Developments

The Impact of EU law on National Judiciaries: Polish Administrative Courts and their Participation in the Process of Legal Integration in the EU

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Abstract

Since May 2004 Polish administrative courts have passed a great deal of judgments in which the law of the European Union (formerly European Community law) has played either the main role or a subsidiary role in the proceedings. This article seeks to examine how the above-mentioned courts comply with the expectations which are put on them by EU law and how they participate in the process of legal integration within the EU. In this context, the author scrutinizes how the national judiciary adjudicating in the administrative law area understands, interprets, employs and applies the systemic principles of EU law such as: supremacy, and (in) direct effect and effectiveness. In addition, the participation of national courts in the process of a dialogue with the Court of Justice of the European Union through the preliminary ruling procedure is captured. The analysis is not aimed at being exhaustive and focuses solely on the total impact of EU law on the national judiciary and the general trends in the judicial application of EU law, that is to say the overall reception of EU law and the dimension of the EU-friendliness displayed by Polish administrative courts.

A. Introduction

Following the collapse of the communist rule, the recapture of sovereignty and the rebirth of pluralism in 1989, Poland has evolved into a stable, liberal and democratic state with a capitalist market economy. Joining the structures of the European Union (EU) became one of the top political priorities after the regaining of independence. The accession to the EU was to become a hard and long-lasting process which touched upon and enforced changes in many areas. The alterations in the national legal system were expected to be very far-reaching, if not revolutionary.

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Needless to say, most of the legislative changes in the Polish legal system were caused, directly or indirectly, by the necessity of the adjustment of national law to EU law.[1] The transposition of the *acquis communautaire* into the Polish legal system was indeed an intense and extensive process which exerted a profound influence on national legal sources and received substantial public and media attention throughout the pre-accession period. In this process a great bulk of national law became immensely harmonized with EU law. The predominantly public law nature of EU law which aims to regulate the functioning of the market economy implies that national public and substantive administrative laws are undoubtedly realms were EU regulation exerted an enormous impact. It suffices to look into the magnitude of the EU primary and secondary regulation and the jurisprudence of the European Court of Justice (ECJ) in the area of the internal market which pertains to, *inter alia*, taxes, customs, telecommunication or environmental protection to see that the majority of national provisions which are interpreted and applied by domestic administration authorities in fact originate from EU law.[2]

On the other hand, from the outset it was implied that the judicial oversight over the activities of the national public administration is the only way to ensure that the rule of law is observed and individuals' rights and interests stemming from EU law are protected against any illegal action in breach of EU law on part of the public authorities.[3] Consequently, in the pre-accession period, Polish judges of ordinary and special courts across all layers had to adapt to the view that from the moment of Poland's accession to the Union they would have to respect the autonomous rules and principles of the application of EU law and would be obliged to ensure the full effect of EU law, "whatever their national legislation may provide".[4] Furthermore, they had faced the fact that soon they would constitute a part of the "Community of Courts".[5] Be that as it may, as opposed to the process of harmonization and approximation of national law, the issue of inevitable changes in the functioning of the Polish judicature related to the accession to the EU did not receive much attention from the general public. Yet it received considerable attention and concern on the part of the scholars.[6] As some of them suggested, even though judges

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[1] At that point of time in European Community law, with the introduction of the Lisbon Treaty the three pillars ceased to exist. Since most of the discussed cases concern situations from before the Lisbon Treaty entered into force the author refers to both EU and EC law interchangeably throughout the present paper.

[2] On the application of EU law by national administration in the New Member States *see* Michal Bobek, *Thou Shall Have Two Masters; the Application of European Law by Administrative Authorities in the New Member States*, 1 REVIEW OF EUROPEAN ADMINISTRATIVE LAW (REAL) 51-63, (2009).

[3] Case 26-62, *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, 1963 E.C.R. 1.

[4] *See* THIJMEN KOOPMANS, EUROPEAN LAW AND THE ROLE OF THE COURTS 9 (1993).

[5] Silvana Sciarra, *Integration through courts: article 177 as a pre-federal device*, *in* LABOUR LAW IN THE COURTS. NATIONAL JUDGES AND THE EUROPEAN COURT OF JUSTICE 11 (Silvana Sciarra ed., 2001).

have never before been such powerful players in the process of rights' enforcement, a proper judicial application of EU law might be faced with various problems and obstacles and the automatic compliance with EU law expectations by national courts may not be taken for granted.[7]

The problem of the reception and acceptance of the EU legal order and the principles of the application of EU law has been a widely and hotly discussed topic in the fields of law and political science. Likewise, the manner in which national courts participate in the judicial dialogue with the ECJ incessantly remains an interesting matter to deliberate upon.[8] Various writers have also attempted to look beyond the doctrine and find possible

[6] It should however be stressed that the necessity of changes in the Polish judiciary was extensively discussed by legal scholars, *see* for instance: Cezary Mik, *Sądy polskie wobec perspektywy przystąpienia Rzeczypospolitej Polskiej do Unii Europejskiej* (Polish courts in view of accession of the Republic of Poland to the European Union), 1 PRZEGLĄD PRAWA EUROPEJSKIEGO(PPE) 20 (1997); Lech Garlicki, *Członkostwo Polski w Unii Europejskiej a sądy* (The membership of Poland in the European Union and courts) in KONSTYTUCJA DLA ROZSZERZAJĄCEJ SIĘ EUROPY (CONSTITUTION FOR THE EXPANDING OF EUROPE) 193 (Ewa Popławska ed., 2000); Andrzej Wróbel, *Uczestnictwo Polski w sądownictwie wspólnotowym* (The participation of Poland in the Community judicature) in PRYZSTĄPIENIE POLSKI DO UNII EUROPEJSKIEJ, TRAKTAT AKCESYJNY I JEGO SKUTKI (THE ACCESSION OF POLAND TO THE EUROPEAN UNION. THE ACCESSION TREATY AND ITS CONSEQUENCES) 201 (Stanisław Biernat, Sławomir Dudzik & Monika Niedźwiedź eds., 2003); Maciej Szpunar, *Wpływ członkostwa Polski w Unii Europejskiej na sądownictwo – zagadnienia wybrane* (The impact of the Polish membership in the European Union on the judiciary – selected issues) in PRYZSTĄPIENIE POLSKI DO UNII EUROPEJSKIEJ, TRAKTAT AKCESYJNY I JEGO SKUTKI (THE ACCESSION OF POLAND TO THE EUROPEAN UNION. THE ACCESSION TREATY AND ITS CONSEQUENCES)277 (Stanisław Biernat, Sławomir Dudzik & Monika Niedźwiedź eds., 2003); Aleksandra Wentkowska, *Sądownictwo polskie w przeddzień przystąpienia do Unii Europejskiej – spostrzeżenia de lege ferenda* (The Polish judiciary on the eve of the accession to the European Union – observations de lege ferenda) in PRYZSTĄPIENIE POLSKI DO UNII EUROPEJSKIEJ, TRAKTAT AKCESYJNY I JEGO SKUTKI (THE ACCESSION OF POLAND TO THE EUROPEAN UNION. THE ACCESSION TREATY AND ITS CONSEQUENCES) 303 (Stanisław Biernat, Sławomir Dudzik & Monika Niedźwiedź eds., 2003); Adam Łazowski, *Adaptation of the Polish legal system to European Union law: selected essays*, 45 SEI WORKING PAPER 21 (2001).

[7] *See* Michal Bobek, *On the application of European law in (not only) the Courts of the New Member States: 'Don't do as I say?'*, 10 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 1 (2008); Zdeněk Kühn, *The application of European law in the new Member States: several (early) predictions*, 3 GERMAN LAW JOUNRAL (GLJ) 563 (2005); SACHA PRECHAL, ROLAND VON OOIK, JAN H. JANDS, KAMIEL MORTELMANS, "EUROPEANISATION" OF THE LAW: CONSEQUENCES FOR THE DUTCH JUDICIARY (2005); Ewa Łętowska, *Między Scyllą i Charybdą – sędzia polski między Strasburgiem i Luksemburgiem* (Between Scylla and Charybda – the Polish judge between Strasbourg and Luxembourg) 1 EUROPEJSKI PRZEGLĄD SĄDOWY (EPS) 3 (2005); Aleksandra Wentkowska, *Sądownictwo polskie w przeddzień przystąpienia do Unii Europejskiej – spostrzeżenia de lege ferenda* (The Polish judiciary on the eve of the accession to the European Union – observations de lege ferenda) in PRYZSTĄPIENIE POLSKI DO UNII EUROPEJSKIEJ, TRAKTAT AKCESYJNY I JEGO SKUTKI (THE ACCESSION OF POLAND TO THE EUROPEAN UNION. THE ACCESSION TREATY AND ITS CONSEQUENCES) 277-302 (Biernat et al. eds., 2003); Aleksandra Wentkowska, *Legal insecurity? ECJ, sovereignty and Polish courts on the eve of EU membership*, 7 YEARBOOK OF POLISH EUROPEAN STUDIES (YPES) 71, 95 (2003); Stanisław Biernat, *"Europejskie" orzecznictwo sądów polskich przed przystąpieniem do Unii Europejskiej* (European jurisprudence of Polish courts before the accession to the European Union) in ZNACZENIE ORZECZNICTWA W SYSTEMIE ŹRÓDEŁ PRAWA. PRAWO EUROPESKIA A PRAWO KARJOWE (The significance of jurisprudence in the system of sources of law. European versus national law) 159, 175 (Bogdan Dolnicki ed., 2005).

[8] *See* for instance ANNE-MARIE SLAUGHTER, ALEC STONE SWEET & JOSEPH H.H.WEILER, THE EUROPEAN COURT AND NATIONAL COURTS DOCTRINE AND JURISPRUDENCE. LEGAL CHANGE IN ITS SOCIAL CONTEXT (1998); George Tridimas & Takis Tridimas, *National courts and the European Court of Justice: a public choice analysis of the preliminary reference procedure*,

explanations for national judicial practices. As national reports indicate, those practices can significantly differ between the Member States. Whereas France is one of those states where the process of the acceptance of EU law principles and foremost the principle of supremacy of EU law has been rather thorny and long-lasting, [9] a similar process taking place in the Netherlands is very much a different story. [10] It shall nonetheless be observed that European scholars mostly draw attention to the functioning of national supreme and /or constitutional courts. Moreover, much of the available literature is written in a language other than English, French or German, which makes it inaccessible to anyone other than national audience.[11] The present article aims to occupy the existent niche by providing an account of the functioning of Polish courts as decentralized EU courts. The author focuses predominantly on first instance administrative courts since those are most frequently confronted with EU law issues. The main questions which will be addressed are as follows: Are Polish administrative courts functioning as European courts or put differently, are they truly the agents of EU legal order? What is the reception of EU law in Polish administrative courts? How do they understand and accommodate the systemic principles of EU law? Do Polish administrative courts seek judicial dialogue with the ECJ?

The structure of this article is as follows: In the first place, the obligations which are put on national courts by *acquis communautaire* will be very briefly sketched. Secondly, the methodological approach applied in this paper will be explained which will be followed by the examination of the place of the administrative justice in the entire national judicial architecture. Thereafter, the way Polish administrative courts capture, interpret and utilize the EU legal concepts will be discussed. The analysis is closed by some concluding remarks on the accommodation of EU law by national administrative courts.

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24 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 125 (2004); Alec Stone Sweet & Thomas L. Brunell, *The European Court of Justice and the national courts: a statistical analysis of preliminary reference*, JOURNAL OF EUROPEAN PUBLIC POLICY 66 (1998).

[9] *See* Jens Plötner, *Report on France*, in THE EUROPEAN COURT AND NATIONAL COURTS- DOCTRINE AND JURISPRUDENCE. LEGAL CHANGE IN ITS SOCIAL CONTEXT 41 (Anne-Marie Slaughter, Alec Stone Sweet & Joseph H.H. Weiler eds. 1998); also reports on Germany, Italy and the UK. MITCHEL DE S.-O.-L L'E LASSER, JUDICIAL TRANSFORMATIONS. THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE 58 (2009). Xavier Groussot suggests however that the situation has vividly changed in the recent years and EU law receives a positive response from the Conseil d'Etat, for more *see*: Xavier Groussot, *EU Law Principles in French Public Law: An Accueil Réservé* 1 REAL (2007).

[10] *See* Monica Claes & Bruno De Witte, *Report on the Netherlands*, in THE EUROPEAN COURT AND NATIONAL COURTS-DOCTRINE AND JURISPRUDENCE. LEGAL CHANGE IN ITS SOCIAL CONTEXT 171 (Anne-Marie Slaughter, Alec Stone Sweet & Joseph H.H. Weiler eds., 1998).

[11] In the present essay many articles and contributions concerning the issue of the application of EU law by Polish (administrative) courts are referred to. As the reader will notice those are predominantly written in Polish, *see* also note 6 and 7.

B. National Courts as Decentralized EU courts: a Theoretical Perspective

As has emerged from the foregoing introduction, the law of the EU can directly affect interests of individuals in the Union, that is to say, it is capable of creating rights and obligations not only in relation to the contracting Member States but also to its citizens. This landmark rule was established by the ECJ as early as 1963 in the *Van Gend* & *Loos* ruling.[12] In turn, under Article 4(3) of the Treaty on European Union[13], the fulfillment of the obligations which follow from EU law is a duty of the Member States. In a nutshell, this provision implicates that whereas the EU institutions are responsible for the adoption of legal rules[14], the application and enforcement of those rules takes place at the national level. The principle of decentralization stemming from the above-mentioned article applies to the system of justice as well.[15] Hence, the system of judicial protection in the EU is decentralized and relies on two pillars, i.e. a European and national one. At the EU level, the institution which is entrusted with the task of ensuring that EU law is observed is the European Court in Luxembourg. In turn, from the case-law of the European Court it follows that the burden of ensuring the *effet utile* of EU law rests *de facto* on national courts.[16] This obligation has recently been reinforced by means of Art.19 (1) of the Treaty on European Union which obliges the Member States to provide remedies which will ensure effective judicial protection in the fields covered by Union law.[17] Without too much dwelling upon the particular obligations which *acquis communautaire* puts on national courts,[18] it should be mentioned that in the academic literature, those obligations are

[12] Case 26-62, *NV Algemene Transport en Expeditie Onderneming van Gend & Loos* v. *Netherlands Inland Revenue Administration*, 1963 E.C.R. 00001.

[13] Formerly: Treaty Establishing the European Community, Art.10, 24 December 2002 (consolidated text), Official Journal C 325, 33, 42.

[14] In those areas where the EU has the competence to do so.

[15] Takis Tridimas, *Enforcing Community Rights in National Courts: Some Recent Developments*, IN JUDICIAL REVIEW IN EUROPEAN UNION LAW. LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HARDLEY 456, 465, (David O'Keeffe ed., 2000).

16 *See* for instance case CILFIT in which the Court of Justice explicitly stated that the national courts are responsible for the application of EU law, Case 83/81, *Srl CILFIT and Lanificio di Gavardo Spa* v. *Ministry of Health*, 1982 E.C.R. 3415, para.7.

[17] Treaty on European Union Art. 19(1) Para. 2, 30 March 2010 (consolidated text), Official Journal C 83, 15, 27 which reads: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

[18] The issue is elaborately explored in the academic writing. For more *SEE* MONICA CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION (2005); ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE (2006); SACHA PRECHA, DIRECTIVES IN EC LAW (2ND ED., 2005); SACHA PRECHAL, ROLAND VON OOIK, JAN H. JANS, KAMIEL MOERTELMANS, "EUROPEANISATION" OF THE LAW: CONSEQUENCES FOR THE DUTCH JUDICIARY (2005); KAMIEL MORTELMANS, ROLAND VON OOIK & SACHA PRECHAL, *EUROPEES RECHT EN DE NEDERLANDSE RECHTER. VERWORENHEDEN EN UITDAGINGEN* (European law and the Dutch Judge. Achievement and challenges) (2004); Lord Slynn of Hadley, *What is a European Community judge?,* 52 CAMBRIDGE LAW JOURNAL 234 (1993) and numerous academic articles.

sometimes classified as belonging to either the first or second generation obligations groups.[19]

The first generation principles created the obligation for national courts to apply EU law, either directly or indirectly. This group includes the cardinal principles of Union's law such as supremacy, direct effect and the obligation to interpret national law in the light of EU law (indirect effect or harmonious interpretation). The first generation obligations refer therefore to the constitutional principles that are fundamental to the existence of the entire legal system of the EU. The second generation problems refer to the rule of the effectiveness of EU law and the 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 rights that individuals derive from European law and the limits to the national procedural autonomy. Somewhere in between those groups the obligations flowing from the state liability principle should be placed.[20] Finally, the story on the role of national courts in the application of EU law is completed by a legal mechanism which proved to be fundamental for the building of the legal order of the EU, that is the dialogue between national courts and the ECJ. The process takes places through the preliminary reference mechanism which is enshrined in Article 267 of the Treaty on the Functioning of the European Union (TFEU) and its existence is in an overwhelming number of cases entirely contingent upon the willingness of national judges to cooperate and refer their questions concerning interpretations of EU law to Luxembourg.[21]

It is clear from the foregoing that the above-mentioned mechanisms and special competences which the national courts are endowed with by means of EU law have become formidable instruments which have empowered the national judge by allowing her to undertake judicial actions which would normally not be allowed under national law. At the same time those instruments also added a particular responsibility by imposing

[19] As a matter of fact, the term "second generation" was employed for the first time by JOSSE MERTENS DE WILMARS, L'EFICACITÉ *DES DIFFÉRENTES TECHNIQUES NATIONALES DE PROTECTION JURIDIQUE CONTRE LES VIOLATIONS DU DROIT COMMUNAUTAIRE PAR LES AUTHORITÉS NATIONALES* 379 (1981). For more check: MONICA CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION 103 (2005). 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 EU.

[20] The principle of state liability has been elevated to the level of the fundamental principles of EU law by the ECJ. *See* joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others* v. *Italian Republic,* 1991 E.C.R. I-5357. It is seen as a corollary of and supplementary to the principles of primacy, direct and indirect effect but at the same time it very much pertains to the problem of availability of an effective judicial remedy and therefore it may be claimed that it occupies the place between first and second generation obligations.

[21] In accordance with TFEU Article 267, only the courts against whose decision there is no remedy are obliged to refer questions to the European Court if a question of interpretation of EU law occurs in a case pending before them.

specific tasks and obligations on the national judge.[22] At present, a national judge in the EU functions in a multi-level and increasingly pluralistic legal order or, expressed differently, at the crossroads of European and national law. Furthermore, she is supposed to give precedence to the law of the EU in case of a collision with national rules. In that respect, she can potentially act in contradiction with the national constitution and is expected to enforce EU law against her own government. She is supposed to employ distinct legal interpretation methods which will facilitate the process of arriving at the objectives of the EU but also, and no less importantly, she is expected to participate in the process of an inter-court dialogue. National courts "have been freed by the European Court from the narrow role of *bouche de la loi* and elevated to a constitutional mission in the European context".[23]

C. Methodological Approach

In contrast to the jurisdiction of the national ordinary courts, the assessment of the way Polish administrative courts operate in the European capacity is a relatively easy task.[24] The website of the Administrative Supreme Court (*Naczelny Sąd Administracyjny*, hereinafter SAC) provides public access to all judgments and decisions including the (often elaborate) reasoning of voivodship administrative courts (*wojewódzki sąd administracyjny*, hereinafter VAC) and the SAC which were issued after 1 October 2007. The database also contains selected earlier judgments.[25] The search engine allows persons to search for cases using various search criteria. Choosing the word "Community" as a search criterion yielded 20 457 cases which were more or less related to EU law or in which EU law was at least referred to by the parties or touched upon by the respective court.[26] The fact that there are such a high number of cases in which the EU law issues were brought up indicates the relevance of this law for the administrative jurisdiction. With the aid of such an excellent

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[22] *See* Paul J.G. Kapteyn, *Europe's expectations of its judges*, in EUROPEAN AMBITIONS OF THE NATIONAL JUDICIARY 181, 187 (Rosa H.M. Jansen et al. eds., 1997).

[23] Marta Cartabia, *Taking Dialogue Seriously. The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union*, 12 JEAN MONNET WORKING PAPERS 41 (2007).

[24] Except some of the judgments and resolutions of the Polish Supreme Court and the Constitutional Tribunal , there is no direct internet access to the case-law of first and second instance common jurisdiction courts in Poland. Some judgments are published and commented in the Orzecznictwo Sądów Polskich (Jurisprudence of Polish Courts) and in the commercial legal (on-line) data bases, such as Lex.

[25] *Available at:* http://orzeczenia.nsa.gov.pl/cbo/query.

[26] Data as of 1 August 2010. The word Community and its various declensions in the Polish language were used in the search engine. 4785 of the cases originated from the Supreme Administrative Court. In addition, phrases such as "supremacy of EU/EC law", "direct effect", "directive", "direct applicability" , "effectiveness of EU law" and alike were entered in the search engine. In as much as 1530 cases in term "the principle of supremacy of EU law" was detected.

research tool the author accomplished a process of screening of the reasoning provided to the multitude of judgments and decisions which in any way related to EU law. Subsequently, all the preliminary ruling references to the ECJ which originate from the administrative courts were examined. In the present article cases originating from both levels of administrative jurisdiction are brought up. The focus is however put on first instance courts since they are literally the first instance courts for EU law issues. It should be kept in mind that the merits of the investigated cases have not been looked into. Whether the courts interpreted the provisions of substantive EU law in question correctly was also not examined. The primary objective of the present study was to infer how the courts approach EU law and whether and how they observe the legal obligations stemming from EU law. Nevertheless, it should not be forgotten that a few years after joining the EU the courts found themselves in a transitional period and many cases concerned situations prior to the accession on which EU law could bear only indirectly. Furthermore, due to some deficiencies in knowledge of and experience with EU law among judges, the line of jurisprudence was wavering in the initial stage of the membership. For the foregoing reasons the emphasis is mostly (but not exclusively) put on the judgments which were given in the last three years of the membership.

On the basis of the reviewed case-law and the respective preliminary ruling references the general trends in the attitude towards EU law and its principles were assessed. The author limited herself to a strictly normative and one-sided approach to the issue and has not attempted to embark on the political discourse which would aim at providing explanations of the judicial behaviour present among the Polish administrative courts judges, their involvement in the preliminary ruling procedure or the reasons underpinning the habit of obedience attached to EU law which they display.

D. The Place of Administrative Adjudication in the Judicial Architecture in Poland

In accordance with Art.175 of the Polish Constitutions, the administration of justice is carried out by common courts, administrative courts and military courts.[27] Article 184 of the Constitution specifies that the Supreme Administrative Court together with administrative courts exercise control over the performance of the public administration. In that sense, administrative courts decide upon complains against the 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.[28] Delivering judgments on the conformity with statutory law of the

[27] See the Constitution of the Republic of Poland, Art. 175, 2 April 1997, Official Journal No.78, item 483.

28 *See* Act on proceedings before administrative courts of 30 August 2002, art. 3, para. 1-4, Official Journal No.153 item 1270 with amendments.

resolutions of organs of local authorities and normative acts of territorial organs of government administration belongs to the competences of the administrative jurisdiction.[29] Further, the scope of the functions and activities of the administrative courts is regulated in the Act on Administrative Courts Regime[30] and the law on Proceedings before Administrative Courts[31].

Importantly, administrative courts can (partly) revoke, annul or uphold the administrative act in question and in that sense they are not competent to issue any new administrative decision that would affect persons' rights and obligations.[32] Put differently, an administrative court does not participate in the administrative decision-making process but decides about the legality and fairness thereof by examining whether the law was properly interpreted and applied by the administrative body at stake.[33] If the court is of the opinion that the body in question indeed misinterpreted the law and applied it incorrectly, the case is sent back to the authority for a reopening and the administrative body is supposed to apply the interpretation of the law provided by the respective court. [34] The most common issues the administrative jurisdiction deals with relate to administrative decisions of public bodies such as for instance tax injunctions or building permits. The complexity and broadness of the realm regulated by substantive administrative law in Poland implies, however, that the cases administrative courts deal with may pertain to nearly all areas of life and human activity. [35]

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[29] *See* Act on proceedings before administrative courts of 30 August 2002, art. 3 para. 5-7 of the Official Journal No.153 item 1270 with amendments.

[30] Act on a system of administrative courts of 25 July 2002, Official Journal No. 153 item 1269 with amendments.

[31] Act on proceedings before administrative courts of 30 August 2002, Official Journal No.153 item 1270 with amendments.

[32] *See* Act on proceedings before administrative courts of 30 August 2002, art.145 para.1Official Journal No.153 item 1270 with amendments which stipulates that an administrative court may annul a decision or an order in whole or partly if it finds an infringement of material law which constitutes a basis for the respective decision/order, an infringement of law enabling reopening of administrative action, infringement of other procedural norms which could have an essential impact on the decision. The administrative court may also invalidate a respective decision/order in a whole or partly if the requirements stated in art.156 of the Code of Administrative Proceeding are met or states that the respective decision/order was issued in breach of the law if the grounds stipulated in the Code of Administrative Proceeding or other norms are met.

[33] KAZIMIERZ PIASECKI, *ORGANIZACIJA WYMIARU SPRAWIEDLIWOŚCI W POLSCE* (The organization of the justice administration in Poland) 178 (2005).

[34] *See* art.153 of the Act on proceedings before administrative courts of 30 August 2002, Official Journal No.153 item 1270 with amendments which explicitly states that a decision of administrative court is binding on the respective administrative body.

[35] STANISŁAW J. FRANKOWSKI, INTRODUCTION TO POLISH LAW 153 (2005).

The administrative jurisdiction consists of first and second instance courts. The Supreme Administrative Court located in Warsaw is an appellate and cassation court for the judgments of sixteen lower voivodship administrative courts.[36]. A proceeding before a VAC is always initiated by an individual who files a complaint against a decision of an administrative body. Likewise, an individual may appeal to the SAC against a judgment of a voivodship court or apply for a cassation. Administrative courts judges have relatively wide discretionary powers. It is up to them which legal basis they select and they are not bound by either the claims and motions which are put forward by the claimant or the legal basis he wishes to rely on.[37] The *iura novit curia* principle implies therefore that the court decides within the limits of the respective case but is not limited to the legal arguments which are advanced by the parties and it alone *ex officio* decides which law applies to a particular case, and how.

E. EU law in the Jurisprudence of the Polish administrative Courts

I. Principles of Supremacy and Direct Effect

From a very cursory screening of the available case-law referring to the principles of supremacy and direct effect it becomes clear that the courts frequently refer to both tenets in their jurisprudence, even in cases when EU law provisions do not constitute the most decisive legal arguments but play merely a subsidiary role. The reviewed case-law also shows that the courts are quite knowledgeable of relevant case-law of the European Court and they often extensively refer to it.[38] Most frequently EU law elements are addressed in cases pertaining to issues of (indirect) taxation, customs, agriculture, public procurement, social security and industrial property.[39] The nature of the occurring EU law aspects is multifold and may relate to the problem of interpretation of directly applicable provisions of EU regulations[40] the application of the Treaty provisions and, in the

[36] The list of the VACS, *available at*: http://www.nsa.gov.pl/index.php/pol/NSA/Wojew%C3%B3dzkie-S%C4%85dy-Administracyjne/(offset)/10.

[37] *See* Act on proceedings before administrative courts of 30 August 2002, art.134, para.1, Official Journal No.153 item 1270 with amendments. For more check DENNIS GALLIGAN, MARCIN MATCZAK, STRATEGIES OF JUDICIAL REVIEW. EXERCISING JUDICIAL DISCRETION IN ADMINISTRATIVE CASES INVOLVING BUSINESS ENTITIES (2005).

[38] *See* for instance I SA/Sz 258/10 of 15 July 2010, VAC in Szczecin, I SA/Wr 501/10 of 20 July 2010, VAC in Wrocław, I SA/Sz 202/09 of 13 May 2009.

[39] *See* also Naczelny *Sąd Administracyjny, Informacja o działalności sądów administracyjnych w 2009* (Information on the functioning of the administrative courts in 2009) 172 (2010).

[40] *See* for instance I SA/Sz 620/09 of 4 November 2009, VAC in Szczecin, I SA/Bk 257/09 of 25 September 2009, VAC in Białystok, III Sa/Gd 90/09 of 19 March 2009, VAC in Gdańsk, II SA/Bk 251/09 of 15 October 2009, VAC in Białystok, II SA/Lu 810/08 of 2 June 2009, VAC in Lublin.

overwhelming number of cases, the implementation, interpretation and application of EU directives. Importantly, those are the claimants who frequently bring the issues of EU law to the courts and wish to rely on EU law and argue the incompatibility of the national regulations with EU provisions.

In a multitude of cases, the courts clearly recognize and accept the principle of supremacy of EU law and its place in the national legal order, they frequently refer to it and often emphasize that it is the most pivotal rule of EU law.[41] In some instances the courts go as far as to deliver quite progressive reasoning, as for instance it happened in the judgment of VAC in Gdańsk in which the court held that preventing a Polish citizen and at the same time EU citizen from altering his first and second name in Poland whereas it was possible in Germany could hamper free movement of persons in the EU which is guaranteed by the Treaty.[42] It is worth noticing that in many instances the courts spend a considerable amount of time and space on a comprehensive elaboration on the role of EU law in the national legal order and the implications of the principle of supremacy and direct effect. It shall, nonetheless, be highlighted that the courts often conduct a sort of a "copy and paste" exercise by placing in each case in which EU law may have some bearing extensive – in some cases pages long – dissertations concerning the Poland's membership in the EU and the implications thereof, the EU legal principles which are applicable and the role of national courts within the processes of application of EU law.[43] Such a practice, even though somewhat tedious and in some instances redundant, is however praiseworthy. Not only does it show that EU law has received recognition and acceptance on the part of the courts and consolidates the line of jurisprudence but it also disseminates and enhances the knowledge of EU law among the attorneys.

The precise formulation of EU law arguments which are brought up by the courts may vary between particular VACs but in most cases they come down to stating that Poland has become a member of the EU which implicates that EU law must be observed since it constitutes part of the national legal order and takes precedence over the national legal provisions in case of incompliance. The courts recognize that it is their obligation to examine whether national provisions are compatible with EU law and if necessary they are supposed to set aside the national provisions which are in contradiction with EU law

[41] *See* for instance I SA/Ke 425/08 of 17 December 2008, VAC in Kielce, III SA/Gl 406/08 of 26 June 2008, VAC in Gliwice, I SA/Bd 268/05 of 20 May 2005, VAC in Bydgoszcz, I SA/Bd 414/10 of 7 July 2010, VAC in Bydgoszcz, I SA/Po 704/07 of 14 June 2007, VAC in Poznań.

[42] Using different names would namely hamper free travelling between the countries and a proper functioning in the broadly understood economic environment. *See* case III SA/Gd 546/04 of 20 October 2005, VAC in Gdańsk. Moreover, the court argued that if all possible pro-European interpretations of the national law in question would still not allow to formally alter his name then in the light of the principle of supremacy of EU law over national law it would not be possible to apply the national provisions.

[43] *See* for instance III SA/Wa 3329/08 of 27 May 2009, VAC in Warsaw.

provisions. The following citations adequately reflect the approach taken toward the issue by many of the courts:

> On the 1st of May 2004 European Community law provisions, including the Council directives, became an integral part of the national legal order. The rules of superiority and supremacy of EC law over national law do not trigger off any doubts when seen in the light of jurisprudence of the European Court of Justice. Therefore, as correctly noticed by the claimant, the party may directly rely on the provisions of directives before both administrative bodies and the court. [44]

Or in a similar vein,

> From the above-mentioned provisions of the Constitution it follows that international agreements ratified by Poland become a part of the national legal order and in principle they shall be directly applied by public administration bodies in individual cases. Those agreements which were ratified on the basis of the consent expressed in a statute take precedence over that statute if the statute is not in line with the agreement. The foregoing also applies to Community law (...) To recapitulate, the excise duty paid by the claimant was imposed in accordance with national provisions which were not in compliance with Art.90 EC Treaty (now Art.110 TFEU) which take precedence over national provisions.[45]

Consequently, in some cases the courts observe that the questioned national provisions are indeed in breach of EU law, be it provisions of EU directives, general principles of EU law[46] or rules enshrined in the Treaties, and should therefore be set aside. As a result, the courts rule that the provisions following from EU law should be applied directly.[47] With

[44] Case I SA/op 348/05 of 9 March 2006 VAC in Opole, translation by the author.

[45] Case I SA/Łd 980/05 of 9 November 2005, VAC in Łódź, translation by the author.

[46] Such as for instance the principle of proportionality.

[47] Case III SA/Wa 2219/05 of 12 October 2005, VAC in Warsaw, I SA/Bk 221/08 of 3 September 2008, VAC in Białystok, , III SA/Wa 82/07 of 31 August 2007, VAC in Warsaw, III SA/Wa 173/08 of 30 April 2008, VAC in Warsaw, III SA/Wa 3329/08 of 27 May 2009, VAC in Warsaw, III SA/Wa 613/09 of 28 September 2009, VAC in Warsaw, III SA/Wa 13/09 of 25 May 2009, VAC in Warsaw, III SA/Wa 1278/08 of 29 October 2008, VAC in Warsaw, I SA/Lu 54/09 of 11 March 2009, VAC in Lublin, I SA/Bk 372/08 of 11 May 2008 , VAC in Białystok, I SA/Bd 375/06 of 19 July 2006, VAC in Bydgoszcz, I SA/Bk 374/08 of 15 October 2008, VAC in Białystok, I SA/Bk 447/08 of 17 December 2008, VAC in Białystok, I SA/Bd 526/08 of 25 November 2008, VAC in Bydgoszcz, III SA/Gd 154/08 of 10 September 2008, VAC in Gdańsk, I SA/Ke 110/08 of of 19 June 2008, VAC in Kielce I SA/Ke 111/08 of 19 June 2008, VAC in Kielce, I SA/Kr 1255/09 of 16 October 2009, VAC in Cracow, III SA/Kr 141/07 of 26 April 2007, VAC in Cracow, III SA/Po 123/10 of 7 April 2010, VAC in Poznań, I SA/Po 947/08 of 9 October 2008, VAC in Poznań, I

regard to the foregoing citations, it is worth mentioning that the administrative courts frequently argue that the national Constitution, and more precisely Art. 87 and 91 thereof, is the primary source of the binding force of EU law and the principle of its supremacy.[48] However, such an argument is by no means straightforward for it might imply that the administrative courts, in line with the judgments of the Polish Constitutional Tribunal[49], could possibly reject the notion of the absolute supremacy of EU law.

Importantly, it follows from the case-law that the courts reaffirm the position taken by the ECJ with regard to the application of EU law by public administration and state that the national authorities are bound to apply EU law and if possible interpret the national provisions in conformity with EU law, or failing this, to set aside national incompatible provisions. In the opinion of the courts, failure to comply with this obligation would amount to a serious infringement of EU law but also of the rule of law and legality which follows from the national Constitution.[50]

The foregoing line of arguments does not imply that the direct application of EU law has entirely been smooth. Even though the courts do recognize the principles of supremacy and direct effect of EU law and emphasize the place of EU law, quite a number of contradictory judgments have been delivered to date. Neither should it come as a surprise that courts make more or less grave mistakes when it comes to the application of EU law. For instance, such a mistake was made by VAC in Bydgoszcz which had doubts as to the binding force of Commission Regulation 1972/2003 due to its inaccessibility in the Polish language. In consequence, the court refused to apply the Regulation.[51] However, as it

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SA/Rz 582/08 of 9 December 2008, VAC in Rzeszów, I SA/Sz 808/06 of 18 July 2007, VAC in Szczecin, I SA/Wr 946/09 of 25 August 2009, VAC in Wrocław, I SA/Wr 399/08 of 3 September 2008, VAC in Wrocław.

[48] *See* the Constitution of the Republic of Poland of 2nd April 1997, J.L. No 78, item 483. Art. 87 stipulates that the sources of universally binding law of the Republic of Poland include: the Constitution, statutes, ratified international agreements and regulations and enactments of local law which are a source of universally binding law of in the territory of the organ issuing such enactments. Art.91 regulates the position of the international agreements by stating that after promulgation thereof in the Journal of Laws they constitute part of the domestic legal order and are to be applied directly, unless its application depends on the enactment of a statute. An international agreement ratified upon prior consent granted by statute takes precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. Finally, if a ratified agreement establishing an international organization so provides, the laws established by it are applied directly and take precedence in the event of a conflict of laws.

[49] *See* the judgment of the Constitutional Tribunal on the European Arrest Warrant of 27 of April 2005 P I/05 and the judgment on the Accession Treaty of 11 of May 2005 K 18/04.

[50] Case I SA/Bk 221/08 of 3 September 2008, VAC in Białystok.

[51] Case I SA/Bd 275/05 of 20 July 2005, VAC in Bydgoszcz. It should however be pointed out that the court observed that the notion of validity of an act is not equivalent to the notion of application and that obligations put on individuals may not stem from unpublished Community legal acts. In that sense the court based its reasoning on the principle of legitimate expectations and legal certainty. See Roman Hausner & Robert Talaga, *Publikacja rozporządzeń WE w języku krajowym a ich stosowanie przez sądy administracyjne* (Publication of EC

follows from the settled case-law of the ECJ, provided that a national court has doubts as to the validity of an Union's legal instrument it is obliged to refer a preliminary question to the ECJ and may not independently set such a legal act aside.[52] The reviewed case-law reveals that there are more individual examples where VACs refused to apply EU regulations.[53] It should also be observed that a considerable number of judgments in which both principles are touched upon concern one and the same issue: the excise duty which was imposed on second-hand vehicles over two years old imported from other EU member states. The line of case-law delivered across the country had shown various approaches the national courts took to the problem: whereas some held that national law was in compliance with EU law, others declared national law in breach of EU law and applied the Simmenthal doctrine[54] or even resorted to the procedure of the preliminary ruling reference to the Constitutional Tribunal. The problem has finally found its epilogue in the courtroom of the ECJ which in Brzeziński case ruled on the incompatibility of the national provisions with Art.90 of the EC Treaty (now Art.110 TFEU) whereby it provided the administrative courts across the country with a clear guideline how to proceed with the respective issue and uniformed the national jurisprudence.[55]

With everything considered, it can be observed that the response of Polish administrative courts to the principles of the supremacy and direct effect of EU law has, in general, been positive. Virtually all sources of EU law are approved as sources of binding law. The reviewed case-law shows that the courts not only recognize the role of written EU law for their jurisprudence but also that they take into consideration the relevant case-law of the ECJ which is frequently referred to. Nonetheless, there are instances where the courts proceed incorrectly and experience some difficulties in the direct application of EU law. Such situations do not come as a surprise though and were anticipated before Poland

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regulations in national languages and their application by administrative courts) 41 EPS 4, 6 (2009) and their comments on the judgment and other judgments of Polish administrative courts which touched upon the application of EU regulations not translated into Polish. The reviewed by the authors case-law reflects different approaches Polish administrative courts take to the problem.

[52] Case 314/85, *Foto Frost* v. *Hauptzollamt Lübeck-Ost,* 1987 E.C.R. I-4199. The problem of the forcibility of Union's act unpublished in the language of a Member State has finally been resolved by the Court in a ruling provided to the question referred by a court of another New Member State, *see* Case C-161/06 *Skoma*-Lux sro v. Celní ředitelství Olomouc, 2007 E.C.R. I-10841. *See* also Michal Bobek, Learning to Talk: Preliminary Rulings, the Courts in the New Member States and the Court of Justice, 45 COMMON MARKET LAW REVIEW (CMLRev) 1611 (2008).

[53] *See* for instance I SA/Lu 438/09 of 4 November 2009, VAC in Lublin, I SA/Lu 443/09 of 13 November 2009, VAC in Lublin.

[54] Meaning that the national court sets aside the incompatible national provision and applies the EU law provision instead., *see* Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA,* 1979 E.C.R. 629, para. 21.

[55] *See* Case C-313/05 *Maciej Brzeziński* v. *Dyrektor Izby Celnej w Warszawi,* 2007 E.C.R. I-513. *See* also the reasoning in the procedural decision of the Constitutional Tribunal P 37/05 of 19 December 2006 which illustrates the divergences in jurisprudence concerning the issue.

joined the EU.[56] This is also reflected in the fact that there are instances where various courts proceed differently in similar cases which involve EU law elements. Likewise, the courts differ in understanding the precise scope of the obligations following from the principle of supremacy and direct effect and frequently they provide for different sources of those obligations.[57] Finally, the courts tend to blur the line between the instrument of direct effect and that of harmonious/conforming interpretation – a problem which will be addressed in the subsequent part of this paper.

II. The Principle of Harmonious Interpretation

The EU principle of indirect effect/harmonious interpretation[58] seems to occupy a special place in the jurisprudence of the Polish courts. Its significance was recognized by the highest national courts already prior to the membership in the EU as the principle was considered to be an optimal manner to approximate national law to EU law before the accession.[59] It does not come as a surprise that at that moment in time it was stipulated that EU law was (yet) not binding in Poland and would not take precedence over national law. The conforming interpretation was thus seen as a voluntary exercise which allowed the national courts to participate in the judicial collaboration across the EU.[60] It is yet necessary to observe that the obligation of conforming interpretation as interpreted in the Polish doctrine and by the national courts is at times different from the definition of consistent interpretation/indirect effect as put forward by the ECJ which pertains to situations when provisions of an EU directive cannot be relied upon by individuals for they are not directly effective.[61]In Poland, the notion of conforming interpretation is frequently interpreted very broadly and in fact encompasses the obligations following from the principle of supremacy and direct effect. As put by Wentkowska the notion of conforming

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[56] *See* BIERNAT, *supra* note 7, at 175.

[57] Dawid Miąsik, *Application of general principles of EC law by Polish Courts*, in GENERAL PRINCIPLES OF EC LAW IN A PROCESS OF DEVELOPMENT 357, 378 (Ulf Bernitz et al Ed., 2000).

[58] Interchangeably called conforming interpretation, interpretation in the light of EU directives, friendly interpretation, consistent interpretation. In the Polish doctrine the principle is predominantly referred to as a pro-Community interpretation.

[59] *See* judgment of the Constitutional Tribunal of 28 January 2003, K2/02, part II point 4.4 of the reasoning in which the Tribunal held that interpreting national law in the light and spirit of EC law may and should be employed as the cheapest and quickest instrument of realizing the obligation to harmonize the law in the pre-accession period; *see* also judgment of the Supreme Court of 17 February 2004 I PK 386/03, judgment of the SAC, V SA 305/00 of 12 February 2001.

[60] Miąsik, *supra* note 57, at 359.

[61] In that sense the principle of indirect effect implies the obligation to interpret national law in conformity with EU directives.

interpretation has its roots in the principle of solidarity and "is strictly bound with the supremacy, efficiency or procedural autonomy principles" and later on the author states that the principle of conforming interpretation implies, inter alia, a refusal to apply national law. [62] This terminological confusion results in frequent inconsistencies which may be detected in the case-law. It follows that some courts indeed blur the line between the direct effect and harmonious interpretation and name both principles as a pro-European interpretation of national law.[63] What is more, this somewhat perplexing and odd practice which definitely creates disarray in the line of jurisprudence is well established in the jurisprudence of the Supreme Administrative Court and is now extensively referred to by VACs.[64]

From the line of jurisprudence of the administrative courts it follows that the pro-European interpretation of the national provisions occupies an important place in their methodology.[65] The jurisprudence of the ECJ and the loyalty principle, as well as the provisions of the Polish Constitutions are given as the principles underpinning the rule.[66] It is, however, evident that the courts tend to refer to both principles, that is supremacy and direct effect and harmonious interpretation, and only after presenting the whole line of arguments do they decide which tool is more appropriate to use in the final decision.[67] Often, the consistent interpretation is seen as a supplementary tool of the last resort

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[62] Aleksandra Wentkowska, *A 'secret garden' of conforming interpretation – European Union law in Polish courts five years after accession*, 12 YEARBOOK OF POLISH EUROPEAN STUDIES (YPES) 127, 128 (2009).

[63] For instance the SAC in case I FSK 600/07 of 13 May 2008 correctly recognizes that an individual may directly rely on sufficiently precise and unconditional provision of a directive in case of non- or incorrect interpretation and it states that in such a situation the administrative court must set aside the national provision and apply EU law provision instead. However, the SAC refers to the foregoing as to the pro-European interpretation. In the whole judgment the SAC refer interchangeably to direct effect and harmonious interpretation to finally decide that pro-European interpretation may not go beyond the literal meaning of the national provision in question because it would impose new obligations on the party.

[64] For instances Cases III SA/Wa 445/10 of 18 June 2010, VAC in Warsaw, I SA/Po 288/10 of 17 June 2010, VAC in Poznań, I SA/Ol 704/09 of 13 December 2009, VAC in Olsztyn. Interestingly, in the academic writing it is also often referred to the principle of "Pro-European interpretation" which is interpreted in a very general way and encompassing the principle of supremacy and direct effect or even the fact of resorting and referring to EU law, see for instance Robert Zenc, *Prowspólnotowa wykładnia polskiego prawa administracyjnego* (Pro-European interpretation of Polish administrative law) in WYKŁADNIA PRAWA UNIE EUROPEJSKIEJ 273 (Cezary Mik ed., 2008).

[65] According to for instance VAC in Białystok the harmonious interpretation is one of the basic conditions which can guarantee a proper relationship between national and EU law and allows the courts to avoid resolving the problems of the relationship at the level of the EU, *see* Case I SA/Bk 221/08 of 3 September 2008, VAC in Białystok.

[66] *See* Case III SA/Gl 1308/08 of 16 September 2009, VAC in Gliwice, III SA/Gl 1312/08 of 20 February 2009, VAC in Gliwice approved by the SAC in case I GSK 1008/09 of 30 June 2010.

[67] *See* Case I SA/Po 194/10 of 23 June 2010, VAC in Poznań.

applicable in situations when the EU law provision at issue cannot be applied directly.[68] The courts also observe that if the national provision in question is only partly incompatible with EU law then there is no obligation to apply the principle of supremacy and direct effect, but it is still necessary to interpret the national provisions in conformity with EU law.[69] The obligation to interpret national law in the light of EU law is not seen in absolute terms. In line with the case-law of the European Court the courts point out that such a way of interpreting national provisions may not lead to *contra legem* results, may not impose new obligations on individuals and is limited to "as far as possible" interpretation which will allow the courts to arrive at the result prescribed by the directive.[70] The *contra legem* interpretation is, in turn, grasped as interpretation which leads to results which are at clear variance with the literal/textual interpretation of the respective provisions.[71] The *clara non sunt interpretanda* assumption implies therefore that pro-European interpretation should not be employed when textual interpretation of national provisions does not leave any room for doubts and in order to arrive at the results which may be achieved only in the legislative process.[72] In that sense, it may be claimed that the obligation to harmoniously interpret national law is perceived rather tightly and the courts vividly emphasize the priority of the textual interpretation in their methodology.[73] By the same token, the teleological, functional and comparative reading of law might be approached with distrust and reluctance.[74] The foregoing observations

[68] *See* Case III SA/Gl 1308/08 of 16 September 2009, VAC in Gliwice, III SA/Gl 1294/08 of 27 January 2009, VAC in Gliwice approved by the SAC in I GSK 995/09 of 29 June 2010, I SA/Lu 130/10 of 18 June 2010, VAC in Lublin.

[69] *See* Case III SA/Gl 1312/08 of 20 February 2009, VAC in Gliwice approved by the SAC in case I GSK 1008/09 of 30 June 2010.

[70] *See* Case I SA/Po 194/10 of 23 June 2010, VAC in Poznań, I SA/Op 495/09 of 15 January 2010, VAC in Opole, III SA/Wa 497/10 of 18 June 2010, VAC in Warsaw, I FSK 600/07 of 13 May 2008, SAC in Warsaw.

[71] *See* Case I SA/Bk 562/09 of 20 January 2010, VAC in Białystok, I SA/Op 495/09 of 15 January 2010, VAC in Opole, I SA/Wr 1620/09 of 14 December 2009, VAC in Wrocław, III SA/Wa 571/09 of 30 September 2009, VAC in Warsaw.

[72] *See* Cases: III SA/Wa 2322/09 of 11 May 2010, VAC in Warsaw, III SA/Wa 3537/06 of 13 July 2007, VAC in Warsaw and III SA/Wa 988/06 of 20 October 2005, VAC in Warsaw.

[73] *See* also ŁĘTOWSKA, *supra* note 7, who claims that "Polish courts are fond of textual interpretation and sometimes they attach too much importance thereto" and adds that in Poland the courts are not well aware of the obligation of harmonious interpretation and do not have the necessary skills to proceed with it. Elsewhere it is observed that "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". *See* Marek Zirk-Zadowski, *Transformation and integration of legal cultures and discourses – Poland*, in SPREADING DEMOCRACY AND THE RULE OF LAW? 299, 310 (Wojciech Sadurski, Adam Czarnota & Martin Krygier eds. 2006).

[74] The reluctance to employ different methodological tool by the courts in the New Member States is quite intensively discussed in the academic literature, see for instance Zdeněk Kühn, *The application of European law in the new member states: several (early) predictions* 3 German Law Journal 563-582 (2005); Michal Bobek, *A new legal order, or a non-existent one? Some (early) experiences in the application of EU law in Central Europe*, 2 CROATIAN YEARBOOK OF EUROPEAN LAW AND POLICY (CYELP) 265 (2006).

indicate that the principle of indirect effect has been and remains somewhat perplexing an issue for Polish courts which in turn might endanger the effectiveness of EU law. The proper functioning of national courts in their European capacity evidently implies the necessity of a decline of the paramount role of linguistic interpretation of texts. The strong attachment to the textual and legalistic interpretation of legal provisions with its strictly literal interpretation of "the most-locally-applicable-rule"[75] which is present in the Polish judicature and follows from the positivistic legal culture results in the lack of skills and willingness to employ distinct methodological tools. As claimed by Zirk-Sadowski "Polish lawyers rarely use this type of interpretation as it is considered to be most susceptible to a breach of the principle of legalism. This results from a very narrow, positivist understanding of law in Poland assuming that the content of law is originally expressed by the law-maker and is only read by lawyers in the process of the application of law."[76] The foregoing has, in fact, been indicated as one of the most heavyweight problems rendering the proper functioning of the national judicature as EU courts difficult in practice.[77] Some courts have themselves observed that applying pro-European interpretation may induce a total change in their functioning since the novel way of interpreting national provisions is aimed at arriving at the European objectives.[78] Despite those concerns, it shall be observed that from the reviewed case-law it follows that Polish administrative courts do attempt to undertake the effort to interpret national law in a way which will allow courts to arrive at the EU objectives and will eventually secure *effet utile* of EU law.

III. Effectiveness of EU Law

Before embarking on the discussion with regard to the application of the principle of effectiveness of EU law, it seems necessary to observe that the principle itself is deemed an elusive, indeterminate and "vague and multifarious concept of EU law".[79] The case-law reveals however that the courts frequently and willingly refer to the principle of *effet utile*.

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[75] From Marcin Matczak, Matyas Bencze, Zdenek Kühn, *Constitutions, EU law and judicial strategies in the Czech Republic, Hungary and Poland*, 30 JOURNAL OF PUBLIC POLICY (JPP) 81, 82 (2010). The authors have conducted an extensive analysis of the case-law of national administrative courts and came to the conclusion that judges predominantly resort to a linguistic interpretation of legal texts and judicial formalism.

[76] Marek Zirk-Sadowki, *The judicature of Polish administrative courts after the accession to the EU*, 15 EIF WORKING PAPER SERIES 19, 25 (2006).

[77] *See* Adam Bodnar, *Comment on Katharina Pabel – the right to an effective remedy in a polycentric legal system,* 6 GERMAN LAW JOURNAL 1617 (2005); ŁĘTOWSKA, *supra* note 9; and various authors in EWA POPŁAWSKA, *KONSTYTUCJA DLA ROZSZERZAJĄCEJ SIĘ EUROPY* (A constitution for the expanding Europe) (2000).

[78] *See* Cases: III SA/Gl 1308/08 of 16 September 2009, VAC in Gliwice, III SA/Gl 1294/08 of 27 January 2009, VAC in Gliwice, I SA/Lu 840/09 of 16 April 2010, VAC in Lublin.

[79] MITCHEL DE S.-O.-L'E LASSER, JUDICIAL DELIBERATIONS. A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 212 (2004).

Yet there are instances in which courts have incorrectly referred to the principle of effectiveness as to the principle of equivalence.[80] It may also be observed that at times the courts list the principle next to the rules of supremacy and direct effect as one of the basic systemic doctrines of the application of EU law.[81]

It is pointed out that the principle *of effet utile* of EU law is derived from the principle of loyalty[82] and often it is interpreted in a very extensive manner. Likewise, many courts observe that the doctrine of indirect effect is underpinned by the principle of effectiveness and is the last instrument of ensuring thereof.[83] The principle is also referred to jointly with the principle of supremacy and direct effect. The process of setting aside national provisions which are incompatible with EU law is namely seen as one of the manners to ensure the effectiveness of EU law[84] or, in a similar vein, in accordance with the principles of direct effect, supremacy and effectiveness, EU law provisions take precedence over national regulations.[85] Also the rules of direct effect allowing individuals to directly rely on sufficiently clear and unconditional provisions of directives in case of non-implementation or incorrect implementation thereof are seen as the way to ensure *effet utile* of EU law.[86] Furthermore, the courts refer to the principle in the context of the application of the interpretations of EU law provided by the ECJ stating that non-application of the judgments of the Court could hamper the effectiveness of EU law.[87] And yet there are also examples of direct application of the principle to be found. In several cases heard by the VAC in Białystok, the effectiveness of EU law was referred to in the context of the national procedures and the right to an effective judicial remedy. The court held that in line with the principle of effectiveness of EU law, individuals must have the right to the excise duty rebate regardless of the national procedural rules which in fact did not provide for such a

[80] *See* I SA/Wr 290/09 of 19 june 2009, VAC in Wrocław, III SA/Gl 1308/08 of 16 September 2009, VAC in Gliwice, III SA/Gl 1323/08 of 13 February 2009, VAC in Gliwice, I SA/Wr 281/08 of 10 December 2008, VAC in Wrocław and tens of other judgments of the VAC in Wrocław.

[81] Case I SA/Go 83/10 of 27 May 2010, VAC in Gorzów Wlkp, I SA/Bd 514/10 of 27 of August 2010, VAC in Bydgoszcz, I SA/Bd 507/10 of 20 July 2010, VAC in Bydgoszcz, I SA/Lu 77/05 of 25 May 2005, VAC in Lublin, III SA/Wa 2962/06 16 January 2007, VAC in Warsaw.

[82] Cases I SA/Go 1015/07 of 18 December 2007, VAC in Gorzów Wlkp, III SA/Wa 133/10 of 21 May 2010, VAC in Warsaw, I SA/Gd 637/06 of 26 January 2007, VAC in Gdańsk , I SA/Gd 900/09 of 26 January 2010, VAC in Gdańsk.

[83] Case III SA/Gl 1309/08 of 16 September 2009, VAC in Gliwice, I SA/Gl 1137/05 of 26 April 2006, VAC in Gliwice.

[84] Case III SA/Kr 199/09 of 27 August 2009, VAC in Cracow.

[85] Case I SA/Lu 607/05 of 7 April 2006, VAC in Lublin, III SA/Wa 1767/06 of 19 January 2007, VAC in Warsaw.

[86] Case I FSK 1244/08 8 July 2009, SAC in Warsaw.

[87] Cases I SA/Go 1015/07 of 18 December 2007, VAC in Gorzów Wlkp, I SA/op 92/09 of 13 July 2009, VAC in Opole, III SA/Wa 1367/08 25 of June 2009, VAC in Warsaw.

possibility.[88] *Ipso facto*, not only a civil company but also the share holders of the partnership which ceased to exist should be ensured effective judicial protection of their rights which stem from the law of the EU and must be reimbursed for the excise duty they have paid.[89]

The foregoing arguments illustrate that administrative courts perceive the principle of effectiveness of EU law as a general rule which underpins other EU law systemic principles. In turn, the ultimate objective of other systemic principles is to arrive at the result which will ensure the full effectiveness of EU law.[90] In that sense, the principle of effectiveness of EU law occurs in the case-law of administrative courts in the context of or next to other principles of EU law such as supremacy, direct effect and indirect effect and, in that regard, it predominantly plays a subsidiary and/or supplementary role.

IV. Participation in the Preliminary Ruling Procedure

The participation of national courts in the process of a dialogue with the European Court in Luxembourg is commonly recognized as the main determinant of the level of Europeanization of national judiciary and the habit of obedience they attach to EU law and the principle of supremacy of EU law. To date there have been twenty references from Polish administrative courts to the ECJ. Nine references originate from the voivodship administrative courts and the remaining eleven from the SAC. The other essential point to note is the fact that the parties to the proceedings frequently claim that a preliminary question should be referred to the ECJ. In many cases those motions of the parties are found groundless and in consequence dismissed due to either an existing *acte clair* or *acte*

[88] The facts of the case are as follows: WK and MF went into partnership and in the framework of the economic activity performed by the partnership they purchased a passenger car abroad. In accordance with the valid at the time national rules the partnership had to pay the excise duty which was levied on the respective car. The partnership applied for the excise duty rebate but their application was rejected. In March 2007 the partnership ceased to exist. In the meantime the judgment in case *Brzeziński* was pronounced which implied that the national rules levying the duty were not in compliance with EU law (see note 55). In March 2008 WK and M, being at the time natural persons since their partnership had already ceased to exist applied for reopening of the proceeding and the excise duty rebate. However, the proceeding was discontinued since the duty was paid by the partnership and not by WK and MF themselves who were classified as third party to the proceeding and the national procedural rules do not provide for excise duty rebate to the persons which did not pay them.

[89] Case I SA/Bk 207/10, 208/10, 209/10, 210/10 of 25 June 2010, VAC in Białystok, also the preceding and following judgments.

[90] Case I SA/Wr 128/06 of 31 October 2006, VAC in Wrocław.

éclairé situation[91] in the respective area or the lack of relevance of the EU provisions at issue for the dispute in question.[92]

The first, ice-breaking reference to the ECJ took place a year after the accession to the EU and originated from the VAC in Warsaw. The problem concerned the already mentioned *Brzeziński* case pertaining to the issue of excise duty imposed on second-hand cars imported from other Member States.[93] The judgment in which the Court held that the national provisions at issue were in breach of EU law put an end to the incoherent approach to the problem presented by the national administrative courts and the national administration. In consequence, the administrative courts accepted the ruling of the Court and recognized that the aggrieved parties had the right to reimbursement for the custom they had paid. By the same token, the courts again showed their subordination to the principle of supremacy and recognized the authoritative position of the ECJ within the judicial architecture in the EU.

The second reference sent in February 2006 proved to be somewhat less successful an attempt. In the *Ceramika – Paradyż* case the Court held that it had no jurisdiction to answer the referred question since the problem concerned the situation preceding the membership of Poland in the EU.[94] The following three references also originated from VACs and concerned exclusively the field of taxation and duties. Most of the references came down to the problem of interpretation of the Sixth Council Directive on the

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[91] Doctrine of *acte éclairé* implies that the provision has already been interpreted by the Court. *Acte clair* means that the provision and its interpretation are obvious as to leave no room for doubt and can be deduced from the existing case law.

[92] *See* for instance Cases: II SA/Gl 324/10 of 11 August 2010, VAC in Gliwice, I SA/Lu 743/09 of 26 February 2010, VAC in Lublin, II OSK 1199/09 of 5 November 2009, SAC in Warsaw., III SA/Wa 82/08 of 17 April 2008, VAC in Warsaw. *See* also Stanisław Biernat & Piotr Wróbel, *Stosowanie prawa Wspólnoty Europejskiej w polskim sądownictwie administracyjnym* (The application of EC law by the Polish administrative judicature) in STUDIA PRAWNO-EUROPEJSKIE (Studies on European law) 7 (Michał Seweryński ed., 2007).

[93] *See* Case C-313/05, *Maciej Brzeziński* v. *Dyrektor Izby Celnej w Warszawie*, 2007 E.C.R. I-513. For a more detailed overview of the Brzeziński case and other cases referred by Polish courts see GAWLIK & GRZESZCZAK *supra* note 83, at 55-60.

[94] *See* the order of the ECJ in Case C-168/06 *Ceramika Paradyż sp. z o.o.* v. *Dyrektor Izby Skarbowej w Łodzi*, 2007 E.C.R. I-00029. The question was referred by VAC in Łódź. For the critique of the way the ECJ proceeded with the respective question, i.e. refused to rule on the issue since the alleged irregularity took place before the accession, see Nina Półtorak, *Ratione temporis application of the preliminary rulings procedure*, 45 CMLR 1357, 1372 (2008) who argues that the decision of the ECJ was surprising and incorrect on several points but also has detrimental effect on national courts in new member states since it can discourage them from referring their questions.

harmonization of the laws of the Member States relating to turnover taxes[95] and the scope of Art.90 EC Treaty (now Art.110 TFEU).[96]

In July 2007 the Supreme Administrative Court referred its first question to the ECJ which, similarly to the preceding referrals, concerned the problem of turnover taxes and the previously mentioned Directive.[97] The first reference concerning an issue other than turnover taxes was not sent to the ECJ earlier than December 2007. The problem related to the national provisions which did not permit a reduction of the income tax by the amount of health insurance contributions paid to another Member State.[98] It is, however, the subsequent reference from the VAC in Poznań which related to the issue of the free movement of persons and the interpretation of Articles 43 EC and 49 EC Treaty (now Articles 49 and 56 TFEU respectively) [99] that deserves a special emphasis in the present analysis.

The national provisions which were at stake before the VAC in Poznań were also subject to an earlier judgment of the Constitutional Tribunal in which the Tribunal held that the provisions at issue which pertained to the income tax payable by natural persons were not compatible with Article 2 and 32 of the Polish Constitution.[100] The Tribunal has however decided to postpone the effects of its decision and defer the date on which the provisions will be held to be unconstitutional until 30 November 2008. The ECJ, after finding that the same national provisions are also incompatible with the EC Treaty, added that the principle of supremacy of EU law obliges the national court to apply Community law and to refuse to

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[95] EC Directive 77/388 of 17 May 1977, O.J. 1977 L 145/1 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, with amendments, also known as the VAT directive.

[96] *See* Cases C-25/07, *Alicja Sosnowska* v. *Dyrektor Izby Skarbowej we Wrocławiu, Ośrodek Zamiejscowy w Wałbrzychu,* 2008 E.C.R. I-05129, - the national provisions were found to be in breach of EU law C-414/07 , *Magoora sp. z o.o.* v. *Dyrektor Izby Skarbowej w Krakowie,* 2008 E.C.R. I-10921 – the national provisions were not in conformity with EU law, C-426/*07 , Dariusz Krawczyński* v. *Dyrektor Izby Celnej w Białymstoku,* 2008 E.C.R. I-06021 - the national provisions in question were in principle compatible with EU law provided that conditions stipulated in the earlier Brzeziński ruling were fulfilled.

[97] Case C-502/07, *K-1 sp. z o.o.* v. *Dyrektor Izby Skarbowej w Bydgoszczy,* 2009 E.C.R. I-00161. The national provisions were held compatible with EU law.

[98] Case C-544/07, *Uwe Rüffler* v. *Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu*, 2009 E.C.R. I-03389. The court found that national legislation was incompatible with the EC Treaty.

[99] Case C-314/08, *Krzysztof Filipiak* v. *Dyrektor Izby Skarbowej w Poznaniu,* 2009 E.C.R. 00000. The national provisions were found to be incompatible with the EC Treaty.

[100] *See* judgment of the Constitutional Tribunal on social security and healthcare insurance contributions paid abroad of 7 November 2007, K 18/06 in which the Tribunal held that Art.27b(1) of the Law of 26 July 1991 on income tax payable by natural persons under which the right to a reduction of the income tax by the amount of compulsory health insurance contributions is restricted to contributions paid on the basis of provisions of national law is in breach of Art. 32 and 2 of the Polish Constitution.

apply conflicting provisions of national law, irrespective of the judgment of the national constitutional court which has deferred the date on which those provisions, held to be unconstitutional, are to lose their binding force.[101] Importantly, the VAC in Poznań shared the view expressed by the ECJ and decided that it is necessary to cease from applying the national legal provisions that are incompatible with EU law. Consequently, the court held that, in line with the principle of supremacy of EU law, the national provisions at issue lose their binding force as of 1 May 2004 and not - as the Constitutional Tribunal held - as of 30 November 2008. In that sense, the VAC in Poznań, in order to comply with the supremacy of EU law, evidently set off against the judgment of the Constitutional Tribunal and proved to be a genuine agent of EU law and a special ally of the ECJ.[102]

The reference from the VAC in Poznań was followed by six references from the Supreme Administrative Court, five of which concerned taxation[103] and one that related to industrial policy[104]. After this quite intense participation in the process of a dialogue with the European Court, the SAC has become so enthusiastic about collaborating with the ECJ that it even sent two separate references the same day.[105] Several days later the SAC again referred a question concerning the interpretation of the Council Directive 2006/112/EC[106] and in May 2010 it decided to refer a question with regard to the interpretation of

[101] *Filipiak, supra* note 99, para. 85.

[102] *See* case I SA/Po 1006/09 of 14 January 2010, VAC in Poznań.

[103] Cases C-441/08 *Elektrownia Pątnów II sp. Zoo* v. *Dyrektor Izby Skarbowej w Poznaniu,* 2009 E.C.R. I-10799 – national provisions were found at variance with EU law; C-188/09 *Dyrektor Izby Skarbowej w Białymstoku* v. *Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski sp. J,* 2010 E.C.R. 00000 – national provisions were found compatible with EU law; C-222/09 *Kronospan Mielec sp. z o. o.* v. *Dyrektor Izby Skarbowej w Rzeszowie – pending*; C-438/09 *Bogusław Juliusz Dankowski* v. *Dyrektor Izby Skarbowej w Łodzi,* 2010 E.C.R. I-0000; C-395/09 *Oasis East sp. z o.o.* v. *Minister Finansów,* – pending.

[104] Case C-522/08, *Telekomunikacja Polska SA w Warszawie v. Prezes Urzędu Komunikacji Elektroniczne,* 2010 E.C.R. 00000, national provisions were found compatible with EC Directive 2002/21/EC of 7 March 2002, O.J. 2002 L 108/33 but incompatible with EC Directive 2005/29/EC of 11 May 2005, O.J. 2005 L 149/22.

[105] It was yet clear that both references of 9 April 2010 , which originated from the same chamber of the SAC, could have been collated since they both concerned the problem of interpretation of EC Directive 2006/112/EC of 28 November 2006, O.J. 2006 L 347/1 and EC Directive 77/288/EEC of 17 May 1977, O.J. 1977 L 145/1. Both references were later joined by the order of the ECJ on 21 June 2010 in Case C-180/10 and 181/10, *Jarosław Słaby* v. *Ministrowi Finansów* and *Emilian Kuć, Halina Jeziorska-Kuć* v. *Dyrektor Izby Skarbowej w Warszawie*, - pending.

[106] EC Council Directive 2006/112 of 28 November 2006, O.J. 2006 L 347/1 on the common system of value added tax. Reference in Case 280/10 *Kopalnia Odkrywkowa Polski Trawertyn P. Granatowicz, M. Wąsiewicz (a partnership)* v. *Dyrektor Izby Skarbowej w Poznaniu,* - pending.

Directive 69/335/EEC.[107] In the meantime the VAC in Gliwice resorted to the ECJ with a question concerning the interpretation of Council Directive 69/335/EEC.[108]

With regard to the execution of the judgments of the Court, it may be observed that the courts which referred the questions have complied with the rulings and applied them in the cases at issue. Likewise, all other courts which deal with identical issues refer to and comply with the judgments of the ECJ and apply them in their cases. Yet, It is necessary to acknowledge that there are instances where particular VACs interpret judgments of the Court in different manners as, for instance happened with the judgment given in the Magoora[109] and Brzeziński[110] cases. In that sense, it is readily apparent that some rulings of the ECJ pose considerable interpretation problems to the national courts and may raise nearly as many questions as they resolve.

As to the formal and procedural requirements attached to the preliminary ruling procedure it can be observed that Polish administrative courts very much apply themselves to sending proper and well substantiated questions.[111] Most of them are preceded by elaborations on the facts of the case including many technical details, the national provisions in questions and their meaning and the binding EU rules, including the relevant judgments of the ECJ, which have triggered the doubts. All referred questions are adequately formulated and there has been no case in which the Court would be forced to give an order in accordance with the *acte éclairé* doctrine. In harmony with the rules established by the ECJ all the courts which sent their questions did also stay the proceedings until the delivery of the judgment by the ECJ.[112] Likewise, all other courts

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[107] Decision in case II FSK 2130/08 of 26 May 2010, SAC in Warsaw, not assigned a reference number yet.

[108] EC Directive 69/335/EEC of 17 July 1969, O.J. 1969 L 249/25 concerning indirect taxes on the raising of capital. Reference in Case C-212/10, *Logstor ROR Polska Sp. z o.o.* v. *Dyrektor Izby Skarbowej w Katowicach*, - pending.

[109] DE S.-O.-L'E LASSER, *supra* note 79. Whereas the VAC in Cracow in Case I SA/Kr 147/09 of 3 April 2008 decided to set aside the national legal provisions which were held incompatible with EU law and apply the directly effective provisions of 6th VAT Directive, other VACs held that the national provisions might still be applicable by virtue of the so-called standstill proviso included in Art.17 of the respective Directive – *see* I SA/Wr 969/08 of 19 February 2009, VAC in Wrocław or I SA/Ol 59/09 of 12 March 2009, VAC in Olsztyn.

[110] Discrepancies as to how the ruling of the Court should be interpreted and applied appeared even within the same VAC as it happened in cases I SA/Gd 570/08 of 16 October 2008, VAC in Gdańsk and I SA/Gd 330/08 of 5 August 2008, VAC in Gdańsk.

[111] On the problem of procedural aspects of the preliminary ruling question in administrative proceedings *see* Maciej Szpunar, *Procedura prejudycjalna z perspektywy unormowań kodeksu postępowania cywilnego oraz prawa o postępowaniu przed sądami administracyjnymi* (The preliminary ruling from the perspective of the code of civil procedure and the law on the proceeding before administrative courts) in *PYTANIE PREJUDYCJALNE W ORZECZNICTWIE ETS. FUNKCJONOWANIE PROCEDURY PREJUDYCJALNEL W POLSCE* (PRELIMINARY QUESTION IN THE JURISPRUDENCE OF THE ECJ. FUNCTIONING OF THE PRELIMINARY RULING PROCEDURE IN POLAND) 185 (Cezary Mik ed., 2006).

[112] The proceedings are stayed on the basis of art. 125 para. 1 point 1 of the Act on proceedings before administrative courts which allows the court to *ex officio* stay the proceedings provided that giving a judgment is

which were dealing with the issue that had been referred to the ECJ decided to suspend their proceedings for the time-being.

Taking all the foregoing into account, it may be claimed that the initial concerns regarding the capability and willingness of national courts to participate in the dialogue with the ECJ, which were quite common before the accession,[113] turned out to be either somewhat exaggerated or misguided. The Polish administrative courts willingly and accurately refer their questions to the Court in Luxembourg and subsequently they apply the Court's judgments to the respective cases. A considerably high number of preliminary references which have been sent to date should undoubtedly be assessed as a positive development which not only mirrors the progressing process of the incorporation of EU law into the daily practice of national courts but also indicates the scope of incompatibility of national law with EU law.[114] Both VACs and the SAC have become very active participants in the preliminary ruling procedure and close confederates with the European Court. It is evident that the SAC occupies a leading position in the number of questions referred, if compared to other new Member States.[115] It should, however, be emphasized that many of the referred questions originate from first instance courts where the decision to send a question is entirely in the discretionary powers of the court. This reflects the good will of the national courts to cooperate with the ECJ even more.[116] On the other hand, the intense participation in a dialogue with the ECJ which is in most cases limited to the problem of interpretation of one and the same directive might indicate that some courts might be

dependent upon another legal proceeding or art. 124 para 1 point 5 of the respective act which allows courts to stay the proceeding in order to refer a preliminary question to the Constitutional Tribunal.

[113] *Supra,* note 6 and 7.

[114] From Katarzyna Gawlik & Robert Grzeszczak, *Pytania prejudycjalne polskich sądów* (The preliminary questions of Polish courts), 38 EPS 55, 55 (2008).

[115] The Czech Supreme Administrative Court has resorted to the procedure five times in cases: C-233/08, *Milan Kyrian v. Celní úřad Tábor*, 2010 E.C.R. 00000 , C-299/09, *DAR Duale Abfallwirtschaft und Verwertung Ruhrgebiet GmbH v Ministerstvo životního prostředí*, - removed from the register , C-339/09, *Skoma-Lux s. r. o v. Celní ředitelství Olomouc*, 2010 E.C.R. 00000 , C-393/09, *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury*, 2010 E.C.R. 00000 , C-399/09 *Marie Landtová v. Česká správa sociálního zabezbečení*, 2010 E.C.R. 00000. The Bulgarian Administrative Supreme Court has resorted to the procedure three times in cases: C-2/09, *Peter Dimitrov Kalinchev v. Regionalna Mitnicheska Direktsia — Plovdiv*, 2010 E.C.R. 00000, C-546/09, *Aurubis Balgaria v. Nachalnik na Mitnitsa*, - pending, C-203/10, *Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna v. Auto Nikolovi OOD*, 2011 E.C.R. 00000. The Supreme Administrative Court of Lithuania resorted to the procedure three times in cases: C-63/06, *UAB Profisa v. Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos*, 2007 E.C.R. I-03239 , C-119/08, *Mechel Nemunas UAB v. Valstybinė mokesčių inspekcija prie Lietuvos respublikos finansų ministerijos*, 2009 E.C.R I-00012 , C-295/10 *Petras Girinskis and Laurynas Arimantas Lašas v. Municipal Council of the District of Pakruojas, the Šiauliai Centre for Public Health and the Šiauliai Regional Department for Environmental Protection*, - pending. The legal systems of the remaining new Members do not provide for a separate administrative jurisdiction.

[116] *See* ADAM BARTOSIEWICZ, *EFEKTYWNOĆI PRAWA WSPÓLNOTOGEWO W POLSCENA PRYKŁADZIE VAT* (The effectivness of Community law in Poland – case of VAT) 58 (2009).

somewhat anxious about declaring on their own that national provisions in question are in conflict with EU provisions.[117] The foregoing observation follows also from the approach taken by the courts to the case of excise duty on second-hand imported cars. The abundant jurisprudence of the Court with regard to very similar matters should have made it clear that such a national provision as the one at issue was not in compliance with EU law and yet many courts either ruled the opposite or sought a helping hand from the ECJ.

E. Concluding Observations

The foregoing analysis allows an assessment of only the global trends in the approach taken to the EU legal system by the Polish administrative courts. Yet illustrates that EU law has become a significant, if not indispensible, element of administrative adjudication in Poland whereby the administrative jurisdiction in Poland has unquestionably become the main line where EU law is applied and enforced.[118] Needless to say, many inconsistencies, misunderstandings and errors with regard to EU law may be found in the relevant jurisprudence. And yet, in spite of everything, it may undoubtedly be claimed that Polish administrative courts have positively adapted to the new legal circumstances which are entailed by the membership in the EU and they endeavor to apply EU law as best as they can. The general impression is that the courts are well aware of the obligations put on them by EU law and do not oppose or reject the principle of supremacy of EU law. Likewise, a rather eager participation in the process of a dialogue with the ECJ seems to indicate the positive response EU law has gained on the part of the judiciary. Taking into account the relatively short time which has elapsed since May 2004, such a performance of administrative courts therefore receives recognition. Nonetheless, it should be recalled that in many instances the courts tend to perform a sort of repetitive exercise and copy entire lines of arguments with regard to EU law case by case. This "copy and paste" activity has reached such an extent that some courts did not notice the entering into force of the Lisbon Treaty and even in July 2010 there were cases detected in which judges refer to Community law, EC Treaty or art.10 EC (which is now repealed and replaced by new Art. 3a TEU) as the source of the loyalty principle.[119]

The preceding discussion does not imply that EU law and its principles are identically interpreted and applied across the whole country. The research has shown that the courts' views regarding the scope of the obligations but also their source may vary. Finally, a note

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[117] This has also been suggested by MIĄSIK, *supra* note 57, at 382.

[118] At the same time, the author would like to stress that the vivid presence of EU law in the jurisprudence of the Polish administrative courts does not imply that the same situation takes place with regard to the jurisprudence of the common courts.

[119] *See* for instance judgments: VII SA/Wa 492/10 of 5 July 2010, VAC in Warsaw, III SA/Wa 133/10 of 21 July 2010, VAC in Warsaw, III SA/Wa 952/10 of 14 July 2010, VAC in Warsaw.

of caution with regard to the obligation of conforming interpretation is perceptible. The perplexing devotion to the textual and legalistic methodological approach to law indicates that the full effectiveness of EU law might not be fully secured yet. Better stated, the courts seem to still lack some capabilities to interpret national law so they would factually arrive at the goals and objectives of the Union and its legal instruments.[120] At the same time, the ambiguous approach of the courts to the principle of direct and indirect effect and in its aftermath to the principle of supremacy of EU law which is reflected in the increasingly blurred dividing line between both principles might indicate that clear cut answers in EU law are scarce and national courts must demonstrate a sort of judicial creativity when confronted with issues of the Union's law.

The last essential point to be made concerns the role the parties and, more precisely, their legal representatives play in the process of the mainstreaming of EU law in the judicial practice of Polish administrative courts. The reviewed cases illustrate that the parties eagerly resort to EU law, frequently wish to directly rely on its provisions or suggest a pro-European interpretation of the national provisions. Likewise, it is often claimed that the preliminary ruling procedure should be employed. Even though the national procedural law stipulates that courts are not bound by the claims and legal basis the parties put forward, the respective court is however at least expected to examine the arguments of the parties and familiarize itself with the relevant EU legal provisions and take an attitude towards the respective EU law claims. In that sense, the parties to the proceedings have been playing an indispensible role in the process of the Europeanization of the Polish administrative courts and their line of jurisprudence.

[120] *See* also KÜHN, *supra* note 7, at 576.

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