

When must national judges raise European law issues on their own motion?

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Abstract This article discusses the Polish legal framework for raising issues *ex officio* in civil procedure, and how this interacts with requirements laid down by the European Court of Justice that certain issues of European Union law be raised on the national judge's own motion. The article looks at how the Polish courts have complied with the case-law of the European Court of Justice in this respect.

Keywords Application of European Union law in national court · Principle of effective judicial protection · Principle of effectiveness · Raising European Union law issues *ex officio* · Polish courts · Polish civil procedure

At the outset it must be emphasised that, in principle, the Court of Justice of the European Union has left to national legislators the decision as to whether there ought to be a duty on national courts to raise European Union law issues on their own motion. It might be therefore interesting to analyse this subject from the Polish perspective, using the example of civil procedure.

The application of a law by Polish courts on their own motion in civil procedure depends on two main factors. First, it depends on whether what is concerned is a substantial or procedural law, and secondly, at what instance the case is adjudicated. Consequently, it also depends on European law which, since Poland joined the European Union in 2004, forms part of the Polish legal system. European law contains

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both substantive and procedural norms (forming a European law of civil procedure), and it is necessary to take this differentiation into account in this analysis.

As for the application of substantive law by the court of first instance, Polish civil procedure is fully based on the principle *da mihi factum, dabo tibi ius*. According to this rule, a Polish court applies substantive law *ex officio*, without regard to the fact of whether the parties raised any legal basis to their claims. Even if the parties raise some legal basis to their claims in the course of the proceedings, the court is not bound by this legal basis and is obliged to evaluate the issue independently. The above-mentioned principle derives not from any particular provision of the civil procedure code but from the nature of judicial powers and is applied without exception by the Polish courts.

The same applies in the course of appellate proceedings, as Polish law provides a so-called full appeal (*cum beneficio novorum*), which means that the court of second instance is obliged to hear the evidence independently with the trial following the one in the court of first instance. Thus the court of appeal must consider the claims with regard to the substantive law and is not bound by the claims made by the appellant. On the other hand the court is obliged to apply procedural law *ex officio* only in the first instance. Taking into account that the procedural law is in fact a public law regulation determining the correct course for proceedings, it is, in principle, independent of the initiative of the parties.

In the course of appellate proceedings, the duty to apply on its own motion procedural rules is quite different. In the light of decision by the seven judges of the Supreme Court of 31 January, 2008, the court of appeal is not obliged to consider *ex officio* infringements of procedural law by the court of first instance, with the exception of particular provisions, the application of which the court must control on its own motion (for example, invalidity of proceedings caused by a party's being deprived of a right of defence). The reason for this is that the view is taken that the parties should signal to the court of first instance potential infringements of procedural law and should not wait to raise them until the appeal proceedings. Besides, some procedural failures on the part of the first instance court will become outdated in the appeal proceedings.

Accordingly, Polish courts, both at first and second instance, are obliged to apply substantive European Union law on their own motion, notwithstanding the claims of the parties. This is particularly true for those European law norms which are directly applicable in the Polish legal system and may constitute a legal basis for a judgment. However, it is also important for the purposes of the *ex officio* interpretation of national law by Polish courts in accordance with the requirements of European Union law (so-called 'indirect effect'). With regard to the application of European Union procedural law, such an obligation lies, in principle, exclusively on the court of first instance. Second instance courts should not, in general, take infringements of European Union procedural law into account on their own motion. Nonetheless, it must be emphasised that the traditional scope of European Union procedural law (*e.g.*, concerning jurisdiction, recognition and the declaration of enforceability of judgments) covers in any case the issues which should be controlled by the court of second instance. The best example of that is the issue of the existence of jurisdiction of Polish courts, which in most cases is taken into account *ex officio*, because it is, in principle, an absolute prerequisite for court proceedings. Some problems may arise when

it comes to a Polish second instance court applying on its own motion European Union civil procedure law with regard to the new unified European proceedings (the European Payment Order and the European Small Claims Procedure) and to legal aid (documents delivery, taking evidence abroad). Failures of the court of first instance regarding European Union law in this domain should be controlled only on the parties' motion, unless these failures lead to the invalidity of the proceedings (for example, an incorrect delivery of a motion starting proceedings leading to the result that a party is deprived of the possibility of defence).

Much more complicated is the problem of applying European Union law *ex officio* in the course of cassation proceedings by the Supreme Court. According to Art. 398¹³ §1 of the Code of Civil Procedure, the Supreme Court examines a cassation complaint in the framework of the legal grounds given for the same. This means that, apart from the question of the invalidity of the proceedings, the Supreme Court does not have the competence to control infringements which have not been indicated in the cassation complaint. This leads to the conclusion that the Supreme Court will not raise on its own motion European Union law issues—either those of a substantial or of a procedural nature—unless they cause the invalidity of the proceedings. This conclusion was confirmed by the Supreme Court in its judgment of December 18, 2006. This judgment for the first time pointed out criteria which allow the Supreme Court to go beyond this limitation and to control the infringement of European Union law *ex officio*. The Supreme Court concluded that this was possible in three situations.

First, where the Supreme Court, as the court of the last instance, is obliged, under Art. 267 of the Treaty on the Functioning of the European Union (TFEU), to request a preliminary ruling in order to interpret or assess validity of a European Union act, if a decision on the question is necessary to enable the Court to pass judgment.

Secondly, when the subject matter of Polish and European Union law is identical but the cassation complaint refers merely to Polish norms and the indirect application of European Union law is possible.

Thirdly, when the subject matter of Polish and European Union law is identical. Here, the requirement of eventual analysis of the infringement of European Union law may arise when it is necessary to interpret national legal provisions according to European Union provisions.

In relation to the first criterion, it must be stressed that without doubt, the Supreme Court, when proceeding with a cassation complaint, always acts as a court of last instance within the meaning of Article 267 TFEU.¹ However the problem lies in the inherent nature of the obligation to refer a question for a preliminary ruling, as this obligation depends on the answer to the question of whether the ruling is necessary to render a national judgment by the Supreme Court. The Court enjoys considerable freedom in this matter. Until now, the Supreme Court of Poland has made a reference for a preliminary ruling on four occasions.² Moreover, other civil courts have made

¹ See the Supreme Court resolution of February 20, 2008.

² Supreme Court: III SK 27/08 – Court of Justice: C-99/09, SC: III SK 2/09 – CJ: C-375/09, SC: III SK 16/09, I UK 344/08.

a reference on five occasions for preliminary rulings and administrative courts have made preliminary references on fourteen occasions.

As for the second criterion, this concerns in the main a situation of where a national piece of legislation (forming the legal basis of the judgment under review) implements a European Union directive but the implementation is incorrect. In such a case, despite the absence of a particular claim in the cassation complaint, the Supreme Court should take into account an infringement of European Union law when a party indicates, as the grounds for a cassation complaint, Polish provisions which implement a European Union directive.

The third criterion concerns those situations where European Union law is directly applicable but the party does not refer to it expressly in the cassation complaint—but, instead, refers to a national provision relating to the same issue—and moreover, the national provision is incompatible with European Union law or else the interpretation of this national provision applied by the court of lower instance does not comply with the European Union law. The Supreme Court judgment of 4 January, 2008 may serve as an example of such a situation. Here the Court took into account the issue of infringement of European Union law. The case involved the claim of a Polish conductor for early retirement where Polish law provided such a possibility only for female conductors. The Supreme Court raised a European Union law issue on its own motion, holding that the unjustified discrimination based on sex is contrary to Art. 4(1) of Council Directive 79/7/EC.

The obligation to interpret provisions of national law in accordance with the obligations of European Union law also comes within the scope of the present analysis of the criteria according to which the Supreme Court will take into account European Union issues on its own motion. The judgment of the Court of 18 December, 2006 may serve as an illustration. The Court held that an interpretation which had been given to the notion of the “date of employer’s insolvency” was contrary to the aims of Council Directive 80/987/EC and to the case-law of the European Court of Justice.

From the practical point of view, all three of the criteria described above can be understood in the following manner. A case reviewed by the Supreme Court has the status of a “European case” when it deals with an issue regulated by European Union law which has not been taken into consideration or has been considered incorrectly by the courts of lower instance.

The above-analysed criteria enable the Supreme Court to raise European Union law issues on its own motion whenever the claims raised by the plaintiff in the cassation complaint refer—even indirectly—to a subject matter regulated by European Union law. If the facts of the case come within the scope of European Union law and the court of lower instance does not interpret national provisions in compliance with European Union law (and, moreover, the plaintiff has not referred to European Union law in the cassation complaint), the Supreme Court will assume that the infringement of substantive law claimed in the cassation complaint is a result of the incorrect interpretation. If a court of lower instance applies national provisions incompatible with European Union law, then the infringement of the Polish provision claimed in the cassation complaint concerns their application (as, because of the primacy of European Union law, the courts of lower instances, should have refused application of national provisions contrary to European Union law).

Conclusion

To date, European Union law issues have been raised *ex officio* to the same extent as issues relating to national law only. In the Polish legal system this has meant that substantive European Union law issues must be raised *ex officio* both in first and second instance proceedings. As regards procedural law, this is always taken into account *ex officio* by the court of first instance. In case of the court of second instance, it is considered on the basis of a particular claim, unless it leads to the invalidity of the proceedings. As for the Supreme Court, there is a rule that the Court is bound by the grounds expressed in the cassation complaint, except for the situation of the invalidity of proceedings.

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