the judges as, to quote one of them, a “hair splitting” exercise and an extracurricular activity. As already illustrated, any engagement with EU law sources and the legal assessment process, is a time- and effort consuming exercise which becomes even more intricate and perplexing if a judge has limited knowledge of EU law.¹⁰³⁴ This observation gains another dimension if seen in the context of the daily judicial functioning paralleled with the constant lack of time on the part of judges. As it has been seen a judge’s performance is mostly assessed on the basis of backlog statistics and discharge of obligations. Also the personal reversal rate plays a role in the evaluation. In consequence, judges’ chances to be promoted are very much dependent upon the preceding factors. Put differently, lower instance judges have one common goal, i.e. to be as efficient as possible and decide their cases without any undue delay. In that sense, procedural economy is one of the primary objectives of a judge and therefore the time she has at her disposal seems one of the most precious commodities she possesses. Yet, the foregoing sections have clearly shown that the processes of gaining the knowledge of EU law and engaging within any EU law discourse are intricate, complicated,

¹⁰³⁴ See also Oldfather (2011), p.20 who puts forward that “Even if we assume the ultimate existence of correct answer to any moderately complex legal problem, efforts to assess whether a given decision has reached that answer requires deep knowledge of both the applicable law and the particular facts and circumstances of the case involved. This requires, at a minimum, fully understanding of the facts, the parties’ arguments, and the governing legal materials, and thus requires, an assessment process involving as much effort as the court’s decisional process.”

laborious and time-consuming and therefore they might cause a potential delay with regard to all other cases and eventually threaten the fulfilment of normal daily tasks. In that sense, any engagement with EU law may even cause adverse effects for a judge for she will very likely have to set aside other pending cases in order to get acquainted with EU law in question. This gains a special significance for the operationalization of the preliminary ruling procedure since in order for a judge to refer a question which does not fall into the *acte éclairé* or *acte clair* doctrines she must be familiar with the existing jurisprudence in the respective field. Yet, the process of law finding will, very likely, be time consuming.

As claimed by Vermeule “judges are boundedly rational: their capacity to process information they can obtain is limited, in part because of cognitive failings.”¹⁰³⁵ The Polish civil judge of a lower instance court will, most likely, have rather limited resources to engage with the process of EU law-finding.¹⁰³⁶ Moreover, since EU law is a novel and tangled aspect of judicial decision-making which definitely does not enjoy a stable position in the daily practice the judge might fear that a particular case where EU law has been referred to and applied will run a higher risk of being quashed by an appellate court which again does bear on the final assessment of the judicial performance and progression on the career ladder but also her reputation with other judges.¹⁰³⁷ In that sense, not only are there no ‘carrots’ (incentives or personal advantages) that could encourage judges to engage with EU law but there are in fact many ‘sticks’ (disincentives) present which will dishearten a judge from engagement with EU law.¹⁰³⁸ Next to the above, there is no formal mechanism that would allow for a review of the

¹⁰³⁵ See Vermeule (2006), p.3. Similarly Guthrie et al (2002), p.50 where the authors claim “judges, it seems, are human. They appear to fall prey to the same cognitive illusions that psychologist have identified among lay persons and other professionals.”

¹⁰³⁶ It could therefore be agreed with Jackson (2010), p.192 who argues that supreme courts are much better equipped to resort to foreign sources of law as their dockets are not that large and they have in overall more extensive control over them, they mostly have fewer cases, they are not under the persistent pressure to resolve disputes as efficiently as possible and they have a better knowledge of foreign sources of law. Jackson’s analysis regards the functioning of the courts in the US but her observations seem relevant for any judicial system in Europe.

¹⁰³⁷ See *ibid*, p.150 “(...) judges may be understandably reluctant either to invest the time needed to feel comfortable relying on those (foreign or international – own annotation by the author) sources or to risk error in relying on them without that investment of time. Judges’ rational decisions are necessarily bounded ones, in a world exploding with legal information.”

¹⁰³⁸ There is a considerable research proving that judges, similarly to “ordinary” people, respond to incentives, see for instance Choi&Gulati (2004), p.305; Schauer (2000), Ramseyer&Rasmusen (1997). Under the list of ‘self-interest’ Schauer mentions *inter alia*: reputation and self-esteem, occupational ambition or peer group, see

way judges consult, refer to and apply EU law. Pure calculation of time and costs might therefore condition further participation in an EU law discourse.¹⁰³⁹ Put differently, it may be claimed that the operational context in which the Polish civil judges has to work immensely bears on the way judges engage with EU law and consequently apply it. In Poland, the workload and output numbers seem one the most decisive factors affecting the way judges operate and consequently engage with and utilize (if at all) EU law. In that sense, the distribution of the resources, i.e. time, knowledge, judicial skills and competences, across the different levels of the civil judiciary in Poland explains why it is so perplexing for the ordinary civil judge of a lower instance court to become a truly EU law judge.¹⁰⁴⁰ Also notions such as: costs, benefits or rationality, to name just a few, come to fore and imply the necessity of incorporating the insights from the disciplines of law-and-economics and psychology in order to accurately reflect the processes of adjudication.¹⁰⁴¹

2.6. The role of the judge and judicial methodology

Parallel to the problem of knowledge of EU law the issue of the judicial methodology and more precisely the methods of interpretation and judicial techniques traditionally utilized by judges proved to pose a significant obstacle to the operationalization of the EU law expectations. As illustrated in Chapter 3, the Polish legal culture rests on textual, positive and very formal approach to statutory law. Moreover, a precedent is not considered a formal

Schauer (2000), pp.625-634. The author observes however that it is necessary to see the limitations to the claim that maximize their personal interests, see pp.634-635.

¹⁰³⁹ Therefore it should be agreed with Posner who claims that judges are rational and in their behaviour react to various benefits and costs (carrots and sticks) attached to different forms of behaviour, see Posner (2000), p.220.

¹⁰⁴⁰ See Komarek (2007), pp.486-487 who argues that "(...) being a judge requires experience, education and skills not possessed by all judges to the same extent. "Judicial wisdom" is distributed throughout the system unevenly – more experienced judges generally sit at the higher courts, as these courts must solve more difficult questions. We do not necessarily have to explain the smaller number of references from national supreme (or higher) courts by their unwillingness to submit themselves to the Court of Justice authority. An equally sound explanation may actually be that they are more competent to deal with complex legal questions."

¹⁰⁴¹ See Fix-Fierro (2003), p.53.

source of law.¹⁰⁴² The empirical data corroborated that indeed the above-mentioned characteristics of the national legal culture render the integration of EU law into the daily judicial practice in Poland difficult.¹⁰⁴³ Furthermore, the traditional literalist school impedes the operationalization of the principle of harmonious interpretation. The teleological method which rests on looking for objectives and goals of legislation does not easily fit this traditional legalist culture and might be seen as illegitimate and crossing the boundaries of judicial function. Needless to say, this problem is a much more complex and intricate one since it may not be completely remedied by a “simple” improvement of knowledge of EU law and the anticipated change may not be considered an automatic one. It has become evident that it requires a significant switch in mentality and attitude towards and views on not only the law of European Union but also and most importantly the place and role the judiciary plays in the entire legal framework and the process of judicial enforcement of the law. The new role evidently expects an active approach on part of the national judge.

The foregoing goes parallel to the aspect of the position of the judge vis-à-vis the national legislator and more precisely to the task of controlling by the judiciary the correctness of implementation of EU law by the lawmaker. The qualitative data seem to indicate that many of the judges do not seem to find it necessary to consult EU law sources, and more specifically, EU directives as they have been implemented by the legislator. In that sense, the mere fact of implementation of EU directives implies that it is not necessary to resort to them as it is not sensible to question the correctness of the legislative work. This also links to the fact that frequently EU law is associated with something that is too sophisticated and sublime and too exceptional to have any bearing on the simple and common, in the view of many judges, cases which appear before first instance civil courts. Consequently, judges may tend to adapt a passive and deferential attitude towards higher (appeal) courts and confine its role to

¹⁰⁴² See note 610 on the problem of the precedential value of the judgments of the ECJ in Poland and the doctrinal divergences in that respect presented by the scholars.

¹⁰⁴³ Brodecki and Majkowska-Szulc claim that as long as the ECJ’s precedents are not recognized as an official source of law in Poland, so long the Polish legal culture will not synchronize with the European legal culture and the Polish judge will not fulfill the tasks which are put on her by virtue of EU law, see Brodecki&Majkowska-Szulc (2006), p.57.

the mere application of the existing rules to the disputes they are presiding over.¹⁰⁴⁴ The task of questioning the law, deliberating upon its content and establishing its correct interpretation should therefore take place, in view of many surveyed judges, at the higher level of adjudication, that is to say at the level of the appeal courts and the Supreme Court.

2.7. Personal attributes of the judge and social psychology

It has been observed by Drobak and North that “non-doctrinal factors and discretion are inherent in judicial decision-making.”¹⁰⁴⁵ Indeed, as the qualitative data seems to suggest, personal traits of judges might possibly play a role in the way they function in the context of EU law. In that sense, individual motivation and ambition, the willingness and courage to step out of line and engage with a distinct legal discourse and to participate in the legal integration in the European Union might possibly influence the manner she approaches EU law. The feeling of commitment to and responsibility for the legal order of the European Union and the necessity of ensuring its effectiveness prompt judges to resort to the sources of EU law. This process of resorting to EU law sources does not necessarily imply that EU law will be directly applied in the pending case but it may be used as a supplementary argument or as an interpretative aid. As will be visualized hereafter, those individual attributes of national judges seem to determine to a high extent the form of legal consciousness. Finally, the specifics of judicial environment and social interaction with other judges may possibly bear on the way judges engage with EU law. As the empirical findings in Chapter 4 suggest, self-presentation and self-interest and closely connected to it ‘disgrace concerns’ might, arguably, dishearten the judge from employing the law and mechanisms which they are not sufficiently familiar with. As the qualitative data illustrates, social psychology, and more specifically taking care of own prestige, authority and good name among colleagues but also a broader legal community may also affect the process of engagement with EU law and particularly the

¹⁰⁴⁴ This deferential attitude towards higher courts was also emphasized during the monitoring of the EU accession process, see Open Society Institute (2001), p.310.

¹⁰⁴⁵ Drobak&North (2008), p.132.

process of dialogue with the ECJ.¹⁰⁴⁶ Being afraid of ‘losing one’s face’ which would be reflected in, for instance, an improper employment of interpretation of EU legal sources, incorrect formulation of a preliminary question or referring a question which falls within the *acte eclare* doctrine might effectively dishearten the judges from resorting to mechanism which are novel and not yet fully grasped.

2.8. Naivety of the theoretical model of the national judge as an EU judge

Based on the findings in this study, it may be argued the theoretical model of an EU law judge as established by the ECJ reveals an arresting and plausible in writing but certainly an elusive legal perspective on the role of a national judge. Indeed, as the study has shown, this theoretical model of EU law judge seems to be marked by a high level of abstraction, is a naïve reflection of Dworkin’s Hercules judge of “superhuman intellectual power and patience who accepts law as integrity”¹⁰⁴⁷ and can by no means reflect the way the national judge functions in reality.

As illustrated, this naivety of the model has several general causes. The first one relates to the evident complexity of the multidimensional legal order, intensity of EU regulatory processes and the overkill of expectations which are put on the national judiciary by means of EU law and which do not always easily accommodate in the national constitutional, procedural and operational framework and the local legal culture. The foregoing, in turn, introduces much (legal) uncertainty and lack of confidence on part of the judges as to the correct way of proceeding in such an intricate legal environment. The second ground, which only adds up to the complexity of the situation has its roots in inadequate institutional arrangements which result in national judges who are, in many instances, ill-equipped to function in the context of EU law. All in all, the law of the EU remains a somewhat abstract and remote legal order to the majority of the Polish civil judges.¹⁰⁴⁸ The

¹⁰⁴⁶ See section 4.4 of Chapter 4.

¹⁰⁴⁷ Dworkin (1996), p.239. See also Bobek, *The new European judges and the limits of the possible* [in] Łazowski (2010), p.127.

¹⁰⁴⁸ Interestingly, scholars which conducted a research concerning the impact of EC law on the practicing lawyers in the Netherlands and Scotland arrived at congruent conclusions. The authors claim that “It was clear

foregoing, in turn, implies that the full coherence of EU law, legal uniformity and legal convergence across the European Union are somewhat elusive concepts.

3. Implications of the study for the theory of Legal Consciousness

Next to reflecting on the problem of the daily functioning of national judges as decentralized EU judges, the present study aimed at contributing to the socio-legal theory of legal consciousness of Ewick and Silbey. This objective was to be achieved by means of anchoring vignettes which were included in the quantitative part of the study. As illustrated in section 2 of the present chapter, the chosen method proved to be marked by several pitfalls though. Ultimately, the vignettes delivered invaluable, though rather intricate in terms of interpretation, data which complemented the novel picture of the national courts functioning in their European capacity. The qualitative part of the study verified what the vignettes had already partly reflected. The stances judges take towards the principle of supremacy of EU law is only a component of the general picture of the functioning of national judges in their EU capacity and the final picture of the present situation may not be based on this agent only. It has, in fact, occurred that the approach judges take to the issue of *ex officio* application of EU law is one of the main determinants of legal consciousness. Indeed, the quantitative and qualitative data has shown that judges are in clear disagreement with regard to the problem of the application of EU law of a judge's own motion. By and large, the final assessment of the existing forms of legal consciousness had to take the qualitative data into account.

The foregoing analysis implies that for the purpose of the present study only some of the elements of the theory of legal consciousness developed by the mentioned authors may be borrowed and applied. For the purposes of the present study, the theory of Ewick and Silbey have therefore been reconceptualized in order to adjust to the results gained in the survey and the interviews. The empirical findings illustrate that Polish civil judges, similarly to the

from the findings that lawyers felt somewhat distant from the European legal system, they had difficulties in gaining access to information, they believed that the inter-relationship between EC and their domestic law was too complex, and they found it difficult to keep pace with developments.”, see Örucü (2007), p.447.

characters of the *Common place of law*, reveal three general forms of legal consciousness with regard to European Union law. Each detected form is characterized by features which, however, do not entirely overlap with the accounts distinguished by Ewick and Silbey. At the same time, the core of each form remains the same as with Ewick and Silbey and rests on either the *conformity*, *engagement* or *resistance* model. Consequently, three accounts of legal consciousness among the Polish civil judges have been detected, those are: passive formalists, EU law activists and EU critics. Each form is characterized by the following attributes:

- A judge archetyped as a *passive formalist* which partly overlaps with the *before the law* formation will perceive EU law as a distinct, magisterial, autonomous, majestic, separate, impartial sphere of law that can be engaged but only in particular situations. Frequently EU law will be seen as something irrelevant and abstract. It will be a “space outside of everyday life.”¹⁰⁴⁹ Nonetheless, the judge will accept the normativity and authority of EU law and will be loyal to it but she will not necessarily engage with it so long it is not necessary. A passive formalist may sometimes feel frustrated about her own powerlessness¹⁰⁵⁰ and possibly about her lack of knowledge of EU law or the methods of its application. It may happen that she will not know how to proceed with a particular issue regarding EU law. She will, in principle, accept the legal premises of EU law, will see EU law as valid and binding but she will not necessarily engage in that law of her own motion. Instead, she will, for instance, wait until the parties to the proceeding claim that EU law could be at stake and should be applied. Alternatively, she may show indifference toward EU law which will most likely origin from the lack of adequate knowledge and/or experience with the application of EU law. Put differently, she will frequently adopt a passive attitude towards it and therefore she will possibly have no or a limited experience with EU law. She will accept the significance of the preliminary ruling procedure but she will consider engaging with it only in an exceptional situations. Recapitulating, a judge acting before the law will

¹⁰⁴⁹ Ewick&Silbey (1998), p.76.

¹⁰⁵⁰ Ibid, pp.47, 74-108.

conform to the law of the European Union but will see it as a remote and distinct aspect of the daily practice.

- A judge archetyped as EU law *activist* which will share some components of the *with the law* paragon, will perceive EU law as an axiomatic part of her daily practice which she will unconditionally and eagerly engage with, frequently of her own motion.¹⁰⁵¹ EU law will be an available and effective instrument that can be used, a tool which allows to achieve a multitude of objectives. The objectives are not necessarily purely legal in their nature. Satisfying a personal conviction that a national judge is obliged to ensure the effectiveness of EU law, to understand the aims of legal provisions, to treat EU law as an integral part of adjudication or to give a proper consideration to all possible aspects of a dispute may be possible motives which make the judges resort to EU law. In this setting, EU law will be operating simultaneously with domestic legal provisions and it will be in a frequent interaction with it. The principles of EU law will be accepted in their entirety, i.e. they will be perceived as fully binding, legitimate and valid. A judge with EU law will not wait for the parties to the proceeding to point out that EU law could be at stake. Frequently, she will be unsatisfied with the quality of EU law legal arguments which are brought by the parties to the dispute. Judges belonging to this group will resort to the preliminary ruling procedure provided that it is necessary and the operational context gives room to do so. In sum, a judge acting with the law will *engage with* the law of the European Union and will be committed to it, she will perceive it as a fully integral part of the national legal order, i.e. both systems will be connected and intertwined.

- A judge having *critical* and *conditional* attitude to the European Union legal order shares some feature with the *against the law* embodiment and can be characterized as occasionally resistant to EU law, as trying to avoid or omit it and frequently having a cynical attitude towards it. At times, EU law will be perceived as an arbitrary product

¹⁰⁵¹ Ibid, pp.48, 108-164.

of power *against* which she struggles¹⁰⁵², as a foreign element which can be escaped from. The reasons to escape from EU law or trying to omit or avoid it might be, however, of a different nature and origin. The most significant reason seems to relate to the fact that EU law adds an unnecessary complexity (technical, interpretative) to the legal discourse. Very likely, a critical judge will not accept the principle of absolute primacy of EU law. She will not consider engaging in the preliminary ruling procedure, unless there is no room to avoid it. Quite likely she will be somewhat cynical about the authority of the European Court of Justice and will not unconditionally accept its precedent. It can be observed that the notion of resistance or being *against* does not have to be interpreted in terms of absolute rejection of EU law and negation of its binding force. This goes in line with Nielsen who claims that the “resistance paradigm is a complex one since the problem of resistance is at the same the problem of definition thereof”.¹⁰⁵³ As the local constitutional, institutional and procedural frameworks constitute constraints to the national judge and will not allow her to simply reject or disregard EU law in its entirety, she will use the leeway at her disposal, or the vague and ambiguous terrains in the processes of judicial application of law which provide for some margin where discretionary powers can be exercised. Put differently, the critical judge may tend to use the discretionary space created by law to avoid involvement in the EU law discourse and its potential application.

In their study Ewick and Silbey established a scheme reflecting specific dimensions of particular Legal Consciousness embodiments.¹⁰⁵⁴ Those dimensions are: normativity, constraint, capacity time-space and archetype.¹⁰⁵⁵ The scheme has been borrowed and applied in the present study in order to reflect the main notions and premises which are likely to emerge within a specific legal consciousness variation. The subsequent table summarizes and

¹⁰⁵² Ibid, pp.28, 47, 165-220.

¹⁰⁵³ Nielsen (2000), p.1086.

¹⁰⁵⁴ See Ewick&Silbey (1998), p.82 where the authors observe that: “These dimensions of legal consciousness should be understood as axes of interpretation that provide alternative vantage points from which to view legality.”

¹⁰⁵⁵ Ibid, pp.82 and 224.

complies the foregoing line of discussion. Yet, it should not be seen as rigid and clear-cut scheme as the forms of legal consciousness are subject to evolution and change. Also, some judges may at times even reflect a contradictory or mixed form of legal consciousness. This finding reaffirms Ewick and Silbey’s conclusion that that legal consciousness is not a steady phenomenon as it is emergent and moving and evolves with the knowledge and experiences.¹⁰⁵⁶

	Engagement with EU law	Passivity towards EU law	Criticisms of EU law
Normativity	EU law unconditionally supreme	EU law supreme but elusive, abstract and frequently misinterpreted	National constitution supreme EU law conditionally supreme
Constraint	Interpretative doubts Technical obstacles: access to EU law sources, procedural efficiency	Operational context Time constraints Autonomy of the parties Lack of a cross-border element Knowledge Lack or limited Experience Powerlessness Uncertainty Separation of powers	Complexity Tension Autonomy of the parties Time constraints Unjustness of EU law Unrightness of EU law Access to EU law sources Limits of knowledge Lack or limited Experience

¹⁰⁵⁶ See also analysis by Jackson (2010) who distinguishes three forms of postures towards international law presented by selected national constitutional courts, those are: resistance, convergence and engagement, see pp.8-9. The author stipulates, however, that her classification is “necessarily overdrawn” as the schemes “can best be understood as arrayed along a continuum, so that stronger form of engagement may be very similar to milder forms of convergence.”, p.9.

National Judges as EU Law Judges: Reconciling Legal and Social Perspectives

Capacity	Self-engagement (<i>ex officio</i>) Openness Courage Motivation Ambition Skills Loyalty to EU Knowledge Experience	Rules and procedures Hierarchy Organization Heuristics	Judicial discretion Flexibility Conditional loyalty
Time/space	Fully integrated Intertwining legal orders	Distinct Abstract	Distinct Tension and possible collision
Archetype	Activists	Passive formalists	Critics

The preceding discourse highlights that the knowledge of EU law and experience with the application of EU law are evidently salient factors bearing on the form of legal consciousness. Without a satisfactory knowledge of EU law a judge cannot engage with it of her own motion and cannot feel confident about the way she proceeds with EU law. The lack of confidence may in turn induce the feelings of frustration and anxiety. Good knowledge of EU law does not imply a wide experience with the application of EU law though. Some of those possessing good knowledge of EU law (or claiming to possess one) are frequently suppressed from engaging with EU law by other factors, such as for instance operational context, a lack of time or a lack of motion by the parties to the dispute. Put differently, knowledge of EU law is a necessary but not sufficient condition for a national judge to become a true agent of EU legal order. The incorrect, from the perspective of EU law, way of proceeding with EU law issues has its roots in the ignorance of EU law, lack of familiarity with the tools of its application, present misconceptions concerning the role of precedent in the process of application. Next to

that, the way the judge perceives her role in the legal order and the process of application of the law as such is an important determinant of the form of legal consciousness. In addition, the degree of openness to the foreign elements and the operational context affect the stance the judge takes toward EU law. It has also been shown that all judges regard EU as a positive development and the membership as profitable for the country. However, judges belonging to the group of activists will reveal a somewhat enthusiastic view of the European Union whereas those belonging the group of critics will very likely indicate its drawbacks and pitfalls.

4. Reflecting on the theories of legal integration within the EU

The foregoing considerations naturally bring the theories of legal integration within the European Union to the fore. Indeed, the empirical results concerning the principle of supremacy of EU law and the mechanism of the preliminary ruling which were delivered in the course of research combined with normative insights following from the jurisprudence of the highest courts open the door to further examination of the existing legal and political science theories of legal integration which were mentioned in the General Introduction to this study. It needs to be recognized that the methodological approach taken in the present study differs from the one taken by the various authors presenting the mentioned theories. It namely relies on empirical data that rests on the assumptive reasons judges provided to the question whether and why they accept the principle of supremacy of EU law and whether and why they would (not) resort to the preliminary ruling procedure. And yet, this data proves to easily lend itself to adding a new dimension and additional insights to the existing theoretical paradigms and hypotheses.¹⁰⁵⁷

In the course of interviews it has emerged that the theories falling under the *neo-realism* school of thought do not seem to gain sufficient support.¹⁰⁵⁸ The principle of

¹⁰⁵⁷ It should be kept in mind in this context that the following hypotheses apply to the Polish civil judiciary only and should not be expanded to the context of other branches of judiciary and/or to judiciaries in other Member States.

¹⁰⁵⁸ For the respective theories see General Introduction, pp.7-11.

independence and impartiality of the judiciary and the desire to stay out of any political discourse implies that promoting any national interest or political concerns through the participation in the preliminary ruling procedure would not be in the interest of judiciary. Lower instance judges are mostly focused on providing (swift) solutions to problems of the parties before them. In view of the judges, own political preferences ought to be put aside. Hence, they do not seem to play any significant role in the way judges of lower level courts make their decisions. Moreover, the fact that the Polish civil judge puts more trust in the European legislator than the national one could, arguably, indicate that in fact the Polish civil judge should eagerly engage with the preliminary ruling procedure which is, as the data clearly shows, not the case.

The *judicial empowerment* theory, which belongs to the neo-functionalism school of thought, seems to gain some, though restrained, support as some of its elements do seem plausible and might possibly bear on the way judges behave in the legal integration in the European Union.¹⁰⁵⁹ From the purely theoretical point of view, the national judge indeed seems empowered and advantaged by participating in the construction of the EU legal order.¹⁰⁶⁰ The question which arises is, however, whether the Polish civil judge (of a lower instance court) longs for the empowerment and the new competences and whether she is willing to make use thereof. The empirical data suggests that the Polish civil judge does not necessarily desire to conduct judicial review and control the legal acts of the parliament. She wants to apply the law and find swift solutions to the problems and she does not aspire to make the law. She also believes in a good will of the legislator to implement EU law correctly and she does not seem to intend to correct its errors and neglects. In that sense, the idea of separation of powers seems to have quite strong bearing on the functioning of Polish civil judges and, from that perspective, the empowerment doctrine does not seem to gain much empirical support. However, judicial empowerment seen through the prism of “the personal self-aggrandisement which comes from directly participating in Community-building”¹⁰⁶¹ might indeed have influence on some judges who, in turn, will quite likely belong to the group

¹⁰⁵⁹ Ibid.

¹⁰⁶⁰ See Stone Sweet (2000), p.165.

¹⁰⁶¹ Golub (1995), p.4.

of the ‘activist’ legal consciousness.¹⁰⁶² For the majority of the judges, though, the active participation in legal integration within the EU may bring about results which may be, as a matter of fact, converse to empowerment. As it was illustrated, resorting to EU law and foremost participating in the preliminary ruling mechanism might even cause disadvantageous effects on the position and authority of a judge. In that sense, participating in the process of legal integration may, in fact, bring about results which would be reverse to the judicial empowerment hypothesis.¹⁰⁶³ By and large, Kilpatrick can be followed who claims that the judicial empowerment doctrine can partly explain the manner judges engage with EU law but it is not the only or the most significant explanation.¹⁰⁶⁴

Alter’s theory of *inter-court competition* does not seem to gain enough support and have much relevance in the context of functioning of Polish civil courts either. From the empirical data it follows that it is not clear how national lower courts could enhance their position vis-à-vis other levels of judiciary through the participation in the preliminary ruling mechanism. Conversely, the Polish judiciary as a whole should be viewed in terms of team and cooperation in lieu of competition or strategic actions. Also, the deferential stance the lower courts take towards the higher courts should be underscored. The claim of Alter that lower court judges are less interested with ensuring coherence across the legal system does not seem to go along with the empirical findings for Poland. As the qualitative data seems to suggest, the uniformity and coherence of jurisprudence are in fact one of the primary objectives of the lower courts judges.¹⁰⁶⁵ The intricacies of the national judicial structure, the hierarchy and distribution of tasks between different levels of judiciary which are reflected in, inter alia, procedural law but also custom and local legal culture tell against interpreting the entire system through the prism of power seeking.¹⁰⁶⁶ In the end the primary objective of judges is to deliver as many correct legal decisions as possible, instead of competing with

¹⁰⁶² See preceding section of the present chapter.

¹⁰⁶³ See also Wind (2010), pp.1039-1063 who rejects the theory of Alter and suggest that her thesis cannot be generalized and stretched to the way judges behave in the process of European Union integration as such.

¹⁰⁶⁴ See Kilpatrick (1998), p.137.

¹⁰⁶⁵ See Alter (2001), p.49 where the author claims that “Lower court judges, with the luxury of focusing only at the case at hand, are usually less concerned with the coherence of the national legal system.”

¹⁰⁶⁶ In that regard the author agrees with the critic lavished upon Alter by various writers. See for instance Kilpatrick (2001), p.3; Micklitz (2005), pp.432-433; Wind (2010), p.1045.

each other. This is in line with Micklitz who argues, contrary to Alter, that it is not about the competition between the lower courts and the higher courts, but the desire to resolve disputes, which is the driving force behind the preliminary references made by the lower courts.¹⁰⁶⁷ Also, a new trend in referring questions to the ECJ is increasingly more present in the jurisprudence of the Court as judges more frequently come across problems with interpreting and applying the directly applicable provisions of EU regulations in the field of cross-border cooperation between national courts.¹⁰⁶⁸ In that sense, resorting to the mechanism of preliminary ruling does not necessarily have to originate in the problem of potential non-compliance of national provisions with EU law but it follows from an explicit problem of interpretation of EU law provisions. This increasingly more relevant trend adds another dimension to the theories of legal integration within the EU.

Another doctrinal stream which builds on the judicial empowerment doctrine focuses predominantly on the role of private actors in propelling the legal integration machine.¹⁰⁶⁹ Indeed, from the empirical data it emphatically follows that without the engagement of private litigants with the EU law discourse, without their activity in bringing the aspects of EU law before the courts EU law will not easily be mainstreamed in the daily practice of the Polish civil courts. Consequently, also the procedure of the preliminary ruling will remain a somewhat empty notion if the litigants do not pressure the judges to resort to it. By and large, the role of private litigants in the process of legal integration in the EU deserves strong emphasis. As the practice in Poland shows, private litigants do not yet seem to be fully aware of the potential power EU law gives at their disposal.

With everything considered, a very nuanced legalist approach to the legal integration¹⁰⁷⁰ informed by some insights from the resource-constrained team theory of Kornhauser¹⁰⁷¹ and Ramos¹⁰⁷², behavioural economics presented by Posner¹⁰⁷³ and the theory

¹⁰⁶⁷ See Micklitz (2005), p.433.

¹⁰⁶⁸ In the last five years there have been 48 references from national courts in which the problem of interpretation of Brussels I Regulation was at stake with Austrian and German courts having resorted to the mechanism most often.

¹⁰⁶⁹ See General Introduction, p.9 and note 29.

¹⁰⁷⁰ As named by Alter, *Explaining national courts acceptance of ECJ* [in] Slaughter et al (1998), p.231.

¹⁰⁷¹ Kornhauser (1995), p.1612 who sees the judicial system as a team in which all members share a common goal "to maximize the expected number of correct answers." See also Torres Perez (2009), p.132

of self-presentation of Baum¹⁰⁷⁴ seems to be of utmost relevance for the purposes of the present study. Such a thesis is premised on the assumption that judges reconcile with the principle of supremacy of EU law and engage with the preliminary ruling procedure because of the coercive nature of EU law and its logic. The responses to the anchoring vignettes and the qualitative part of the study clearly show that many judges take a very legalistic approach to EU law and the principle of supremacy thereof. In accordance with the advanced by the judges arguments, Poland has become a member of the European Union and by doing so it agreed to observe and apply its rules and principles. Similarly, it is commonly recognized that the Court of Justice is the only body having the competence to interpret EU law. The obligation to observe those principles is underpinned by the national Constitution and it extends to the judiciary as well. In view of the judges, it is a fact that cannot be subjected to any resistance, rejection or political inclinations. Likewise, the participation in the procedure of the preliminary ruling will very likely have formal motives. The paramount source of the subordination to EU law is the principle of good legal policy and the authority of the law and the European Court of Justice as one of its creators. In a similar vein, disobeying decisions of the Court would simply mean breach of the law. Finally, the need to ensure uniformity and coherence of the legal system and judicial decisions across the country but also across the European Union seem to occupy a supreme place in the hierarchy of judicial principles. The virtual fulfilment of the obligations stemming from EU law is, however, very much dependent on the operational framework the judge functions in which include, *inter alia*, time constraints, efficiency expectations, organizational goals of judges, division of labour and the methodology the judges are accustomed with. What is more, social psychology and personal merits, skills and cognitive capabilities and the way judges respond to their working environment and strive at being perceived as being capable of doing their work have to be taken into consideration. The fact that judges are hesitant to involve into the preliminary ruling procedure does not imply that they are hostile to EU law, do not comply with it or reject

¹⁰⁷² See Ramos (2002), p.12 who also claims that the team model is the most plausible one.

¹⁰⁷³ See Posner (2000) and his theory of judges as “rational maximizers”.

¹⁰⁷⁴ See Baum (2006) and Oldfather (2007).

the principle of its supremacy.¹⁰⁷⁵ Arguably, many judges would be willing to resort to the mechanism of preliminary ruling but various contextual aspects will first be taken into consideration, the process of balancing different arguments will take place which may finally result in an attempt to resolve the EU law problem on a judge's own, without involving the ECJ. Therefore, an active participation of national judges in the mechanism of the dialogue with the ECJ indicates a far-going integration of EU law in the national legal order and its mainstreaming in the processes of adjudication. Yet, the fact that national judges do not refer preliminary questions does not need to imply that they do not recognize EU law or reject it. In that sense, the relatively low number of preliminary questions sent by the Polish civil judges can by no means indicate the rejection of the EU law. The preliminary ruling should therefore be seen as a rather exceptional mechanism and not an axiomatic and natural tool which the judge eagerly resorts to.¹⁰⁷⁶

What is more, limited knowledge of EU law or understanding the system works may cause (unintended) judicial mistakes and result in for instance ignorance of or non-compliance with EU law.¹⁰⁷⁷ This again supports the legalist approach to the process of legal integration which claims that non-compliance with EU law might simply be caused by judicial mistakes which are linked to the lack of adequate knowledge of EU law.¹⁰⁷⁸ Likewise, the account provided by Brunell and Stone Sweet who assume that judges prefer to dispose of their cases as efficiently as possible is very much in line with the foregoing.¹⁰⁷⁹ Some judges will

¹⁰⁷⁵ This goes in line with Claes and Vink who claim that “when explaining the use of the procedure across member states we need to go beyond a pathological perspective that sees small reference numbers as a sign of a compliance problem.” See Claes&Vink (2008), pp.24-25.

¹⁰⁷⁶ See Komarek (2007), p.476 where the author claims that “preliminary ruling must be seen as a deviation from normal organization of the judicial process, not as a natural component. This is because it allows obviating the existing hierarchy amongst the courts, which plays an important role in the rationalization of the judicial process, and the delays final resolution of the dispute, thus potentially bringing an element of injustice.”

¹⁰⁷⁷ See Alter, *Explaining national court acceptance of European Court Jurisprudence: a critical evaluation of theories of legal integration* [in] Slaughter et al (1998), p.230.

¹⁰⁷⁸ Ibid.

¹⁰⁷⁹ Stone Sweet&Brunell (1998a), p.73 where the authors put forward the following: “We wish to propose a more banal interpretation of national judicial behaviour, one that we suspect may explain better the variance we find in the relationship between the ECJ on the one hand, and different sets of national judges on the other. Congruent with our theory, we expect that judges who handle relatively more litigation in which EC law is material (such as disputes that arise out of transnational activity) will be more active consumers of EC law, and of preliminary rulings, than judges who are asked to resolve such disputes less frequently. We assume that national judges strongly prefer to dispose of their cases efficiently, that is, they would like to go home at the end

therefore be more willing to consume EU law than other. This finding is also supported if the branch of civil judiciary is juxtaposed with the administrative jurisdiction in Poland. As existing research shows the administrative courts are confronted with EU law issues on a daily basis due to the intense regulatory activity of the EU in this area of adjudication. Consequently, administrative judges resort to the preliminary ruling procedure on a much more frequent basis.¹⁰⁸⁰ The patchwork EU legislative activity in the private law area implies that civil judges are confronted with EU law problems rather sporadically whereby their engagement with the preliminary ruling procedure would also be exceptional. In that sense, the process of Europeanization of adjudication takes a sectoral form and should, therefore, also be scrutinized as such.¹⁰⁸¹

With everything considered, it is impossible to generate one, and absolute theory which would, moreover, apply to the judiciaries of all the Member States. In fact, nearly all existing theories provide for valuable and insightful explanations of judicial behaviour in the process of legal integration within the European Union but none of them should be taken for granted and applied without reservations.

5. Embracing the future: implications and recommendations

From the preceding sections a complex and somewhat perplexing picture of the functioning of national judges as EU judges looms. On the one hand it has been shown that the theoretical model of a national judge as created and expected by the European Court of Justice is somewhat naïve and difficult (but not impossible) to be met in practice. On the other hand, many judges seem to lack appropriate skills to properly function in the EU capacity and the legal environment they function in does not necessarily create optimal circumstances to fulfill all the expectations. In that sense, the study delivers further evidence that the progress towards

of the day having disposed of more, rather than fewer, work-related problems. As the percentage of cases involving EC law rises, so do judicial incentives to master the tools that are most appropriate for the job, and those tools have been supplied by the European Court. Judges that do not need these tools will be more reticent to master them, and have less reason to be concerned with the overall effectiveness of EC law (...)"

¹⁰⁸⁰ See Jaremba (2011).

¹⁰⁸¹ See Wind et al (2009), p.74.

the legal convergence and coherence and the uniform application of EU law across the Union remain elusive concepts.

Yet, even though there seems to be a considerable gap between the model of a national judge as expected by EU law and its possible shape in practice, this should not imply that nothing can be done to overcome the obstacles, even if only partly. Hence, the broad scope of the study results in a wide range of recommendations and suggestions which might facilitate the functioning of national judges in the EU law capacity. The subsequent suggestions are premised on a realistic and not idealistic attitude towards possible changes which implies that they are of essentially practical and pragmatic character and they pertain to both legal and extra-legal aspects of the legal and judicial environment. The most significant proposals relate to the core problem of disseminating EU law knowledge and possible procedural adjustments in national law. The following recommendations concern in particular the situation in Poland but many of them have a much broader dimension and are applicable to other Member States.

5.1. Training in EU law, specialization and socialization

The multifarious evidence included in this study suggests that that the problem of a lack of knowledge of EU law among national judiciaries is widespread across the Member States, albeit the intensification of the problem might take different degrees in particular countries. The problem of education in EU law should, therefore, be given more concern and the solutions should pertain to system of education at all levels, be it university legal education or judicial vocational training. It is reasonable to infer that without a certain amount of confidence with regard to the knowledge of EU law and the way the entire multi-level system works, the national judge will remain rather skeptical, hesitant or closed towards it in her daily practice.¹⁰⁸² Yet this is only one side of the story. From both studies it follows that the massiveness and complexity of Union's law which is of a piecemeal character leads to the situation where the whole body of EU law can never be captured. In that respect, it seems

¹⁰⁸² See Law&Chang (2011), pp.39-43 in which the authors claim that the most plausible reason of resorting to foreign law by justices is educational and professional background of judges. The authors juxtaposed Taiwanese Constitutional Court and the US Supreme Court justices.

unrealistic to expect national judges to know the entire body of EU law as it is unrealistic to require judges to know the entire body of national law. Instead it is rational to expect that a judge is familiar with the body of EU law (including jurisprudence of the ECJ) in the domain she adjudicates in. The foregoing may however become somewhat perplexing in case of those lower instance civil law judges who are daily confronted with cases of heterogeneous character. These findings naturally underscore the necessity of further specialization in the judiciary which could also facilitate the functioning of national judges in the context of EU law.

For the change in the way judges approach EU law to take hold a significant modification in the way the law is taught both during the legal studies and the professional legal training thereafter is necessary. First of all, the aspects of EU material law ought to be mainstreamed in the teaching of any domain of national law. In that sense, while teaching private, company or labour law the relevance of EU directives should be given a proper consideration. Secondly, the rules of the internal market and the four freedoms should be given adequate attention. Third, during the judicial and vocational training judges should clearly be made aware of the expectations which are put on them by means of EU law which follow from the principles of direct effect, supremacy, indirect effect and the procedure of the preliminary ruling. Teaching of EU law itself also should be concentrated on the meaning of these tenets but foremost their practical relevance. As it has been illustrated in this study, judges mostly learn through practical experience. Hence, the vocational training should rest on practical examples of application of EU law based on hypothetical cases which are necessarily embedded in the local legal and factual circumstances. The positivistic and doctrinal manner of teaching the law, still so firmly present in the Polish legal education, can by no means provide national judges with relevant knowledge of EU law and adequate skills for its further application.

A coherent, free of charge, transparent system of trainings available to any judge who wishes to broaden her knowledge in that respect seems indispensable. It should also not be forgotten that trainings (in EU law) play an important socialization role. Judges can learn from each other, share their problems attached to the application of EU law they came across EU and share their solutions. Those who have not dealt with EU law might, in turn, learn from

their colleagues that EU law aspects will sooner or later appear in their own practice as well. Finally, a free and transparent access to all sources of EU law should be warranted to each and every judge. Even though the foregoing may seem axiomatic but the practice shows otherwise.

5.2. Procedural aspects: legibility, transparency, recognition and accessibility

Judges of lower instance courts prefer to work with clear procedural rules which provide them with explicit, ready-made solutions in specific situations. It seems necessary that the Constitution explicitly recognizes the membership of the country in the European Union and the place of its sources of law in the national legal order. In that sense, EU law would become ‘domesticated’ and officially integrated in the national system. Likewise, introduction of concrete provisions regulating the preliminary ruling to the ECJ in the Polish Code of Civil Procedure seems one of the steps which could be undertaken by the legislator in order to ease the functioning of national judge as EU law judge. Furthermore, the legislative amendments which aim at implementing EU law directives should be given a proper recognition. In that sense, the elements introduced to national law in the course of implementation of EU directives should clearly be distinguished in the civil code and other legislative acts. This could easily be achieved by for instance printing the implementing provisions in different color/other italics.

In addition, the perplexing aspect of access to (translated!) jurisprudence of the ECJ should be given even more attention. It has abundantly been made clear that that the lack of proper translation of ECJ’s case-law, especially that preceding the membership, is a large technical obstacle for the adequate functioning of national judges in their EU law capacity. In this context it has to be welcomed that translations of the recent case-law of the ECJ improved substantially which should be seen as a positive sign.

5.3. Jurisprudence of the higher courts and the national doctrine: call for coherence and unanimity

Both the Constitutional Tribunal but foremost the Supreme Court should continue their work in educating the judges how they are expected to approach EU law and fulfill their expectations following from it. In that respect two aspects are of utmost importance. First of all, the highest courts and consequently the doctrine should emphasize the relevance, authority and role of the ECJ's precedent for jurisprudence. Second, it is of utmost importance that contradictory signals with regard to the role of ECJ's precedent are avoided. The foregoing also applies to the legal scholarship which does not seem to send a straightforward message to the judges in that respect.¹⁰⁸³

6. Suggestions for further research

As the present study reveals, a purely theoretical and normative approach is unsatisfactory to explain the functioning of national judges in the context of EU law and the "habit of obedience"¹⁰⁸⁴ attached to EU law. The political science scholarship, which is at abundance, seems to frequently play down the normative factors which are at stake. In that sense, empirical research based on, inter alia, individual experiences of legal actors with EU law which is well informed by the normative insights but open to other potential political, psychological, sociological, behavioral or economical determinants very much enriches the existent picture of the national judge as EU law judge. The present study reveals that there is a great deal of empirical and multidisciplinary research yet to be done in the field of the functioning of national courts in their European capacity and the implementation of EU law at the national level in general. Numerous further research questions are prompted which go along three general lines.

First, the present study pertains to the issue of EU law at a very aggregate level. It nevertheless highlights that there is great deal of uncertainty and practical problems attached

¹⁰⁸³ See note 610.

¹⁰⁸⁴ From Weiler (1993), p.423.

to more specific aspects of the application of EU law such as, for instance, the cross-border judicial cooperation and the application of the EU regulations in this area or the application of the EU principle of proportionality. In that respect, the practical experiences of national judges with those aspects seem interesting issues to be investigated. Parallel to that there is a problem of the functioning of criminal law judges in their EU capacity. The Lisbon Treaty has introduced changes in the area of criminal law, which are for instance reflected in the availability of the preliminary ruling procedure, that put a whole range of questions to the fore. Those relate to for instance the state of preparation of criminal judges to the functioning in their EU capacity and the possible obstacles they may run to while exercising their EU competences.

The second aspect relates to the process of national implementation of the judgments of the ECJ by the courts which referred their questions to the ECJ. This could be done from two points of departure: a purely normative one where national rulings implementing the ECJ's decisions are analyzed and an empirical one where the concerned judges are questioned about their experiences with the implementation of the respective ruling to the case at hand and possible problems attached to. This could share more light on the process of specific implementation of ECJ's jurisprudence and the compliance behaviour of judges.¹⁰⁸⁵ Such study would also contribute to the discussion on the issue of legitimacy of the jurisprudence of the ECJ as the national judges are the very customers of its rulings. In this context the views of judges on the methodology of the ECJ, the clarity and style of its case-law and the practicability and feasibility of the judgments could be investigated. Such a study would not only allow to see the potential problems attached to the implementation of ECJ's judgments. It would also give a food for thought for the Court itself which in turn could contribute to, on the one hand, the enhancement of the judicial dialogue between the European Union Court judges and the national judges and, on the other hand, strengthening the Court's authority.

Third, the problem of judicial application of EU law should also be examined from the other side, i.e. from the point of view of the legal actors who represent their clients before the national courts and their reception of EU law and the place they assign it in their daily

¹⁰⁸⁵ For examples of research in this area see for instance Nyikos (2003).

practice.¹⁰⁸⁶ The research concerning the behavior of litigants in the context of EU law combined with the insights from the present study would provide a much broader and complete picture of the Europeanisation of the judicial discourse in the EU Member States.

Finally, the system of national implementation of EU law is not constrained to the aspect of adjudication itself as the issue should be seen through the wider prism. In that sense, not only the functioning of judiciary system but also the impact of EU law on the governmental authorities and the compliance behaviour of national civil servants needs to be addressed.¹⁰⁸⁷

7. Final remarks: *taming the Fox*

In the course of the process of Europeanisation, the legal, including judiciary, systems of the Member States and of the EU have been brought and bound together. In order to properly act in their EU capacity the national judges ought to understand the different nature of the role they are expected to play in this multidimensional legal order. They must understand that they are functioning in the context of increasingly more homogenous European legal order. National judges must not and cannot be passive actors in the process of legal integration in the European Union.¹⁰⁸⁸ They are expected to actively participate in the construction of a common legal order and should engage with and remain in dialogue with the ECJ.¹⁰⁸⁹ Non-fulfillment of this duty can seriously compromise the unity and *effet utile* of EU law across the Union. The success of fulfillment of this new role attached to EU law rests upon several necessary components such as adequate knowledge of EU law, good will of national judges to collaborate and contribute to the common European Union project but also a favourable constitutional, procedural and operational environment. All in all, the present study reaffirms

¹⁰⁸⁶ For a limited in scope research concerning Dutch and Scottish lawyers see Özücü (2007), pp.435-449.

¹⁰⁸⁷ It is necessary to observe that there is limited amount of congruent scholarship work done by political science scholars. See work of Mastenbroek (2010) (2011) on the impact of EU law on the functioning of Dutch civil servants and the Europeanisation of governmental authorities in the Netherlands.

¹⁰⁸⁸ This claim is expressed in many other studies, see for instance Groussot et al (2009), p.109.

¹⁰⁸⁹ From Maduro (2007), p.30.

the finding that the developments in the sphere of law must always be read in a much broader context.¹⁰⁹⁰

When addressing the question whether national courts function as decentralized EU courts legal scholarship seems to be preoccupied with the question whether national judges ensure the supreme position of EU law in their legal systems. The present study supports the observation that confining the academic discourse concerning the functioning of national courts in European capacity to the problem of acceptance of the principle of supremacy of EU law by national judiciaries is, arguably, not a satisfactory approach for the overall assessment of the reception of the EU legal order by national judiciaries. Being an EU judge does not confine itself to ensuring that the law of the European Union takes a supreme position vis-à-vis national law but goes much beyond that. It is presently put forward that situations when judges utterly reject EU law and the principle of its supremacy are in fact pathological and exceptional. If national judges indeed proceed so then they do not necessarily do it just for the sake of rejecting the place of EU law in the national legal order but, very likely, there are other factors having influence thereupon. To truly understand the functioning of national judges as EU judges it is necessary to investigate how they approach, *inter alia*, the obligation to apply EU law *ex officio* which seems to be of the most absorbing but at the same time most confusing EU law aspects attached to the functioning of national courts as decentralized EU courts.

This study has shown that the functioning of Polish civil courts, and arguably any court in each Member State, as EU courts is a complex issue comprising of various legal and extra-legal variables. For the time-being EU law seems to remain a somewhat abstract, remote and therefore also to some extent irrelevant and unexplored aspect of the judicial decision-making for many civil judges in Poland. In anticipating the ways the process will develop in the future it should be taken into consideration that the novelty of the entire system comprising new mechanism and the way they work requires adapting time for national lawyers¹⁰⁹¹ as “one only understands the things that one tames.”¹⁰⁹² In that sense the Polish

¹⁰⁹⁰ From Dehousse (1998), p.4.

¹⁰⁹¹ From Volcansek (1986), p.251 where the author claims that “Active use of the mechanisms, which implies awareness, cannot be documented in the Member States until at least 1968. This slowness to respond should not

civil judges and the whole judiciary system are currently only at the beginning of a complex, yet definitely fascinating, process of Europeanisation. The process of domesticating the Fox has commenced but it has been progressing with somewhat little steps.¹⁰⁹³ Yet, envisaging the way the situation might develop in the future is necessarily conjectural as it is dependent upon various factors which are essential to facilitate the process. So long as the Fox is not fully tamed nearly any case comprising EU law element will be an indeterminate and *hard* case.¹⁰⁹⁴ “Hard cases, it is said, make bad law.”¹⁰⁹⁵ They may also generate bad feelings between judges.¹⁰⁹⁶

be confused with resistance. Where knowledge of Community law was attainable in a tangible way, acceptance of Community norms was more rapid.”

¹⁰⁹² De Saint-Exupéry (2000), p.70.

¹⁰⁹³ See Jupille&Caporaso (2009), p.205 for the “indigenization model”. The authors put forward that national courts “gradually domesticate previously alien concepts.” The authors test the principles of EU law such as: purposive interpretation, proportionality and legitimate expectations which were alien to the British legal tradition.

¹⁰⁹⁴ Traditionally, the term “hard case” is used to describe a difficult case to which a solution is not straightforward due to different interpretations of law which can affect the clarity thereof. As it is put by Dworkin “when a particular law-suit cannot be brought under a clear rule of law, laid down by some institution in advance, then the judge has, according to that theory, a discretion to decide the case either way”, see Dworkin (1978), p.81. In the context of present project the term “hard case” is used to describe a case in which the overlaps of different legal systems, the interpretative doubts attached to this and different judicial mechanisms which are supposed to be applied, leave a judge in situation where clear-cut legal answers are scarce. In that sense, the Dworkin’s Hercules judge gains a new dimension in the context of EU legal order, see *ibid*, p.105.

¹⁰⁹⁵ Legal maxim attributed to John Campbell Argyll (1678-1743).

¹⁰⁹⁶ See Oxford dictionary of proverbs (2003), p.156.

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EU acquis in the field of private law¹⁰⁹⁷

Consumer Protection and Contract Law Directives:

- Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products as amended by Directive 1999/34/EC, OJ L 210/29 as amended by directive 1999/34/EC, OJ L 141/20; the so called Products Liability Directive.
- Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contacts negotiated away from business premises, OJ L 372/31.
- Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ L 382/17.
- Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member states concerning consumer credit as modified by Directive 90/88/EEC, 98/7/EEC and 2008/48/EC, OJ L 42/48.
- Council Directive 92/59/EEC of 29 June 1992 on general product safety, OJ L 228/24.
- Council Directive 89/109/EEC of 21 December 1988 on the approximation of the laws of the Member States relating to materials and articles intended to come into contact with foodstuffs, OJ L 40/38.
- Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158/59.
- Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29.
- Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ L 280/83.
- Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144/19.
- Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80/27.
- Directive 1999/41/EC of the European Parliament and of the Council of 7 June 1999 amending Directive 89/398/EEC on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses, OJ L 172/38.
- Directive 1999/44/EC of the European Parliament and the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171/12.

¹⁰⁹⁷ The aim of the Annex is to provide indicatory information on the influence EU law exerts on national private laws. The list updated on 1 December 2011.

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- Directive 2000/13/EC of the European Parliament and of the Council of 16 February 1998 on the approximation of the laws of the Member States relating to the labeling, presentation and advertising of foodstuffs as amended by Directive 2003/89/EC, OJ L 109/29 and OJ L 308/15 respectively.
- Directive 2001/95/EC of 3 December 2001 on general product safety, OJ L 11/4.
- Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member states relating to food supplements, OJ L 183/51.
- Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directives 90/619/_EEC, 97/7/EC and 98/27/EC, OJ L 271/16.
- Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L 152/16.
- Directive 2004/35/CE of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143/56.
- Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004, OJ L 149/22.
- Directive 2006/29/EC of the European Parliament and of the Council of 11 May 2006 – Unfair Commercial Practices directive, OJ L 149/22.
- Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ L 376/36.

System of Payments Directives:

- Directive 97/5/EC of the European Parliament and Council on cross-border credit transfers, OJ L 43/25.
- Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166/45.
- Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, OJ L 200/35.
- Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, OJ L 319/1.

Electronic Commerce and Communication Directives:

- Directive 99/93 of 13 December 1999 the European Parliament and Council on a Community framework for electronic signatures, OJ L 13/12.
- Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1.
- Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, OJ L 108/51.

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Financial Services and Insurance Directives:

- Council Directive 79/267/EEC of 5 March 1979 on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life insurance as amended by directive 90/619/EEC and later by Directive 92/96/EEC, OJ L 63/1, OJ L 330/50 and OJ L 360/1 respectively.
- Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing, OJ L 66/21.
- Council Directive 80/390/EEC of 17 March 1980 co-coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities of official stock exchange listing as amended by Directive 87/345/EEC, OJ L 100/1 and OJ L 185/81 respectively.
- Council Directive 82/121/EEC of 15 February 1982 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing, OJ L 48/26.
- Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, OJ L 185/77.
- Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of, OJ L 348/62.
- Council Directive 89/298/EEC of 17 April 1989 co-coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public, OJ L 124/8.
- Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, OJ L 334/30.
- Council Directive 92/49/EEC of 18 June 1992 on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC, OJ L 228/ 1, the so-called third non-life Insurance Directive.
- Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, OJ L 141/27.
- Directive 96/10/EC of the European Parliament and of the Council of 21 March 1996 amending Directive 89/647/EEC as regards recognition of contractual netting by the competent authorities, OJ L 85/17.
- Council Directive 98/29/EC of 7 May 1998 on the harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover, OJ L 148/22.
- Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities as amended by Directive 2003/71/EC, Directive 2004/109/EC and Directive 2005/1/EC, OJ L 46/11, OJ L 345/64, OJ L 390/38 and OJ L 79/9 respectively.
- Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, OJ L 345/1.
- Directive 2002/92/EC of 9 December 2002 of the European Parliament and of the Council on insurance mediation, OJ L 9/3.
- Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC, OJ L 323/1, OJ L 228/3, OJ L 168/21, OJ L 330/1 and OJ L 345/1 respectively.

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○ Fifth Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles, OJ L 149/14, OJ L 103/1, OJ L 8/17, OJ L 172/1, OJ L 129/33, OJ L 181/65 respectively.

○ Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector, OJ L 247/1.

Intellectual Property Directives:

○ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member states relating to trade marks, OJ L 40/1.

○ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122/42.

○ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain related to copyrights in the field of intellectual property, OJ L 346/61.

○ Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248/15.

○ Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, OJ L 290/9.

○ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77/20.

○ Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products, OJ L 24/36.

○ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, OJ L 213/13.

○ Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, OJ L 320/54.

○ Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, OJ L 289/28.

○ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the Information Society, OJ L 167/10.

○ Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, OJ L 194/26.

○ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108/7.

○ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (corrected version), OJ L 195/16.

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Company Law Directives:

- First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ L 65/8.
- Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent as amended by Council Directive 92/101/EEC of 23 November 1992, OJ L 26/1 and OJ L 347/64 respectively.
- Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies, OJ L 295/36.
- Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies, OJ L 378/47.
- Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts, OJ L 193/1.
- Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54 (3) (g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents, OJ L 126/20.
- Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions, OJ L 372/1.
- Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State, OJ L 395/36.
- Twelfth Council Company Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies, OJ L 395/40.
- Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, as amended by Council Directive 2005/19/EC of 17 February 2005 and Council Directive 2006/98/EC, OJ L 225/1, OJ L 58/19 and OJ L 363/129 respectively.
- Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States as amended by Council Directive 2003/123/EC of 22 December 2003, OJ L 225/6 and OJ L 7/41 respectively.
- Council Directive 90/604/EEC of 8 November 1990 amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as concerns the exemptions for small and medium-sized companies and the publication of accounts in ecus, OJ L 317/57.
- Council Directive 90/605/EEC of 8 November 1990 amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as regards the scope of those Directives, OJ L 317/60.
- Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings, OJ L 374/7.

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- Council Directive 92/101/EEC of 23 November 1992 amending Directive 77/91/EEC on the formation of public limited-liability companies and the maintenance and alteration of their capital, OJ L 347/64.
- Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166/45.
- Directive 98/78/EC of the European Parliament and of the Council of 27 October 1998 on the supplementary supervision of insurance undertakings in an insurance group, OJ L 330/1.
- Directive 2001/65/EC of the European Parliament and of the Council of 27 September 2001 amending Directives 78/660/EEC, 83/349/EEC and 86/635/EEC as regards the valuation rules for the annual and consolidated accounts of certain types of companies as well as of banks and other financial institutions, OJ L 283/28.
- Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, OJ L 178/16.
- Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies, OJ L 221/13.
- Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142/12.
- Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145/1.
- Directive 2006/31/EC of the European Parliament and of the Council of 5 April 2006 amending directive 2004/39/EC on markets in financial instruments, as regards certain deadlines, OJ L 114/60.
- Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310/1.
- Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC, OJ L 157/87.
- Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings, OJ L 224/1.
- Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital, OJ L 264/32.
- Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184/17.
- Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives 78/855/EEC and 82/891/EEC as regards the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies, OJ L 300/47.

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- Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital, OJ L 46/11.
- Directive 2008/30/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts, as regards the implementing powers conferred on the Commission, OJ L 81/53.

Public Procurement Directives:

- Council Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts as amended by Council Directive 92/50/EEC, OJ L 395/33.
- Council Directive 92/50/EEC of 18 June 1992 relating to the co-ordination of procedures for the award of public service contracts, OJ L 209/1.
- Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ L 199/54.
- Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134/1.

Labour Law, Social Security and Equal Opportunities Directives:

- Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, OJ L 39/40 and OJ L 269/15 respectively.
- Council Directive 91/383/EC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, OJ L 206/19.
- Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288/32.
- Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, OJ L 216/12.
- Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 254/64.
- Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145/4.
- Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18/1.
- Council Directive 97/74/EC of 15 December 1997 extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 10/22.

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- Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14/6.
- Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 14/9.
- Council Directive 98/23/EC of 7 April 1998 on the extension of Directive 97/81/EC on the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC to the United Kingdom of Great Britain and Northern Ireland, OJ L 131/10.
- Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, OJ L 209/46.
- Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, consolidating Directives 75/129/EEC and 92/56/EEC, OJ L 225/16.
- Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Ship-owners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) as amended by Directive 2009/13/EC, OJ L 167/33 and OJ L 124/30 respectively.
- Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175/43.
- Council Directive 2000/34/EC of 22 June 2000 and of the Council of 22 June 2000 amending Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive, OJ L 195/41.
- Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22.
- Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16.
- Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), European transport Workers' Federation (ETF), European Cockpit Association (ECA), European Regions Airline Association (ERA) and the International Air Carrier Association (IACA), OJ L 302/57.
- Council Directive, 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16.
- Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, consolidating Directives 77/187/EC and 98/50/EC, OJ L 82/16.
- Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294/22.
- Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80/29.

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- Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities, OJ L 80/35.
- Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ L 270/10.
- Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, OJ L 235/10.
- Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L 207/25.
- Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299/9.
- Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373/37.
- Council Directive 2005/47/EC of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector, OJ L 195/15.
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204/23.
- Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version), OJ L 283/36.
- Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327/9.
- Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), OJ L 122/28.

Miscellaneous Directives:

- Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/31.
- Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201/37.

EU Regulations:

- Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits, OJ L 124/1.
- Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149/2.

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- Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 74/1.
- Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199/1.
- Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 326/21.
- Regulation (EC) No 1348/2000 of the Council of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ L 160/37.
- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (so-called Brussels I Regulation), OJ L 12/1.
- Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160/1.
- Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking evidence in civil or commercial matters, OJ L 174/1.
- Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), OJ L 294/1.
- Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, OJ L 243/1.
- Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1.
- Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE), OJ L 207/1.
- Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000 (so-called Brussels II Regulation), OJ L 338/1.
- Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ L 46/1.
- Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators, OJ L 138/1.
- Council Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143/15.
- Regulation (EC) No 1896/2006 of 12 December 2006 of the Council and European Parliament creating a European Order for Payment Procedure, OJ L 399/1.
- Regulation (EC) No 861/2007 of 11 July 2007 of the Council and European Parliament establishing a European Small Claims Procedure, OJ L 199/1.
- Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (so-called Rome II), OJ L 199/40.

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- Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ L 315/14.
- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6.

ANNEX II

Questionnaire

Translation from the Polish version into English

EU law and experiences of national judges

This questionnaire is part of a study concerning the judicial application of EU law by national judges. On the basis of your answers it will be attempted to understand how Polish judges experience the application of EU law in practice and what stance they take towards the obligations which are put on them by means of EU law. The goal of this project is to come up with a set of solutions which will help the national judges in the process of application of European Community law.

The questions in this questionnaire relate to your personal views and experiences with regard to EU law. The survey is conducted in the framework of a doctoral thesis carried out at the Erasmus University Rotterdam, School of Law, Department of EU law by Urszula Jaremba. The project is conducted in cooperation with the National School for Judiciary and Public Prosecutors and the University of Groningen which is involved in a similar project concerning the Dutch and German judges.

This questionnaire has been sent to selected judges of first and second instance courts which adjudicate in civil law cases. The validity of the evidence is fully dependent upon the data gained through this questionnaire and you are kindly asked to fill out this survey to the fullest extent possible. Participating in this research will be anonymous and the data will be stored confidential. The filling in of this questionnaire will take approximately 20 minutes. The above-mentioned PhD candidate will be the only person having access to the questionnaires. At the end of this questionnaire, we will ask you if you are willing to participate in a short interview in continuation of this research. Should you experience any problems with this questionnaire please contact U.Jaremba, tel no..... or e-mail at...

Thank you very much for your cooperation.
Sincerely,
Urszula Jaremba

Part 1

The following questions concern your familiarity with EU law

Can you indicate to what extent you agree or disagree with the propositions mentioned below?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree
I am in general well informed about legal developments in Polish law	<input type="checkbox"/>				
I am in general well informed about legal developments in EC law	<input type="checkbox"/>				
It is clear when EU law should be applied <i>ex officio</i>	<input type="checkbox"/>				
I know in which situations I am expected to refer a preliminary question to the ECJ	<input type="checkbox"/>				
The procedure of the preliminary ruling is clear to me	<input type="checkbox"/>				
I know how I am supposed to proceed	<input type="checkbox"/>				

ANNEX II

with an answer of the ECJ to the asked by me question

As an estimate, over how many cases did you preside over during the past 12 months?

As an estimate, in how many of those cases did European Community law play a role?

In how many of those cases did you consult other persons?

Can you indicate who you approached in these cases?

Multiple answers possible.

- Colleague(s) judge(s) from my home/another court
- Foreign judge(s)
- Acquaintances in legal profession
- Friends/acquaintances/family
- Academic scholar
- I did not consult anyone
- Differently, namely _____

Which of the following sources do you use to look for information on EU law?

Multiple answers possible.

- Legal textbooks
- Judgements of the Court of Justice of the European Communities
- Legal journals
- EC Directives
- EC Regulations
- Consultations in my won court
- Online databases (EUR-LEX, curia, etc.)
- Internal courses
- External courses
- I never look for information on EC law
- Differently, namely _____

How do you assess your knowledge of national law?

- Very good
- Good
- Moderate
- Poor
- Very poor

How do you assess your knowledge of EU law?

- Very good
- Good
- Moderate
- Poor
- Very poor

How do you assess your knowledge of EU law, in comparison with that of your colleagues?

- Higher
- The same
- Lower
- I do not know/ no opinion

Do you feel the need to broaden your knowledge of EU law?

ANNEX II

- Yes
- No
- I do not know/ no opinion

Are you willing to participate in EU law trainings?

- Definitely
- Rather yes
- Rather not
- Definitely not
- I do not know/ no opinion

Which form of EU law trainings would you prefer?

- 1 day long training in own court
- 3-5 days long external trainings
- 3-5 days long trainings abroad
- Postgraduate (weekend) studies
- E-learning

If you are not willing to participate in EU law trainings, why not?

- I do not need it in my practice
- I am not interested in EU law
- I have no time to follow trainings
- I do not like the form of the trainings
- Other reasons, namely _____

Which issues of EC law should be subject of trainings?

- The principles and sources of EU law
- The obligations of national courts with regard to EU law
- EU material law , in particular.....
- EU procedural law
- Other, namely _____

Which aspects of EC material law should be subject of trainings?

- Employment and social security law
- Competition law
- Consumer law
- Contract law
- Other, namely _____

Can you indicate to what extent you agree or disagree with the following propositions?

	Strongly agree	agree	Neutral	Disagree	Strongly disagree
EU law trainings offer is satisfactory	<input type="checkbox"/>				
Courses in European law should be obligatory for national judges.	<input type="checkbox"/>				
Judges should be obliged to follow a course in EU law yearly	<input type="checkbox"/>				
Courses in European law are too theoretical and not sufficiently focused on practice	<input type="checkbox"/>				
Whether and how I apply European law in a concrete case depends of the input of the parties in that respect	<input type="checkbox"/>				

ANNEX II

Courses in European law give sufficient information on the question when and how I ought to apply European law in a concrete case

Amount of EU law is so large that I find it difficult to keep up with it

During law school, I have acquired sufficient knowledge of European Community law

Information on European law is so abundant, that I find it difficult to get familiar with it

Courses for judges in European law should exclusively be given by judges

How many hours (including preparation) did you spend on courses in European law during the past 12 months?
0/ 1-10 / 11-20 / 21-30 / 31-40/ More than 40

Which institution organized the courses? NSJP/ Europäische Rechtsakademie (ERA)/ Own court/ My judicial district/ Different, namely _____

How do you value the quality of this last course? Very low/ Rather low / Average / Good / Very Good/ Don't know/no opinion

How do you assess your access to the sources of EU law and jurisprudence of the ECJ?

- I have a very good access to all the documents and jurisprudence
- I have sufficient access to the documents and jurisprudence
- I do not have sufficient access to all necessary documents and jurisprudence
- I have no or nearly no access to the documents and jurisprudence
- Don't know/no opinion

Part 2 Next part deals with your experiences with EU law in practice

Can you indicate to what extent you agree or disagree with the propositions mentioned below?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree
In practice, it is difficult to recognise if EU law is applicable to a case, if the parties do not point this out	<input type="checkbox"/>				
I think EC law provisions law is easy to find	<input type="checkbox"/>				
In my experience, the application of European law is swift	<input type="checkbox"/>				
In general, judgements of the ECJ are clear and comprehensible	<input type="checkbox"/>				
In general, secondary EC law is clear and comprehensible	<input type="checkbox"/>				

Have you ever posed a preliminary question to the ECJ? Yes/No

Why did you never pose a preliminary question to the ECJ? (several answers possible)

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- It takes too long to formulate a preliminary question
- It takes too long to get an answer on a preliminary question.
- It is not clear to me how the preliminary procedure works.
- I think that only the Supreme Court should refer preliminary questions
- Too much workload does not make it possible to engage with the issue
- European Community law has never played a role in my cases
- European Community law which played a role in cases over which I had to judge, was always clear.
- Differently, namely _____

Has the answer provided by the ECJ to your preliminary question satisfied your expectations?
 Yes/ No, why not? _____

What is the probability that you would send a preliminary question to the ECJ in case of interpretative doubts with regard to EU law?

- I would definitely use the procedure
- I would probably use the procedure
- I would probably not use the procedure
- I would definitely not use the procedure
- I don't know

Do you know the rules concerning the harmonious interpretation of EU law? Yes/No/ Partially

Do you find those rules practicable? Yes /No /Partially

Have you ever interpreted national regulation in conformity with an EU law? Yes/No /I do not know

Which sources did you resort to in order to gain more information about the concerned EC directive? (Several answers possible)

- Text/system of the directive
- Other language versions of the directive
- Preamble of the directive
- Aims of the directive
- Jurisprudence of the ECJ
- Literature
- National jurisprudence
- National jurisprudence from another Member State
- I do not know

Did the interpretation of national provisions in harmony with EU law deviate from the normal reading of the concerned provisions? Yes /No

In your own court, are there special consultant judges for EC law? Yes /No/ I don't know

If so, have you ever resorted to them in order to solve an EU law problem? Yes/ No

Can you indicate to what extent you agree or disagree with the propositions mentioned below?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree
Provisions of the EC Treaty are clear and comprehensible	<input type="checkbox"/>				
Finding provisions of EC law which might be applicable to a pending case is a long-lasting process	<input type="checkbox"/>				

ANNEX II

Application of EU law takes longer than first assumed	<input type="checkbox"/>				
I apply EU law only if it provides a better solution than national law	<input type="checkbox"/>				
Rules with regard to state liability in damages for breaches of EC law are clear	<input type="checkbox"/>				
Interpretations of EC law by the ECJ go too much beyond the letter of law	<input type="checkbox"/>				

Part 3

The next questions deal with your opinion on the European Union and the role of the national judge.

To what extent do you agree/disagree with the following propositions?

The membership in the EU is favourable for Poland

- Very strong agreement
- Fairly strong agreement
- I do not know/no opinion
- Fairly strong disagreement
- Very strong disagreement

I have in general a positive view of the European Union.

- Very strong agreement
- Fairly strong agreement
- I do not know/no opinion
- Fairly strong disagreement
- Very strong disagreement

Can you indicate to what extent you trust the following institutions?

	Very high	Rather High	Moderate	Rather low	Very low
The European Parliament	<input type="checkbox"/>				
The European Commission	<input type="checkbox"/>				
The Council of the European Union (Council of Ministers)	<input type="checkbox"/>				
The Polish parliament	<input type="checkbox"/>				
The European Court of Justice	<input type="checkbox"/>				
The Supreme Court of Poland	<input type="checkbox"/>				
The Constitutional Tribunal of Poland	<input type="checkbox"/>				
The European Court of Human Rights	<input type="checkbox"/>				
Ministry of Justice of Poland	<input type="checkbox"/>				

Can you indicate how attached you feel to...

	Not attached at all	Rather unattached	Neutral stance	Rather attached	Very strongly attached
Poland	<input type="checkbox"/>				
The European Union	<input type="checkbox"/>				
Place where you live	<input type="checkbox"/>				
Europe	<input type="checkbox"/>				
The city where you were born	<input type="checkbox"/>				

ANNEX II

Can you indicate to what extent you agree or disagree with the propositions mentioned below?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree
As a national judge, I feel to be part of the European legal order.	<input type="checkbox"/>				
<i>Ex officio</i> application of Community law should be extended.	<input type="checkbox"/>				
Uniform application of Community law in all Member States is important.	<input type="checkbox"/>				
I consider EC law to take precedence over national law.	<input type="checkbox"/>				
The rules of application of EU law are alien to the Polish legal system.	<input type="checkbox"/>				
The principle of supremacy of EC law is essential for the existence of EU legal order.	<input type="checkbox"/>				
Application of EC law is an important tasks of national civil judges	<input type="checkbox"/>				
National court shall set aside obstacles of procedural nature in order to ensure effectiveness of EC provisions	<input type="checkbox"/>				
EC legal order constitutes an integral part of the national legal order	<input type="checkbox"/>				
I see myself as a Community law judge.	<input type="checkbox"/>				
I believe that, when judgements of the ECJ and the Supreme Court/Constitutional Tribunal are in conflict, a national judge should follow the judgement of the national court	<input type="checkbox"/>				
One should agree with the ECJ with regard to the principle of state liability for breaches of Community law	<input type="checkbox"/>				
Legal definitions and terminology enshrined in EU law sources easily fit in national law	<input type="checkbox"/>				
I reluctantly apply EU law because I am of the opinion that its origins are undemocratic	<input type="checkbox"/>				
The preliminary ruling procedure is useful	<input type="checkbox"/>				
I support one common code of civil law for the entire EU	<input type="checkbox"/>				
I support one common code of civil procedure for the entire EU	<input type="checkbox"/>				
EC legal order is separate from the national legal order	<input type="checkbox"/>				

In the next part of this questionnaire there are several fictive situations illustrated. Could you describe in each case how you think you would act?

Vignette 1: In its recent judgment the ECJ has ruled that a certain national regulation is in conflict with European Union law. You have to judge over a case whereby this national regulation stands central. However, the national legislator has so far not undertaken any action to change the respective national provisions. You do not agree with the interpretation by the Court of Justice but you apply this interpretation to the case pending before you because you are of the opinion that EU law should take precedence over national law.

- I would definitely proceed the same way
- I would probably proceed the same way
- I don't know how I would proceed

ANNEX II

I would probably proceed differently

I would definitely proceed differently

Could you please explain your choice? _____

Vignette 2: In a dispute pending before you, one of the parties draws your attention to the EU legal character of the case. You decide, however, not to pay attention to this aspect, as you do not feel to be responsible for the application of European law.

I would definitely proceed the same way

I would probably proceed the same way

I don't know how I would proceed

I would probably proceed differently

I would definitely proceed differently

Could you please explain your choice? _____

Vignette 3: You are presiding over a case where national and EU law provisions can apply. Both parties to the dispute are of the opinion that national law regulates the issue way in a satisfactory way and therefore you are not referring to EU law in the respective case. In a similar dispute you decide to resort to EU law because the parties to the proceedings wish so. You are of the opinion that it does not matter what kind of rules are applied, as long as the dispute is settled.

I would definitely proceed the same way

I would probably proceed the same way

I don't know how I would proceed

I would probably proceed differently

I would definitely proceed differently

Could you please explain your choice? _____

Vignette 4: The European Court of Justice renders a ruling in line with which specific national provisions are in conflict with EU law. You preside over a case in which those national provisions constitute the legal basis for the judgment. You are familiar with the judgment of the Court but you do not refer to it in the respective dispute. You are of the opinion that a national judge has to apply the law which is enshrined in the national civil code and national statutes and not the case-law of the ECJ.

I would definitely proceed the same way

I would probably proceed the same way

I don't know how I would proceed

I would probably proceed differently

I would definitely proceed differently

Could you please explain your choice? _____

Vignette 5: You are uncertain whether particular national provisions are in compliance with an EU directive. As you believe it is your duty to apply European law and ensure the effectiveness of EU law you refer a preliminary question to the ECJ concerning the interpretation of the directive. The ECJ rules that the national regulation is in conflict with the directive. Consequently, you set aside the national provisions and follow the ruling of the ECJ.

I would definitely proceed the same way

I would probably proceed the same way

I don't know how I would proceed

I would probably proceed differently

I would definitely proceed differently

Could you please explain your choice? _____

Vignette 6: You have to decide in a case to which both European and national rules can apply. You consider both sources and decide to apply European Union rules to this case, because in your eyes those rules offer a better solution to the dispute.

I would definitely proceed the same way

ANNEX II

I would probably proceed the same way

I don't know how I would proceed

I would probably proceed differently

I would definitely proceed differently

Could you please explain your choice? _____

Part 4 Basic personal data

What is your age? 29-35 years/36-40 years / 41-50 years / 51-60 years / 61 and more

What is your gender? Male/ Female

Do you perform other functions next to your judge function? Yes/ No

In which chamber do you adjudicate? civil / employment and or/social security / commercial / other, namely

How long do you adjudicate in your chamber?

In which chamber did you adjudicate before? Civil/ employment and or/social security / commercial / criminal/
municipal / land and mortgage register / family and juvenile / other/ I have not changed the chamber

In which appellate unit do you adjudicate? Warsaw / Rzeszów / Poznań / Gdańsk / Białystok / other

In which instance do you adjudicate? First/ Second

Do you have further observations or comments with regard to EU law? If so please share them here

For a better perspective on how European Community law is dealt with by judges in practice, we are willing to complement the insights (acquired with this questionnaire) with interviews. If you are willing to share your experiences and opinion on European law in a short interview, please fill in your personal contact information. This information will be treated confidentially and the anonymity of the interviewee will be ensured.

Name:

Phone number:

E-mail address:

Thank you very much for your cooperation!

ANNEX III

Kwestionariusz

Prawo UE a doświadczenia sędziów krajowych

Niniejszy kwestionariusz jest częścią badań nad kwestią sądowego stosowania prawa Unii Europejskiej przez sędziów krajowych. Na podstawie odpowiedzi, których udzieli Pan/i w ramach poniższej ankiety podjęta będzie próba zrozumienia jak polscy sędziowie doświadczają stosowanie prawa europejskiego w praktyce oraz jaki mają stosunek do nałożonych na nich przez prawo europejskie zadań. Wbadania te pozwol na wypracowanie zespołu rozwiązań, które ułatwią sędziom krajowym stosowanie prawa WE w ich codziennej praktyce.

Pytania w poniższym kwestionariuszu dotyczą Pana/i **osobistych** poglądów i doświadczeń na temat sądowego stosowania prawa europejskiego. Badania są prowadzone w ramach przewodu doktorskiego, który został otwarty na Uniwersytecie Erazma w Rotterdamie, wydział Prawa, Katedra Prawa Europejskiego przez Urszulę Jarembę. Badania są prowadzone we współpracy z Krajową Szkołą Sądownictwa i Prokuratury oraz Uniwersytetem w Groningen, który prowadzi podobne badania wśród sędziów holenderskich i niemieckich.

Kwestionariusz ten został rozesłany do wybranych polskich sędziów sądów powszechnych pierwszej i drugiej instancji orzekających w sprawach szeroko pojętych spraw cywilnych. Adekwatność wspomnianych badań jest w pełni zależna od wyników, które zostaną otrzymane w kwestionariuszach, w związku z czym uprasza się o jak najdokładniejsze wypełnienie ankiety. Wypełnienie ankiety zajmuje około 20 minut. Sędziom biorącym udział w badaniach zapewnia się pełną poufność. Jedyną osobą mającą wgląd w wypełnione kwestionariusze jest wyżej wymieniona doktorantka.

W przypadku gdy zgodzi się Pan/i na dalszy udział w badaniach w postaci osobistego wywiadu uprasza się o podanie danych kontaktowych na końcu kwestionariusza. W przypadku jakichkolwiek problemów z wypełnieniem akwestionariusza prosi się o kontakt telefoniczny lub e-mailowy z p.U.Jarembą pod numer...

Serdecznie dziękuję za współpracę!

Z poważaniem,
Urszula Jaremba

Część 1. Poniższe pytania dotyczą Pani/a znajomości prawa wspólnotowego

Czy może Pan/i wskazać na ile się Pan/i zgadza lub nie zgadza z poniższymi stwierdzeniami?

	Zdecydowanie się zgadzam	Raczej się zgadzam	Neutralna postawa	Raczej się nie zgadzam	Całkowicie się nie zgadzam
Jestem ogólnie dobrze poinformowany/a o zmianach dokonywanych w polskim prawie	<input type="checkbox"/>				
Jestem dobrze poinformowany/a o zmianach i nowych przepisach wprowadzanych w prawie WE	<input type="checkbox"/>				
Jest dla mnie jasne kiedy powinienem stosować prawo europejskie z urzędu	<input type="checkbox"/>				
Wiem w jakich sytuacjach powinienem skierować pytanie prejudycjalne do ETS	<input type="checkbox"/>				
Procedura kierowania pytań prejudycjalnych jest dla mnie czytelna	<input type="checkbox"/>				
Wiem jak należy postąpić z orzeczeniem wydanym przez ETS na zadane pytanie	<input type="checkbox"/>				

ANNEX III

W ilu sprawach orzekał Pan/i w ciągu ostatnich 12 miesięcy? (prosze podać przybliżoną liczbę)

W ilu z tych spraw prawo WE odegrało rolę?

W ilu ze spraw z elementem prawa UE konsultował/a się Pan/i z kimś innym?

Czy może Pan/i wskazać z kim się konsultował/a Pan/i?

(więcej niż jedna odpowiedź możliwa)

- Koleżanka/kolega z sądu
- Sędzia orzekający w innym kraju
- Znajomy/i w adwokaturze
- Przyjaciele/znajomi/rodzina
- Pracownik akademicki
- Z nikim się nie konsultowałam/em
- Inne, mianowicie _____

Czy może Pan/i wskazać z których z obok podanych źródeł korzysta Pan/i w celu zdobycia informacji o prawie UE? (więcej niż jedna odpowiedź możliwa)

- Podręczniki prawnicze
- Orzecznictwo ETS
- Czasopisma prawnicze
- Dyrektywy WE
- Rozporządzenia WE
- Konsultacje z moim sądzie
- Źródła online (eurolex, curia etc.)
- Szkolenia w moim sądzie
- Szkolenia poza moim sądem
- Nigdy nie szukam informacji o prawie WE
- Inne, mianowicie _____

Jak ocenia Pan/i swoją wiedzę na temat prawa krajowego?

- Bardzo dobra
- Dobra
- Średnia
- Słaba
- Bardzo słaba

Jak ocenia Pan/i swoją wiedzę na temat prawa UE?

- Bardzo dobra
- Dobra
- Średnia
- Słaba
- Bardzo słaba

Jak ocenia Pan/i swoją wiedzę na temat prawa europejskiego w porównaniu ze swoimi kolegami/koleżankami z sądu?

- Lepsza niż u kolegów
- Taki sam poziom
- Słabsza niż u kolegów
- Nie wiem/brak opinii

Czy czuje Pan/i potrzebę poszerzania swojej wiedzy na temat prawa europejskiego?

- Tak
- Nie
- Nie wiem/brak opinii

ANNEX III

Czy wyraża Pan/i chęć uczestniczenia w szkoleniach z prawa UE?

- Zdecydowanie
 Raczej tak
 Raczej nie
 Zdecydowanie nie
 Nie wiem/brak opinii

Jaką formę szkoleń z prawa UE preferował(a)by Pan/i?

- Jednodniowe szkolenia we własnym sądzie
 3-5-dniowe szkolenia w kraju
 3-5-dniowe szkolenia za granicą
 Studia podyplomowe
 E-learning

Jeśli nie wyraża Pan/i chęci uczestniczenia w szkoleniach z prawa UE dlaczego nie?

- Nie potrzebuję go w praktyce
 Prawo UE mnie nie interesuje
 Brak czasu na szkolenia
 Nieakrakcyjna forma szkoleń
 Inne powody, mianowicie _____

Które zagadnienia prawa WE powinny być objęte szkoleniami?

- Zasady prawa UE i źródła prawa unijnego
 Obowiązki sądów krajowych wynikające z prawa UE
 Unijne prawo materialne, w szczególności
 Unijne prawo procesowe
 Inne zagadnienia, mianowicie _____

Które zagadnienia materialnego prawa WE powinny być objęte szkoleniami?

- Prawo pracy i/lub ubezpieczeń społecznych
 Prawo konkurencji
 Ochrona konsumentów
 Prawo zobowiązań
 Inne, mianowicie _____

Czy może Pan/i wskazać na ile się Pan/i zgadza lub nie zgadza z poniższymi stwierdzeniami?

	Zdecydow anie się zgadzam	Raczej się zgadzam	Neutralna postawa	Raczej się nie zgadzam	Całkowicie się nie zgadzam
Oferta szkoleń dla sędziów z prawa europejskiego jest zadowalająca	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Szkolenia dla sędziów z prawa europejskiego powinny być obowiązkowe	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sędziowie powinni każdego roku obowiązkowo przechodzić szkolenia z prawa europejskiego	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Szkolenia z prawa europejskiego są zbyt teoretyczne i niewystarczająco skoncentrowane na praktyce	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
To czy i jak stosuję prawo WE w danej sprawie zależy od wkładu stron w tej kwestii	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Kursy z prawa UE dostarczają wystarczającej informacji kiedy i w jaki sposób należy	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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zastosować to prawo w konkretnej sprawie

Ilość informacji na temat prawa europejskiego jest tak olbrzymia, że trudno jest mi się z nią zaznajomić	<input type="checkbox"/>				
Podczas moich studiów prawniczych nabyłem wystarczającą ilość wiedzy na temat prawa UE	<input type="checkbox"/>				
Kursy z prawa UE powinny być prowadzone wyłącznie przez sędziów	<input type="checkbox"/>				

Ile godzin spędził/a pan/i na szkolenia z UE (wliczając przygotowania) w ciągu ostatnich 12 miesięcy?

- 0
 1-10
 11-20
 21-30
 31-40
 Więcej niż 40

Przez kogo były organizowane szkolenia?

- KCSSiP/ KSSiP
 Europäische Rechtsakademie (ERA) w Trierze
 Rodzimy sąd
 Okręg apelacyjny
 DiffereInne, mianowicie _____

Jeśli przeszedł/przeszła pan/i szkolenia z prawa europejskiego w latach 2007/2008 jak ocenia pan/i poziom tych szkoleń? bardzo niski / raczej niski / średni / wysoki / bardzo wysoki / Nie wiem/brak opinii

Jak ocenia Pan/i swój dostęp do źródeł prawa UE i orzecznictwa ETS?

- Mam bardzo dobry dostęp do powyższych dokumentów
 Mam wystarczający dostęp do powyższych dokumentów
 Nie mam wystarczającego dostępu do powyższych dokumentów
 Nie mam wcale lub prawie wcale dostępu do powyższych dokumentów
 Nie wiem/brak opinii

Część 2: poniższe pytania dotyczą Pana/i doświadczeń ze stosowaniem prawa UE

Proszę wskazać do jakiego stopnia zgadza lub nie zgadza się Pan/i z poniższymi stwierdzeniami.

	Zdecydowanie się zgadzam	Raczej się zgadzam	Neutralna postawa	Raczej się nie zgadzam	Zdecydowanie się nie zgadzam
W praktyce trudno jest rozpoznać czy prawo UE ma zastosowanie w konkretnej sprawie jeśli strony sporu same się do niego nie odwołają	<input type="checkbox"/>				
Przepisy prawa WE są łatwe do odnalezienia	<input type="checkbox"/>				
Stosowanie prawa WE przebiega szybko	<input type="checkbox"/>				
Orzeczenia ETS są z reguły jasne i czytelne	<input type="checkbox"/>				
Wtórne prawo WE jest z reguły jasne i czytelne	<input type="checkbox"/>				

Czy kiedykolwiek zadał Pan/i pytanie prejudycjalne Trybunałowi w Luksemburgu? Tak / Nie

ANNEX III

Jeśli odpowiedź na powyższe pytanie jest negatywna to dlaczego?

- Sformułowanie pytania zajmuje zbyt wiele czasu
- Otrzymanie odpowiedzi na pytanie trwa zbyt długo
- Procedura kierowania pytań prejudycjalnych nie jest dla mnie czytelna
- Uważam że tylko Sąd Najwyższy powinien korzystać z procedury
- Too much workload does not make it possible to engage with the issue
- Prawo wspólnotowe nie odgrywało do tej pory roli w sprawach w których orzekam
- Prawo WE, z którym miałem/am do tej pory do czynienia było jasne i czytelne.
- Inne, mianowicie _____

Czy odpowiedź, której udzielił spełniła Pan/i oczekiwania? Tak/Nie
Dlaczego nie?

Jakie jest prawdopodobieństwo, że w przypadku wątpliwości interpretacyjnych co do przepisów prawa WE skorzystałby Pan/i z procedury pytania prejudycjalnego?

- Na pewno skorzystałabym z procedury
- prawdopodobnie skorzystałabym z procedury
- prawdopodobnie nie skorzystałabym z procedury
- na pewno nie skorzystałabym z procedury
- Nie wiem

Czy zna Pan/i zasady ustanowione przez ETS dotyczące interpretacji prawspólnotowe? Tak/ Nie / Częściowo

Czy te zasady są według pan/i wykonalne? Tak / Nie /Częściowo

Czy kiedykolwiek w swojej praktyce dokonał/a Pan/i interpretacji prawspólnotowej? Tak / Nie / Nie wiem

Jeśli tak, jakie źródła skonsultował/a Pan/i w celu zdobycia informacji na temat dyrektywy zgodnie z którą interpretował/a Pan/i prawo krajowe? (kilka odpowiedzi możliwych)

- Tekst/systematyka dyrektywy
- Inne wersje językowe dyrektywy
- Preambuła dyrektywy
- Cele dyrektywy
- Orzecznictwo ETS
- Literatura
- Krajowe orzecznictwo
- Orzecznictwo zagranicznych sądów
- Nie wiem

Jeśli tak, czy na podstawie owej dyrektywy nadał/a Pan/i takie znaczenie krajowym przepisom prawnym, które normalnie nie miałyby miejsca? Tak/ Nie

Czy w Pan/i sądzie są wyznaczeni sędziowie, członkowie sieci ds. prawa WE? Tak/ Nie/ Nie wiem

Jeśli tak, czy korzystał/a Pan/i z ich pomocy przy rozwiązywaniu problemów powstałych przy stosowaniu prawa UE? Tak/ Nie

Proszę wskazać do jakiego stopnia zgadza lub nie zgadza się Pan/i z poniższymi stwierdzeniami.

	Zdecydowanie się zgadzam	Raczej się zgadzam	Neutralna postawa	Raczej się nie zgadzam	Zdecydowanie się nie zgadzam
Przepisy Traktatu WE są jasne i czytelne	<input type="checkbox"/>				

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Odnalezienie stosownych przepisów prawa europejskiego mogących mieć zastosowanie w toczącej się sprawie jest długotrwałym procesem	<input type="checkbox"/>				
Stosowanie prawa europejskiego zajmuje w rzeczywistości więcej czasu niż się założyło	<input type="checkbox"/>				
Stosuję prawo europejskie tylko w przypadku jeśli oferuje ono lepsze rozwiązanie sporu niż prawo krajowe	<input type="checkbox"/>				
Kompetencje i obowiązki sądu krajowego w zakresie roszczeń odszkodowawczych za szkody wywołane pogwałceniem prawa WE są jasne	<input type="checkbox"/>				
Interpretacje prawa WE dokonywane przez ETS wychodzą zbyt daleko poza literę tego prawa	<input type="checkbox"/>				

Część 3: Poniższe pytania dotyczą Pana/i zdania na temat UE i roli sędziego

Czy może Pan/i wskazać na ile się Pan/i zgadza lub nie zgadza z poniższymi stwierdzeniami?

Uważam, że członkostwo w UE jest pozytywne dla RP.

Całkowicie się zgadzam/ Zgadzam się/ Nie wiem/ brak zdania/ Nie zgadzam się/ Absolutnie się nie zgadzam

Ogólnie mam pozytywny obraz UE.

Całkowicie się zgadzam/ Zgadzam się/ Nie wiem/ brak zdania/ Nie zgadzam się/ Absolutnie się nie zgadzam

Czy może Pan/i wskazać jaki jest Pana/i poziom zaufania do poszczególnych instytucji?

	Bardzo wysoki	Raczej wysoki	Średni	Raczej niski	Bardzo niski
Parlament Europejski	<input type="checkbox"/>				
Komisja Europejska	<input type="checkbox"/>				
Rada Ministrów Unii Europejskiej	<input type="checkbox"/>				
Parlament RP	<input type="checkbox"/>				
Europejski Trybunał Sprawiedliwości	<input type="checkbox"/>				
Sąd Najwyższy RP	<input type="checkbox"/>				
Trybunał Konstytucyjny RP	<input type="checkbox"/>				
Trybunał Praw Człowieka w Szttrasburgu	<input type="checkbox"/>				
Ministerstwo Sprawiedliwości	<input type="checkbox"/>				

Proszę wskazać do jakiego stopnia czuje się Pan/i przywiązany/a do...

	W ogóle nieprzywiązany/a	Raczej nieprzywiązany/a	Obojętny stosunek	Raczej przywiązany/a	Bardzo mocno przywiązany/a
Polski	<input type="checkbox"/>				
Unii Europejskiej	<input type="checkbox"/>				
Miejsce gdzie Pan/i mieszka	<input type="checkbox"/>				
Europy	<input type="checkbox"/>				

ANNEX III

Miejsce gdzie się
Pan/i urodził/a

Czy może Pan/i wskazać na ile się Pan/i zgadza lub nie zgadza z poniższymi stwierdzeniami?

	Zdecydo wanie się zgadzam	Raczej się zgadzam	Neutralna postawa	Raczej się nie zgadzam	Całkowic ie się nie zgadzam
Jako sędzia krajowy czuję się częścią Wspólnotowego porządku prawnego	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sądowe stosowanie prawa Wspólnotowego z urzędu powinno być rozszerzone	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Jednolite stosowanie prawa wspólnotowego we wszystkich państwach członkowskich jest istotne	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Postrzegam prawo wspólnotowe jako mające pierwszeństwo nad prawem krajowym	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Uważam że zasady stosowania prawa europejskiego są obce prawu polskiemu.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Zasada prymatu prawa wspólnotowego nad krajowym jest warunkiem koniecznym dla istnienia wspólnotowego porządku prawnego	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Stosowanie prawa europejskiego jest ważnym zadaniem spoczywającym na sędziach krajowych orzekających w sprawach cywilnych	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sąd krajowy powinien usunąć istniejące przeszkody natury proceduralnej w celu zapewnienia pełnej efektywności przepisu WE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
System prawa WE stanowi integralną część polskiego porządku prawnego	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Postrzegam siebie jako sędziego prawa wspólnotowego	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
W przypadku jeśli orzeczenie ETS jest w kolizji z orzeczeniem TK lub SN, sędzia polski powinien dać pierwszeństwo orzeczeniom polskich sądów	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Należy się zgodzić z ETS w kwestiach odpowiedzialności odszkodowawczej państwa za szkody wyrządzone naruszeniem prawa wspólnotowego	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Definicje i terminy prawne stosowane w prawie WE łatwo akomodują się w prawie krajowym	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Stosuję prawo UE niechętnie ponieważ jestem zdania, że jego załączki są niedemokratyczne	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Procedura pytania prejudycjalnego jest przydatna	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Popieram utworzenie jednego wspólnotowego kodu cywilnego dla całej UE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Popieram utworzenie jednego wspólnotowego kodu postępowania cywilnego dla całej UE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
EC legal order is separate from the national legal order	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Jak ocenia Pan/i decyzje podjęte przez sędziów w poniżej opisanych sprawach i do jakiego stopnia utożsamia się Pan/i ze sposobami w jaki hipotetyczni sędziowie podjęli decyzję?

1. W ostatnim czasie ETS wydał orzeczenie z którego wynika że pewne kwestie normowane przez prawo krajowe są sprzeczne z prawem wspólnotowym. Ustawodawca nie podjął jednak żadnych kroków aby prawo to

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zmienić w celu jego dostosowania do europejskich wymagań. Ma Pan/i do czynienia ze sprawą, w której owa norma krajowa jest podstawą do wydania orzeczenia. Co prawda nie zgadza się Pan/i z interpretacją dokonaną przez ETS jednakże postanawia Pan/i zastosować ową interpretację w sprawie przed nim się toczącą gdyż uważa Pan/i że prawo europejskie ma pierwszeństwo w stosunku do prawa krajowego.

1. na pewno postąpił(a)bym w ten sam sposób
2. najprawdopodobniej postąpił(a)bym w ten sam sposób
3. nie wiem czy bym postąpił/a w ten sam czy inny sposób
4. najprawdopodobniej postąpił(a)bym w inny sposób
5. na pewno postąpił(a)bym w inny sposób

Czy mogłaby Pan/i wytłumaczyć swój wybór? _____

2. W toczącej się przed Panem/ią sprawie jedna ze stron powołuje się na przepisy prawa wspólnotowego, które według strony powinny być zastosowane. Postanawia Pan/i jednak nie poświęcać uwagi temu aspektowi sprawy, gdyż nie uważa się Pan/i odpowiedzialnym/ą za stosowanie prawa europejskiego.

1. na pewno postąpił(a)bym w ten sam sposób
2. najprawdopodobniej postąpił(a)bym w ten sam sposób
3. nie wiem czy bym postąpił/a w sam ten czy inny sposób
4. najprawdopodobniej postąpił(a)bym w inny sposób
5. na pewno postąpił(a)bym w inny sposób

Czy mogłaby Pan/i wytłumaczyć swój wybór? _____

3. Ma Pan/i do czynienia ze sprawą, w której mogą być zastosowane przepisy prawa krajowego jak i wspólnotowego. Obie strony procesu uważają że prawo krajowe reguluje kwestię w odpowiedni sposób i dlatego też postanawia Pan/i nie odwoływać się do przepisów wspólnotowych. W bardzo podobnej sprawie powołuje się Pan/i jednakże na prawo wspólnotowe gdyż chcą tak strony postępowania. Uważa Pan/i, że nie robi różnicy jakie prawo będzie stanowić podstawę orzeczenia o ile kwestia sporna zostanie rozstrzygnięta.

1. na pewno postąpił(a)bym w ten sam sposób
2. najprawdopodobniej postąpił(a)bym w ten sam sposób
3. nie wiem czy bym postąpił/a w sam ten czy inny sposób
4. najprawdopodobniej postąpił(a)bym w inny sposób
5. na pewno postąpił(a)bym w inny sposób

Czy mogłaby Pan/i wytłumaczyć swój wybór? _____

4. ETS wydał w ostatnim czasie orzeczenie, z którego wynika że krajowe uregulowania pewnej kwestii są niezgodne z prawem wspólnotowym. Rozpatruje Pan/i sprawę, w której wspomniane uregulowania krajowe stanowią podstawę dla wydania wyroku. Zna Pan/i orzeczenie ETS ale nie odwołuje się Pan/i do niego, gdyż uważa Pan/i że sędzia krajowy musi stosować prawo zawarte w kodeksie cywilnym i innych krajowych aktach prawnych a nie orzeczenia ETS.

1. na pewno postąpił(a)bym w ten sam sposób
2. najprawdopodobniej postąpił(a)bym w ten sam sposób
3. nie wiem czy postąpił(a)bym w ten sam czy inny sposób
4. najprawdopodobniej postąpił(a)bym w inny sposób
5. na pewno postąpił(a)bym w inny sposób

Czy mogłaby Pan/i wytłumaczyć swój wybór? _____

5. Nie jest Pan/i pewien/a czy przepisy krajowe są zgodne z dyrektywą WE. Ponieważ uważa Pan/i że Pana/i obowiązkiem jest zapewnić skuteczność przepisom prawa wspólnotowego postanawia Pan/i zwrócić się z pytaniem prawnym do ETS. Pytanie dotyczy interpretacji wspomnianej dyrektywy. ETS wydaje orzeczenie, z którego rzeczywiście wynika że przepisy krajowe są niezgodne z dyrektywą. W konsekwencji odmawia Pan/i zastosowania przepisu prawa polskiego i wydaje stosowny wyrok w oparciu o orzeczenie ETS.

1. na pewno postąpił(a)bym w ten sam sposób
2. najprawdopodobniej postąpił(a)bym w ten sam sposób
3. nie wiem czy postąpił(a)bym w ten sam czy inny sposób
4. najprawdopodobniej postąpił(a)bym w inny sposób

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5. na pewno postąpił(a)bym w inny sposób
Czy mogłaby Pan/i wytłumaczyć swój wybór? _____

6. Ma Pan/i do czynienia ze sprawą, w której mają zastosowanie zarówno przepisy krajowe jak i wspólnotowe. Rozważa Pan/i obydwie przepisy i dochodzi do wniosku, że przepis wspólnotowy oferuje lepsze rozwiązanie od krajowego w tej konkretnej sprawie. Z tego też powodu postanawia Pan/i zastosować prawo wspólnotowe.

1. na pewno postąpił(a)bym w ten sam sposób
2. najprawdopodobniej postąpił(a)bym w ten sam sposób
3. nie wiem czy postąpił(a)bym w ten sam czy inny sposób
4. najprawdopodobniej postąpił(a)bym w inny sposób
5. na pewno postąpił(a)bym w inny sposób

Czy mogłaby Pan/i wytłumaczyć swój wybór? _____

Część 4: Informacje podstawowe

Wiek? 29-35 lat/36-40 lat/41-50 lat /51-60 lat /61 lub więcej

Płeć: Kobieta/Mężczyzna

Czy wykonuje Pan/i inne funkcje poza zawodem sędziego? Tak/ Nie

W którym wydziale pan/i orzeka? Cywilny, prawa pracy/ubezpieczeń społecznych / gospodarczy

Jak długo wykonuje pan/i zawód sędziego w w swoim wydziale ?

W którym wydziale orzekał/a Pan/i wcześniej? cywilny/ pracy i/lub ubezpieczeń społecznych/ gospodarczy/ karny / grodzki / ksiąg wieczystych / rodzinny i nieletnich / inny / nie zmieniłem/am wydziału

W którym okręgu apelacyjnym Pan/i orzeka? warszawski, rzeszowski / poznański / gdański / białostocki / inny

W której instancji Pan/i orzeka? Pierwsza / Druga

Czy ma Pan/i inne spostrzeżenia na temat stosowania prawa WE, którymi chciałaby Pan/i się podzielić?

W dalszej części badań przewidziane jest przeprowadzenie osobistych wywiadów z wybraną grupą sędziów na temat ich własnych doświadczeń ze stosowaniem prawa UE. Celem wywiadu jest uzyskanie głębszej i bardziej szczegółowej wiedzy na temat wyzwań jakie prawo UE stawia sędziom krajowym. Czy zgodził(a)by się Pan/i na uczestnictwo w osobistym wywiadzie? Jeśli tak, proszę o podanie wybranych danych kontaktowych. Dane te zostaną wykorzystane tylko i wyłącznie w celu podjęcia z Panem/Panią kontaktu.

Imię i nazwisko; Tel; E-mail; Inne dane:

Serdecznie dziękuję za współpracę!

ANNEX IV

List of general interview questions (translated from Polish)

- What are your experiences with the application of EU law so far? How many times have you dealt with EU law in your practice?
- What was the nature of the EU law related problems you came across?
- Which of the cases are engraved in your memory? Why?
- If you have so far no experiences with the application of EU law, why do you think this is so?
- What is in your opinion the role of the parties in the process of application of EU law?
- How do you assess your workload?
- Do the processes of application of EU law imposes a higher workload on part of the judge?
- Which interpretative methods do you employ on a daily basis?
- What is your general opinion about the jurisprudence of the ECJ? What is its role for your daily practice?
- Is the jurisprudence 'workable' and clear?
- How and when have you acquired knowledge of EU law?
- What is your access to the sources of EU law?
- What is your opinion about the amount of EU law?
- What is your opinion about the quality of EU law?
- How do you assess the new role which is put on you by EU law?
- Do you see any obstacles for the application of EU law?
- What is your opinion about the preliminary ruling procedure?
- Would you be willing to employ the procedure in your own practice? Why yes/not ?
- Do you think that the procedure could be employed by the judges to achieve other than legal purposes? What can motivate a judge to ask a question?
- Do you feel you constitute a part of EU legal order?
- How do you assess the EU in general?
- Could you shortly describe your attitude towards EU law?

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NEDERLANDSE SAMENVATTING

Introductie

Een van de belangrijkste juridische ontwikkelingen in Europa in de laatste decennia is het proces van Europeanisering van het nationale recht. EU wetgeving heeft in toenemende mate invloed op een groot aantal nationale rechtsgebieden door middel van een zeer intens wetgevingsproces en door de rechtspraak van het Hof van Justitie van de Europese Unie. In de loop van de tijd hebben de EU-regels niet alleen de nationale, staats- en bestuursrechtswetten, maar ook het gebied van privaatrecht geëuropeaniseerd. Dit proces van europeanisering heeft geleid tot de toename van het aantal rechtsbronnen en tevens tot een snelle transformatie van de nationale wetgeving op diverse gebieden. Het voorgaande krijgt een heel bijzonder belang gezien het feit dat EU recht individuele belangen kan beïnvloeden, daar individuen een beroep op EU-recht kunnen doen in de nationale rechtbanken. Dit principe, dat een van de meest revolutionaire kenmerken van de rechtsorde van de EU is, werd in 1963 al toegepast door het Hof van Justitie in de historische *Van Gend & Loos*-uitspraak. Van groot belang om is te weten dat het systeem van de EU-verdragen aan de ene kant een systeem van rechterlijke bescherming op het niveau van de Europese Unie creëert, maar aan de andere kant geen afzonderlijke EU-rechtbanken vestigt in elke lidstaat, die de rechten van de individuen beschermen welke voortvloeien uit het EU-recht. Als gevolg daarvan, worden geschillen met betrekking tot EU recht tussen individuen en overheden of tussen individuen behandeld in de nationale rechterlijke instanties. De nationale rechters zijn verplicht om deze EU-rechten te beschermen en tegelijkertijd wordt van hen verwacht dat ze het “*effet utile*” van het EU-recht waarborgen. Met andere woorden, de nationale rechters van alle niveaus en alle specialisaties zijn EU-rechters geworden en de verdere ontwikkeling van de rechtsorde van de Unie is voor een groot deel afhankelijk geworden van hen.

Om deze belangrijke taak te kunnen vervullen biedt het EU-recht verschillende mechanismen aan de nationale rechters. Die mechanismen volgen uit onder meer de fundamentele beginselen van de EU-recht, zoals voorrang van het EU-recht, rechtstreekse werking, richtlijnconforme interpretatie en prejudiciële beslissing voor het Hof van Justitie. Uit Hoofdstuk 2 van deze studie wordt duidelijk dat het geheel van verwachtingen richting de nationale rechters door het EU-recht erg groot is. Van de nationale rechter wordt verwacht dat ze bekend is met de bronnen van het EU-recht en dat ze deze in haar dagelijks werk toepast. De nationale rechter past het EU-recht ambtshalve toe en ziet erop toe dat nationale autoriteiten het EU recht volgen. De nationale rechter blijft in dialoog met het Hof van Justitie via de prejudiciële procedure. De nationale rechter beslist het inhoudelijke conflict tussen nationaal recht en Unierecht in het voordeel van de Unie. Ze geeft uitvoering aan de EU-bepalingen

die rechtstreekse werking hebben. Ze past de jurisprudentie van het Europees Hof van Justitie, welke voor haar de hoogste rechterlijke instantie met betrekking tot EU-recht is, toe. Ze interpreteert nationale regels in de volledige context van de integratie van de Europese Unie zodat ze voldoen aan de doelstellingen van het EU-recht en ze kent schadevergoedingen toe aan individuen wiens EU rechten door de lidstaat geschonden zijn. Om dit alles te bereiken gebruikt de nationale rechter andere methodologie zoals bijvoorbeeld teleologische interpretatie en vergelijkende methoden. De voorgaande taken vinden plaats in de context van het steeds meer geëuropeiseerd raken van nationale juridische bronnen en het streven naar het waarborgen van de fundamentele beginselen van EU-wetgeving, zoals de effectiviteit en de uniformiteit van het EU-recht in alle lidstaten en de effectieve bescherming van de rechten die individuen ontleen aan de EU-wetgeving.

Echter, ondanks het feit dat de nationale rechter nooit eerder zo'n krachtige speler in het proces van rechtsbescherming is geweest, kan een correcte en uniforme toepassing van de nieuwe hulpmiddelen die door de EU-wetgeving aan haar toegewezen wordt te maken krijgen met allerlei problemen. Zo wordt er onder andere geopperd dat de nationale rechters niet voldoende kennis van de EU-bronnen hebben, niet bekend zijn met de methoden van de juridische interpretatie zoals die worden toegepast door het Europese Hof van Justitie, vreemde taalvaardigheden missen of simpelweg geen toegang hebben tot EU-wetgevingsbronnen. Anderen wijzen op de kenmerken van de autonome wettelijke en gerechtelijke systemen van de lidstaten, kenmerken van de nationale rechtscultuur die belemmerend zouden kunnen werken op de vervulling van de verwachtingen van de EU-wetgeving, de grenzen van de rechterlijke discretie of de nationale procedurele obstakels. Daarom moet ervan uitgegaan worden dat de uniforme uitvoering van de verwachtingen die voortvloeien uit het EU-recht door nationale rechters niet vanzelfsprekend is.

Onderzoeksdoel en methodologie

Deze studie poogt de manier waarop de civiele rechters van lagere rechtbanken in Polen - een relatief nieuwe lidstaat van de EU - zich gedragen in het kader van de EU-wetgeving te doorgronden en uit te leggen of en hoe de nationale rechters zich aanpassen aan de nieuwe juridische situatie die door de EU-wetgeving is ontstaan. In feite is er weinig bekend over de algemene aanvaarding van het Unierecht door nationale rechters van lagere rechtbanken, de feitelijke impact van de EU-wetgeving op hun dagelijkse werkzaamheden en de mogelijke belemmeringen die nationale rechters zoal tegenkomen tijdens de uitoefening van hun EU-wetgevingsbevoegdheden. Wat betekent het om een EU rechter te zijn in de praktijk? Is het theoretisch model van de nationale rechter als EU-rechter te vertalen naar de dagelijkse werkzaamheden van een gewone eerste instantie rechter die oordeelt op het

gebied van privaatrecht? In welke mate wordt de rechtsorde van de Europese Unie aanvaard onder nationale rechters en (in welke mate) voldoen zij aan de taken die aan hen zijn toegekend door de EU-wetgeving? En van nog groter belang: zijn ze bereid om dit te doen? En wat zijn de factoren die het gedrag van rechters in het kader van de EU-wetgeving kunnen beïnvloeden? Deze en andere vragen van empirische aard waren de katalysator van deze studie en tevens de focus gedurende de rest van deze studie.

Om antwoorden te vinden op de bovenstaande vragen gaat de studie in op de mate van de impact van het Unierecht op het dagelijkse gerechtelijke functioneren van nationale rechters en de manier waarop nationale rechters het EU-recht benaderen. Dit is gedaan door middel van empirische data, zowel kwantitatieve en kwalitatieve, die zijn verkregen van Poolse civiele rechters door middel van een vragenlijst en semi-gestructureerde diepte-interviews. De data richten zich op drie clusters van problemen die betrekking hebben op: de kennis van de EU-wetgeving bij de nationale rechters, hun ervaringen met de toepassing ervan en hun houding tegenover de nieuwe rol opgelegd door de EU-wetgeving. Deze drie variabelen worden onderzocht in de bredere institutionele en operationele juridische context van het dagelijkse gerechtelijke functioneren. Op die manier wordt het beeld van de werking van de nationale rechter geschetst vanuit het persoonlijk perspectief van de rechter. Door te onderzoeken wat de individuele perspectieven van de rechters zijn over de taken die voortvloeien uit EU-recht, kon er een algemeen beeld worden geschetst van het functioneren van de Poolse civiele rechters als Europese Unie rechters. Met andere woorden, het onderzoek stelt eerst de formele, juridische context vast waarin de rechters functioneren en vervolgens richt het zich op de manier waarop rechters persoonlijk de EU rechtmatigheid opvatten, de manier waarop ze hun functie als de EU-wetgeving rechters zien en begrijpen en de manier waarop ze de EU-wetgeving in hun dagelijkse praktijk ervaren. Samenvattend richt deze studie zich op de manier waarop Poolse civiele rechters denken en handelen als ze te maken krijgen met het EU-recht. Tot slot zal deze studie delen van de empirische verkregen data vergelijken met soortgelijke gegevens verkregen uit parallelle studies voor Duitsland en Nederland.

Structuur van het boek

Vijf thema's staan centraal in dit boek. Eerst worden de theoretische en methodologische uitgangspunten van het onderzoek besproken. Ten tweede wordt het normatieve kader van het onderzoek toegelicht. Daartoe wordt het Europeaniseringsproces van de nationale rechtsordes en de implicaties daarvan voor de nationale rechterlijke macht oppervlakkig besproken. En vervolgens worden de feitelijke verplichtingen, die door de EU-wetgeving aan de nationale rechters wordt

opgelegd, besproken. In hoofdstuk 3 wordt de gerechtelijke structuur in Polen nader uitgewerkt. Hoofdstuk 4 en 5 geven de kwantitatieve en kwalitatieve bevindingen weer die zijn opgedaan tijdens het empirische onderzoek. Daarna volgt het vergelijkende hoofdstuk waarin de resultaten van de parallelle onderzoeken in Nederland en Duitsland worden samengevoegd. Het laatste deel van deze studie heeft als doel om alle bevindingen van deze studie te verzamelen. Het functioneren van de Poolse civiele rechters als EU-wetgeving rechters kan dan zo breed mogelijk worden beoordeeld. In dit laatste stuk worden ook aanbevelingen gegeven hoe het functioneren van de Poolse civiele rechters als EU rechters ondersteund kan worden.

Bevindingen

Een van de belangrijkste conclusies die uit het empirische onderzoek naar voren komt is dat gerechtelijke gedrag niet kan worden verklaard door slechts een enkele factor. Uit de empirische gegevens blijkt dat het functioneren van rechters als EU-rechters wordt beïnvloed door een brede reeks van factoren waaronder, onder andere, de constitutionele, institutionele en procedurele kaders en de operationele context met zijn interne beperkingen ingebed in de sociale constructie van het gerechtelijke milieu. Bovendien kan de lokale rechtscultuur, maar ook de persoonlijke eigenschappen van de rechter van invloed zijn op de manier waarop rechters functioneren als EU-rechters. Dit laatste, zoals uit de kwalitatieve data lijkt, kan hand in hand gaan met sociale psychologie functies, zoals bijvoorbeeld eigenbelang, zelfpresentatie en zelfrespect. Maar ook aspecten zoals onder meer de werklust en de interactie met andere juridische en niet-juridische actoren kunnen een rol spelen in de manier waarop rechters de EU-wetgeving ontvangen, benaderen, zich eigen maken en als gevolg daarvan toepassen. Met betrekking tot de specifieke clusters van problemen die werden onderzocht in het empirische deel van de studie werd het volgende gevonden.

Kennis

De reeks van data en argumenten onthult de flinke tekortkomingen in de kennis van de EU-wetgeving bij de burgerlijke rechters van lagere rechtbanken in Polen. Bij veel rechters in Polen ontbreekt een goede kennis van essentiële EU-wetgeving en de manier van toepassing ervan. Bovendien realiseren de rechters zich in veel gevallen niet of, wanneer en hoe de EU-wetgeving relevant zou kunnen zijn voor de procedures en wat de feitelijke justitiële taken zijn welke aan de EU-wetgeving verbonden zijn. De wijdverspreide opvatting dat de EU-wetgeving alleen relevant is wanneer er een grensoverschrijdend element verschijnt in een geschil, maakt de EU-wetgevingsdiscussie in veel

gevallen vrijwel “niet-bestaand”. Bovendien wordt, door een nogal onduidelijk beeld van de rol van het Europese Hof van Justitie en de toepassing ervan in de juridische praktijk, de uitvoering van het Europese mandaat door de rechter duidelijk belemmerd. Uiteraard is deze constatering niet van toepassing op de gehele onderzoeksgroep. Gevallen waarin een rechter beschikt over een goede of zelfs zeer goede kennis van de EU-wetgeving zijn zeker aanwezig. De oorzaken welke ten grondslag liggen aan het gebrek aan kennis van de EU-wetgeving zijn duidelijk van een tweërlei aard. Aan de ene kant, de oneindigheid en uitgebreidheid van de EU-wetgeving die bovendien van een fragmentarisch karakter is. De EU-wetgeving kan wellicht daarom ook nooit volledig worden eigen gemaakt en begrepen door een eenvoudige civiele rechter van een lagere instantie die vaak geconfronteerd wordt met gevallen van diverse aard die betrekking kunnen hebben op uiteenlopende juridische aspecten. Aan de andere kant, de brede en complexe jurisprudentie van het Europese Hof van Justitie met betrekking tot de feitelijke verplichtingen die worden gesteld aan de nationale rechters en welke in veel gevallen incoherent, niet eenvoudig of zelfs tegenstrijdig zijn. Dit resulteert in een aanzienlijk vertroebeld beeld van de verwachtingen. In het algemeen is de bekendheid van de nationale rechter met EU-recht blijft een van de meest ingewikkelde problemen gelet op de werking van de rechterlijke structuur in de Europese Unie.

Ervaringen

Over het algemeen is gebleken dat de ervaringen van de Poolse civiele rechters met het zich wenden tot en het toepassen van het Unierecht tot nu toe vrij beperkt zijn. Het merendeel van de civiele rechters zien het EU-recht dan ook als een abstract, op afstand of niet relevant aspect van de besluitvorming. Deze geringe praktische ervaring met de toepassing van de EU-wetgeving leidt tot een aanzienlijk aantal rechters met eenvoudigweg een zeer ambivalente houding ten opzichte van de verplichtingen die hen worden opgelegd door de EU-wetgeving. De resultaten voor Nederland en Duitsland tonen eveneens aan dat, hoewel de rechters in beide landen iets uitgebreidere ervaringen hebben met de toepassing van het EU-recht dan hun Poolse tegenhangers, het belang van de EU-wetgeving in de dagelijkse praktijk van een civiele rechter over het algemeen beperkt blijft, zeker gelet op het aantal zaken waar de rechters mee geconfronteerd worden. Bovendien wordt uit de empirische gegevens duidelijk dat de toepassing van Unierecht, die begint met het zoeken naar en het vinden van relevante bepalingen en de daarop betrekking hebbende rechtspraak van het Hof van Justitie, door het gehele proces van het interpreteren tot aan de toepassing ervan in een specifieke zaak neerkomt op een tijdrovend, kostbaar en ingewikkeld proces. De kwalitatieve studie toonde inderdaad aan dat een rechter, zodra deze wordt geconfronteerd met een Unierecht aspect, het haar zeer

waarschijnlijk veel tijd en moeite zal kosten om de desbetreffende kwestie te verkennen en te begrijpen. Dit alles moet bovendien gezien worden in relatie tot de dagelijkse praktijk van de werking van de nationale rechterlijke instanties en in het bijzonder in relatie tot de achterstand van zaken en efficiëntieverwachtingen die worden opgelegd aan de rechters. Het niet vaak voorkomen van het Unierecht in de dagelijkse praktijk betekent bovendien dat de toepassing ervan als uitzonderlijk wordt gezien en als gevolg daarvan het als een lastige kwestie wordt gezien elke keer als er een EU-wetgevingszaak speelt. Dit gebrek aan ervaring loopt gelijk op met het feit dat private partijen en hun vertegenwoordigers nog niet erg actief hun toevlucht nemen tot de EU-wetgeving en dus hun claims niet daarop baseren. Uit zowel de kwantitatieve en kwalitatieve gegevens blijkt dat de rol van de partijen en vooral hun professionele vertegenwoordigers in het erop wijzen dat de EU-wetgeving van toepassing zou kunnen zijn in een geschil onmisbaar lijkt. Ook de resultaten voor Duitsland en Nederland ondersteunen duidelijk de essentiële rol van private partijen in de Europeanisering van de gerechtelijke behandeling. Zonder twijfel zal zonder hun inbreng de betrokkenheid en bereidheid om toevlucht te nemen tot de EU-wetgeving om hun eisen te steunen, en dus de reikwijdte van het proces van integratie van de EU-wetgeving in de dagelijkse praktijk van (privaatrechtelijke) rechtbanken van Polen en andere landen, zeer beperkt blijven.

Opvattingen

Uit de empirische data blijkt dat de rechters de EU gunstig gezind zijn en het EU-lidmaatschap als een positieve ontwikkeling zien. Opvallend vergelijkbare resultaten komen voort uit de studie in Duitsland en Nederland. De EU-instellingen krijgen in feite zelfs meer vertrouwen van een deel van de Poolse rechters dande nationale autoriteiten.. In dezelfde geest krijgt het bestaan van het principe van voorrang van het Unierecht relatief veel steun onder de rechterlijke macht en veel rechters geven aan de EU-wetgeving te zien als een integraal onderdeel van de nationale rechtsorde. Parallel aan dat lijkt de prejudiciële procedure aanzienlijke steun te winnen. Het feit dat in de drie betrokken landen de rechters duidelijk pro-Europees zijn ondersteunt de bevinding dat de persoonlijke positieve instelling ten aanzien van de Unie aan de ene kant niet de manier beïnvloedt waarop de rechters hun taken benaderen naar aanleiding van de EU-wetgeving en hun rol van de beschermers van de EU-wetgeving en anderzijds ook niet de wijze beïnvloedt hoe rechters het EU-recht zien en de relevantie ervan voor de dagelijkse juridische praktijk. Evenzo hoeft de gunstige gezindheid richting de EU niet te betekenen dat de rechters enthousiast bezig zullen zijn met het juridische integratieproces in de Europese Unie. Politieke voorkeuren en persoonlijke perspectieven lijken opzij te worden geschoven. De primaire doelstellingen van de nationale lagere rechter zijn eerder het efficiënt oplossen van

conflicten en het rechtspreken in overeenstemming met de beginselen van de rechtsstaat. Dit proces van beslechting van geschillen vindt echter plaats in een lokale operationele context, iets wat invloed heeft op de manier waarop nationale rechters het EU recht waarnemen en benaderen.

Andere bevindingen

Naast bovengenoemde punten blijkt uit de empirische data ook dat de operationele context waarin de rechters functioneren belemmeringen kunnen vormen voor de invulling van de verwachtingen welke uit het Unierecht voortkomen. Het blijkt dat de (meest gemiddelde) Poolse civiele rechter lijdt aan tijdsdruk welke voortkomt uit het aanzienlijke werkpakket en achterstand in de behandeling van de zaken. Uit de data lijkt naar voren te komen dat een rechter zo snel als mogelijk werkt om haar zaken op een rechtvaardige manier te beslissen met als gevolg dat ze haar toevlucht neemt tot de wet die rechtstreeks tot haar beschikking staat en zij relatief goed kent, dat is de nationale wetgeving. Op deze manier zal elke ambtshalve raadpleging van EU-wetgeving of het zoeken naar relevante EU-wetgeving door veel rechters worden gezien als een extra activiteit buiten het gewone werk om, of zoals een van de rechters zei: een "hair splitting" oefening. Daarnaast zal de Poolse civiele rechter van een rechtbank in lagere aanleg waarschijnlijk gelimiteerde toegang hebben tot bronnen die toegang verschaffen tot het proces van EU rechtsvinding. Bovendien is EU recht een nieuw en verwarrend aspect in juridische besluitvorming zonder een stabiele positie in het dagelijks gebruik, waardoor de rechter zou kunnen vrezen dat een zaak waarin EU recht is toegepast een hoger risico loopt om vernietigd te worden door een hogere rechtsinstantie, wat van invloed kan zijn op de eindbeoordeling van de juridische capaciteiten en voortgang op de carrièreladder, maar ook haar reputatie bij andere rechters. Parallel aan het probleem van kennis van EU recht, de kwestie van juridische methodologie en meer precies, de methoden van interpretatie en juridische technieken die traditioneel gebruikt worden door rechters bleken een significant obstakel te zijn voor de operationalisering van de verwachtingen van EU recht. Zoals beschreven in hoofdstuk 3 berust de Poolse juridische cultuur op een letterlijke, positivistische en zeer formele benadering van de wet. Precedent wordt bovendien niet gezien als een formele bron van recht. Empirisch onderzoek bevestigt dat bovengenoemde kenmerken van de nationale juridische cultuur de integratie van EU recht in de dagelijkse juridische praktijk in Polen bemoeilijken. Daarnaast belemmert de traditionele literalistische school de operationalisering van het principe van harmonieuze interpretatie. De teleologische methode, die rust op het zoeken naar objectieven en doelen van wetgeving past niet gemakkelijk in de traditionele positivistische cultuur en zou gezien kunnen worden als onwettig en het doorkruisen van de grenzen van de juridische functie. Hiernaast lijken de kwalitatieve data te suggereren dat de persoonlijke eigenschappen van rechters een

rol kunnen spelen in de manier waarop zij functioneren in de context van EU recht. In die zin kunnen individuele motivatie en ambitie, de bereidheid en de moed om uit gewoonten te stappen en een distinctieve juridische koers te volgen en te participeren in de juridische integratie van de Europese Unie de manier bepalen waarop iemand functioneert als een EU rechter. Het gevoel van inzet en verantwoordelijkheid voor de rechtsorde van de Europese Unie en de noodzaak om voor effectiviteit te zorgen bemoedigt rechters om zich te richten tot bronnen van EU recht. Zoals de empirische bevindingen in hoofdstuk 4 laten zien, zelfpresentatie en zelfinteresse en dicht daaraan verwant, de ‘angst voor oneer’, kunnen de rechter ontmoedigen om de wet en mechanismen te gebruiken waarmee zij niet voldoende bekend zijn. Gebaseerd op de bevindingen in dit onderzoek kan over het algemeen beargumenteerd worden dat het theoretische model van EU rechter zoals vastgesteld door het HvJ een boeiend en plausibel beeld schetst op papier, maar dat het een ongrijpbaar perspectief op de rol van de nationale rechter biedt. Zoals dit onderzoek laat zien lijkt het theoretische model van de EU rechter te worden gekenmerkt door een hoog niveau van abstractie en reflecteert dit in geen geval de manier waarop de nationale rechter in realiteit functioneert. Zoals geïllustreerd zijn er verschillende oorzaken voor de naïviteit van dit model. De eerste betreft de evidente complexiteit van een multidimensionale rechtsorde, de intensiteit van EU wetgevingsprocessen en de overdaad aan verwachtingen die opgelegd worden aan de nationale rechterlijke macht door EU recht, die niet gemakkelijk te huisvesten zijn in het nationale constitutionele, procedurele en operationele kader en de lokale juridische cultuur. Bovengenoemde zorgt voor veel (rechts)onzekerheid en gebrek aan vertrouwen bij een deel van de rechters wat betreft de juiste manier van handelen in een dergelijk ingewikkeld juridisch milieu. De tweede oorzaak voegt enkel toe aan de complexiteit van de situatie en is geworteld in inadequate institutionele regelingen die resulteren in nationale rechters welke in veel gevallen slecht uitgerust zijn om te functioneren in de context van EU recht. In het geheel bezien, het EU recht blijft een enigszins abstracte en afgezonderde rechtsorde voor het merendeel van de Poolse civiele rechters. Bovengenoemde impliceert dat volledige samenhang van EU recht, juridische uniformiteit en convergentie van de Europese Unie enigszins concepten van desillusie zijn. Dit onderzoek heeft laten zien dat het functioneren van Poolse civiele rechtbanken, en misschien wel iedere rechterlijke instantie in iedere lidstaat, als EU rechterlijke instanties een complex onderwerp is, bestaande uit verschillende juridische en buitengewoon juridische variabelen. Voor nu lijkt het EU recht een enigszins abstract, afgezonderd en daarom ook tot op zekere hoogte een irrelevant en onontgonnen aspect van de juridische besluitvormingsprocessen te blijven voor veel Poolse civiele rechters. Bij anticiperen op de manieren waarop dit proces zich zal ontwikkelen in de toekomst moet men in aanmerking nemen dat de nieuwigheid van het gehele systeem bestaande uit een nieuw mechanisme en de manier waarop er gewerkt wordt, aanpassingstijd vereist voor nationale juristen. In

die zin staan de Poolse civiele rechters en het gehele juridische systeem momenteel slechts aan het begin van een complex, maar zeker ook fascinerend proces van Europeanisering. Dit proces lijkt met kleine stapjes vooruitgang te boeken.

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Urszula Jaremba was born on 2 October 1979 in Nowy Dwór Gdański, Poland. After graduating from Kazimierza Jagiellończyka High School in Elbląg in 1994, she studied International Relations and European Studies at the Nicolaus Copernicus University in Toruń, Poland. In 2004 she obtained both degrees. In 2004 she moved to the Netherlands and in June 2007 she obtained a LL.M. degree (*cum laude*) in International and European Public Law from the Tilburg University. During her studies in Tilburg she joined *Zenc*, a Dutch research and consultancy firm focused on innovation in the public sector. In January 2008 she started her doctoral thesis at the department of EU law at the Erasmus School of Law, Rotterdam. During her PhD trajectory she was also lecturing master courses at the Department of EU law. Next to the academic work she served as a member of the executive board of the Legal PhDs Association (JAR) at the Erasmus School of Law. She was appointed as *wetenschappelijk docent* / university lecturer at the Erasmus School of Law in March 2012.