The Rule of Law the German Way

1.

The provision of Article 2 of the Treaty on European Union stipulates that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[1]

As a result, the rule of law is thought to be one of the fundamental principles or values that underlie the European Union.[2] In other words, it is believed that the European Union cannot exist unless its member states respect the rule of law. Interestingly, for some, it is the lack of respect for the rule of law that is considered today to be the most significant threat to European integration; even greater than the Eurosceptics.[3]

That being said, the EU law does not define the concept of the rule of law or the principle of the rule of law, which is nothing unusual or surprising. The task to define this principle or value was undertaken in 2014 by the European Commission, the 'guardian of the Treaties,' in a document entitled 'Communication from the Commission to the European Parliament and the Council "A new EU Framework to strengthen the Rule of Law"' (COM/2014/0158 final).[4] In the Commission's view, as expressed in the Communication, protection of the rule of law is required to ensure that 'all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.' It is acknowledged in the document that the exact content of the principles and standards under the rule of law may vary at national level, depending on each member state's constitutional system. However, the case law of the CJEU and the ECHR as well as the documents drawn up by the Council of Europe, which are based in particular on the expertise of the Venice Commission, contain a non-exhaustive list of these principles. Thus, they define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU. According to the Commission, the elements common to all member states that make up the principle of the rule of law include legality, that is a transparent, accountable, democratic

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[1] Treaty on European Union of 7 February 1992 (Journal of Laws 2004 No 90 item 864[30])
[2] More in: J. Barcik, Ochrona praworządności w Radzie Europy i Unii Europejskiej ze szczególnym uwzględnieniem niezależności sądów i niezawisłości sędziów, Warszawa 2019, p
[3] According to: Katarzyna Pełczyńska-Nałęcz, *Praworządność w Unii poza politycznymi podziałami. Sankcje budżetowe i nowy program dla obywateli.* https://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Praworzadnosc%20w%20Unii.pdf.
[4] Available at: https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=celex%3A52014DC0158.

and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; independent and impartial courts, effective judicial review including respect for fundamental rights; and equality before the law.

As we can see, the European Commission's definition of the rule of law is simply a set of further rules, the content of which is by no means clear. The specific ways of their implementation may still be the subject of dispute, as well.

2.

This is precisely what happened in the context of a dispute between Poland and the European Commission. The Commission namely found that the rule of law in Poland is under a systemic threat, seeing that Poland had ceased to observe the rule of impartiality and independence of courts. The Polish authorities, on the other hand, maintain that the model of appointing courts adopted in Poland does not violate their independence at all. Thus, it is a dispute about the way the principle of the rule of law is construed. It even borders on a dispute about the limits of power of EU institutions, in particular the CJEU.

The experience of the Association Patria Nostra in Olsztyn is that even when a specific provision of EU law is violated, the Union's mechanisms to protect the rule of law fail if the offender is one of the leading Member States.

Of course, what we mean here is Germany, whose highest judicial authorities follow their own understanding of the rule of law, in which the interests of the German state take precedence over EU law.

We cannot namely take any different view on the situation when the highest court of the German civil and criminal justice system, the Federal Court of Justice (Bundesgerichtshof seated in Karlsruhe, hereinafter: the BGH),[5] refuses in its judgment[6] – contrary to Article 33(1) and Article 36 or Article 45(1) and Article 45(2) of Regulation no 44/2001[7] – to recognise the enforceability in German territory of a final Polish judgment[8] ordering German public television to apologise on its website to Polish citizen Mr Karol Tendera.

In its refusal to recognise the Polish judgment, the German BGH cited Article 34(1) of Regulation No 44/2001, pursuant to which a judgment shall not be recognised if, among others, such recognition is 'manifestly contrary to public policy in the Member State in which recognition is sought.' As follows from the analysis of the reasoning of the BGH's judgment in case IX ZB 10/18, the German judges found that the content of the apology specified by the Appeal Court in Cracow in the part in which it describes the relevant statement as a falsification of history and an infringement of the personal interests of a former concentration

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[5] Pursuant to Article 95(1) of the Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) of 23 May 1949. See also the website of the BGH: https://www.bundesgerichtshof.de/DE/DasGericht/StellungGerichtssystem/stellungGerichtssystem_node.html.

[6] Order of the Federal Court of Justice of 19 July 2018, file ref. IX ZB 10/18, available on the website of the BGH: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=86838&pos=0&anz=1.

[7] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ EU L 2001 No. 12, p. 1). The Regulation was applied even though the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ EU L 2012 No 351, p. 1) was in force at that time on account of transitional provisions, i.e. Article 66(1).

[8] Judgment of the Appeal Court in Cracow, 1st Civil Division of 22 December 2016, file ref. I Aca 1080/16, available at: http://orzeczenia.krakow.sa.gov.pl/content/$N/152000000000503_I_ACa_001080_2016_Uz_2016-12-22_001.

camp prisoner is an opinion. As a result, the German ZDF would – in their view – be forced by the court to publish and sign someone else's opinion. Meanwhile, according to the BGH, one of the fundamental norms of German law is the freedom not to issue opinions of others.

The BGH's decision in the case of Karol Tendera was based on challenging the merits of the Polish judgment and went beyond the right to cite the public policy clause:

First of all, the obviousness of the conflict between the court order to publish a statement with a certain content imposed on the ZDF by the Appeal Court in Cracow and the principles adopted in Germany for the protection of the freedom of expression invoked by the BGH in its refusal to recognise the Polish judgment is highly questionable.

This is evidenced by the fact that such conflict could not be found by German common courts of both instances,[9] also when they considered the arguments of ZDF's lawyers which questioned the applicability of Article 34(1) of Regulation No 44/2001 to the case. Moreover, an analysis of the reasoning behind the decision of the Higher Regional Court in Koblenz suggests that even if the order to publish an apology with a specific content imposed on the ZDF by the Polish court is not specific to the German legal system, it still falls within the scope of the claims for removal of the infringement of personal rights provided for by the German law. As the court in Koblenz namely explained: *'There are therefore no significant constitutional objections to the fact that the court, after a thorough assessment of the degree (severity and prevalence) of the infringing activity and the measures necessary to remedy the effects of the infringement, gave specific guidelines as to the content of the retraction or rectification sought (content, place and font size; cf. the case law of the Federal Court of Justice in civil matters 128, 1 = NJW 1995, 861; Palandt/Sprau in the indicated place preceding § 823 section 41). (…) The general notion of "apology" used in the factual assessment does not deviate from the German terminology. As the Appeal Court made clear, this was essentially a matter of remedying a violation of personal interests (compensation). Thus, according to the German understanding of the law, a claim for rectification bears the hallmarks of an apology (erasure of guilt, redress).*'[10]

Let us recall that the CJEU in its decision of 28 April 2009 (Apostolides, C-420/07, EU:C:2009:271) pointed out that Article 34(1) of Regulation No 44/2001 should be subject to strict interpretation, since it constitutes an obstacle to the achievement of one of the fundamental objectives of the regulation and can be invoked only **in exceptional cases**. By laying down a prohibition on reviewing the merits of a foreign judgment, Articles 36 and 45(2) of Regulation No 44/2001 prevent a court of the requested member state from refusing to recognise or to enforce that judgment exclusively on the ground of a disparity between the legal norm applied by the court of the state which handed down that judgment and the norm that would be applied by the court of the state of enforcement if the latter ruled on the case. The requested court is also not allowed to

[9] Pursuant to the order of the Higher Regional Court in Koblenz of 19 January 2018 (2 U 138/17 AVAG), the appeal of the ZDF against the order of the Regional Court in Mainz, 3rd Civil Division of 27 January 2017 (3 O 35/17) concerning the admission of forced execution of the judgment of the Appeal Court in Cracow of 22 December 2016 was dismissed.

[10] In German: *Es begegnet jedenfalls keinen durchgreifenden verfassungsrechtlichen Bedenken, wenn das angerufene Gericht nach wertender Betrachtung des (Schwere- und Verbreitungs-) Grades dr Verletzungshandlung und des zur Folgenbeseitigung Notwendigen konkrete inhaltiche Vorgaben in Ansehung eines Wideruffs- bzw. Berichtigungsausspruchs mach (Text, Standort und Schriftgrosse; vgl. BGHZ 128, 1=NJW 1995, 861; Palandt/Sprau a.a.O. vor § 823 rn. 41). (…) Der verwendete Oberbegriff der „Entschuldigung" (przeproszenie) entfernt sich bei sachgerechter Bewertung nicht in untragbarer Weise von der deutschen Begrifflichkeit. Es geht dabei – wie das Appellationsericht klar herausgearbeitet hat – im Kern um die Beseitigung der Folgen der Personlichkeitsverletzung (Wiedergutmachung). So gesehen wohnt auch dem Berichtingungsanspruch nach deutschem Rechtsverstandnis ein entschuldigendes (die Shuld tilgendes; wiedergutmachendes) Moment inne.*

examine the adequacy of the legal or factual assessment made by the court of the state which handed down that judgment. Consequently, the public policy clause stipulated in Article 34(1) of Regulation No 44/2001 may be invoked only when the recognition or enforcement of a judgment passed in another member state would unacceptably infringe the legal system of the requested state, as it would infringe one of the fundamental principles. **The prohibition on reviewing the merits of a judgment passed in another member state is therefore respected when the infringement constitutes an obvious violation of a legal rule perceived as fundamental to the legal order of the member state in which recognition is sought or for a right deemed fundamental in that legal system.**

Thus, it seems that **an obvious violation of German law in the case of Mr Karol Tendera should undoubtedly have been seen by German common court judges, i.e. the president of the 3rd Civil Division of the Regional Court in Mainz and the judges of the Higher Regional Court in Koblenz**. An obvious violation of the law occurs when it is visible to every average lawyer without the need to carry out an in-depth legal analysis of the relevant legal provisions. Thus, **when the German judges at first and second instance did not recognise such an allegedly obvious contradiction between the Polish and the German legal norm, everyone – let alone the European Commission – should wonder whether this violation is in fact so exceptional and significant that it can constitute grounds for derogation from the principle of recognition of judgments within the European Union.**

Secondly, it is highly questionable that the order for the ZDF as the party who infringed personal interests to publish an apology according to precise guidelines of the Appeal Court in Cracow is in conflict with the freedom of speech/expression, which was invoked by the German BGH, since the European Court of Human Rights found this form of remedying the effects of infringement of personal rights consistent with Article 10 of the European Convention on Human Rights.

Suffice it to mention the judgment in the case of Cihan Öztürk v. Turkey, App. No 17095/03,[11] in which the ECHR examined whether the compensation for non-pecuniary damage ordered by the Turkish court from the applicant (and from the co-defendant editor-in-chief of the press magazine in which the article that – according to the Turkish courts – infringed the personal rights of a third party was published) was 'necessary in a democratic society.' Noting the considerable amount of compensation, the court then pointed out explicitly that national courts ought to consider other sanctions rather than pecuniary sanction, for instance the issuance of an apology or publication of their judgment finding the statements to be defamatory.[12] Thus, **the ECHR found in its judgment that the order to publish an apology is an acceptable form of remedying the effects of an infringement of personal interests, even if it is in conflict with the freedom of expression enshrined in Article 10 ECHR**. Similarly, in Aleksey Ovchinnikov v. Russia, No 24061/04,[13] the ECHR ruled that a provision providing for an apology as a form of protection of personal interests and the application of that provision do not necessarily result in finding that an unjustified violation of the right to freedom of expression occurred.

[11] Available at:
https://hudoc.echr.coe.int/eng#{%22docname%22:[%22Cihan%20%C3%96zt%C3%BCrk%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%2 2,%22CHAMBER%22],%22itemid%22:[%22001-92918%22]}.

[12] As we can read there: *'(…) the national courts might instead have considered other sanctions, such as the issuance of an apology or publication of their judgment finding the statements to be defamatory.'*

[13] Available at:
https://hudoc.echr.coe.int/eng#{%22appno%22:[%2224061/04%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22 itemid%22:[%22001-102322%22]}.

It is also worth noting that the ECHR has reviewed the judgments of Polish courts that ordered the issuance of apologies on numerous occasions (Błaja News v. Poland, App. No. 59545/10; Kubaszewski v. Poland, App. No 571/04; Gasior v. Poland, App. No. 34472/07; Stankiewicz and Others v. Poland, App No. 48723/07; Kania and Kittel v. Poland, App. No. 35105/04; Kurski v. Poland, App. No. 26115/10, Zybertowicz vs Poland, App. No 65937/11). In none of these cases did the ECHR ever take the position that a court's order to issue an apology was a form of imposing opinion and thus violated the right to freedom of expression. The ECHR examined only whether the sanction for the exercise of the right to freedom of expression applied in the specific circumstances of the relevant case was necessary (adequate) in a democratic society. Moreover, in Kubaszewski v. Poland, the ECHR considered the order for the publisher of the local daily to issue an apology to be 'relatively light.' Likewise, in case Gasior v. Poland, when evaluating the severity of the ordered apology as redress in conflict with the right to freedom of expression, the ECHR decided that 'the applicant was only ordered to publish an apology.'

Thus, **even if one were to agree with the BGH that a court order for the offender to publish an apology with a specific content violates their freedom of expression in that it orders them to publish someone else's view, one cannot agree that the enforcement of such a court order is in serious (obvious) conflict with the foundations of the German public policy, since it would at the same time not be in conflict with the guarantees of freedom of expression under Article 10 of the European Convention on Human Rights.**

<u>**Thirdly**</u> and most centrally, **the reasoning behind BGH's decision make it clear that it results from a review of the merits of the Polish judgment, which was unacceptable under Article 36 and Article 45(2) of Regulation No 44/2001**. In a situation when the German BGH rules that the content of the apology that the ZDF was ordered to publish is an opinion, it reviews the circumstances underlying the Polish court's decision on its merits.

As follows from an analysis of the reasons behind the BGH's judgment, the German judges found that the content of the apology specified by the Appeal Court in Cracow in the part in which it describes the relevant utterances as falsification of history and an infringement of the personal interests of a former concentration camp prisoner is an opinion. As a result, the German ZDF would – in their view – be forced by the court to publish and sign someone else's opinion, not its own. Meanwhile, according to the BGH, freedom from issuing another's opinions is one of the fundamental norms of German law; an individual (ZDF) may not be restricted in this freedom in that sense even by a court judgment.

In other words, **according to the authors of the BGH's decision in case IX ZB 10/18, forcing the ZDF to admit in a public statement that it falsified history and infringed the personal rights of Mr Karol Tendera would be contrary to a fundamental standard of German law, because it would be tantamount to forcing it to publish an opinion that is not its own.**

Yet it cannot be omitted that the BGH drew this conclusion as a result of comparing the content of the apology with the content of the utterance that was the subject of the action and taking into consideration the circumstances of its publication. As a result, it made its own independent findings contrary to the findings of the Appeal Court in Cracow. The BGH ignored the fact that the content of the apology specified in the operative part of the Polish judgment was the result of, among other things, the Polish judges' assessment of the adequacy of the apology so ordered to the manner of infringement of the complainant's personal

interests and the extent of the harm he suffered. This is a manifestation of the judicial competences of the Polish judges, who in this way decided on a specific claim to remove the effects of the infringement of the complainant's personal interests. In other words, **by making an independent assessment of whether the statement of specific content ordered in the Polish judgment is true and adequate to the seriousness of the infringement committed by the ZDF, the BGH assumed the judicial competences of the Polish judges, that is reviewed their ruling as to its substance, ultimately taking a different position on the merits.**

The position of the German judges is especially peculiar when they deny the compatibility of the content of the apology with German law in the part where the defendant should admit that it had infringed the complainant's personal interests. After all, the recognition of such an infringement is a prerequisite for the recognition of a claim for protection of personal interests (sic!).

The interference of the German judges with the Polish court's decision on the merits is particularly evident in the last part of the reasoning of the ruling in case IX ZB 10/18. The reasoning explaining why the order to publish an apology is in conflict with Article 10 of the European Convention on Human Rights directly addresses the adequacy of the manner of the ordered removal of the effects of the infringement of personal interests in comparison with the manner of the infringement of those rights by the ZDF. Moreover, **the German judges make a direct reference to the circumstances of the statement in question, including the reason for and the time of its publication, and even the reaction of the defendant at the pre-trial stage**. As we can read: '*In view of the immediate rectification, the published apology and the Defendant's letters addressed to the Applicant personally, it would be beyond all measure if the Defendant now had to publish on its homepage the text specified by the court of the state which hands down that judgment*.'[14]

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The view of the Association is confirmed by **Professor Aurelia Nowacka's commentary to** the judgment of the German BGH. The commentary was published in one of the major Polish **journals: Polski Proces Cywilny, no. 2/2019, pp. 131-152. It explains how the BGH's judgment is in conflict with the provisions of Article 36 and Article 45(1) of Regulation No 44/2001.**

3.

For these reasons, the Patria Nostra Association petitioned the vice-president of the European Commission, Ms Vera Jourova, to take action against the German Federal Court of Justice's refusal to enforce the Polish judgment recognising the infringement of personal interests of Karol Tendera by a German television station. The European Commission should namely examine the decision of the German BGH in Mr Karol Tendera's case in order to ascertain whether it is an appropriate way of protecting fundamental rights. It ought to be

[14] In German: '*Angesichts der unverzüglich erfolgten Richtigstellung, der veröffentlichten Entschuldigung und der Schreiben der Antragsgegnerin an den Antragsteller persönlich übersteigt es jedes Maß, wenn die Antragsgegnerin nunmehr den vom Gericht des Urteilsstaats vorgegebenen, schon für sich genommen ihr Grundrecht aus Art. 5 Abs. 1 GG offensichtlich verletzenden Text für einen Zeitraum von einem Monat durch Schriftgröße, Fettdruck und Rahmen hervorgehoben auf ihrer Startseite veröffentlichen muss. Dies ist weder zur Beseitigung einer fortwirkenden Persönlichkeitsrechtsverletzung des Antragstellers erforderlich noch der Antragsgegnerin zumutbar*.'

stressed that the BGH's judgment may not be treated as a one-off case of applying law in an individual matter. This is a ruling of Germany's highest judicial authority, whose opinion will affect other decisions made in similar cases by German common courts. In any event, it seems evident that said decision is precisely a kind of signal to common courts, which in the first and second instance saw no obstacles to the recognition of the Polish judgment in accordance with EU law, how they are supposed to resolve such cases, i.e. in a manner contrary to EU law.

In other words, the European Commission should not ignore the fact that the highest German court has given a clear signal to the common courts subordinate to it that in disputes between German subjects and citizens from other member states, they should take care to protect precisely the former, even if this would be in conflict with the obligation to protect the fundamental rights (dignity) of the latter.

Importantly, the BGH's decision in case IX ZB 10/18 causes damage not only to Mr Karol Tendera's individual rights, but also to one of the EU's crucial foundations, i.e. the free market. The objective of the principle of recognising in a particular member state (here: in Germany) decisions issued by the courts of another member state (here: Poland), established in Regulation No 44/2001 and subsequently reinforced in Regulation No 1215/2012,[15] is to maintain and develop an area of freedom, security and justice, with guaranteed free movement of persons, and thus to provide conditions necessary for the proper functioning of the internal market.

As a result, **it is not only a right but also a necessity for the European Commission to react to the abuse of the power of the German BGH to invoke the public policy clause (ordre public) in order to avoid recognising the judgment of a Polish court and enforcing it in Germany.**

The European Commission's action in this case may be based on the provision of Article 258 of the Treaty on the Functioning of the European Union, pursuant to which: *If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.*

According to this provision, **as follows from the annex to the Communication from the European Commission titled *EU law: Better results through better application*,[16] the EC may initiate a procedure against a member state for failure to comply with its obligations stipulated among others in secondary legislation, in this case: Regulation No 44/2001, which applied to the case subject to the BGH's ruling.**

What is important, an infringement procedure against a Member State may be carried out on the basis of this provision with regard to any infringement of legally binding Union law committed by that state. The procedure may therefore be started regardless of the national authority responsible for the infringement, of its form, seriousness or frequency (C-209/89 Commission v. Italy, paragraph 19). The infringement may result from

[15] As a result of the entry into force of a new regulation, also the procedure of recognising judgments has been simplified. In particular, the procedure of declaration of enforceability has been abolished. As a result, foreign judgments are supposed to be directly enforceable.

[16] We mean here annex entitled *Administrative procedures for the handling of relations with the complainant regarding the application of European Union law* to Communication from the Commission of 19 January 2017 – EU law: Better results through better application (2017/C 18/02).

an action or omission of a national authority. While the most common cause of a Member State's failure to comply with EU law concerns the transposition of directives, **an infringement procedure may be also started due to the member state's incorrect interpretation of EU law** (100/84 Commission v. United Kingdom, paragraph 17), including issuing 'binding rules of interpretation' (94/77 Fratelli Zerbone). Another reason can be errors in the application of EU law (C-342/05 Commission v. Finland, paragraph 22). What is meant here is an interpretation of Article 34(1) of Regulation No 44/2001 by the BGH, according to which a court requested to recognise a foreign judgment on an infringement of personal interests may assess whether the content of the statement which removes the effects of the infringement ordered in the judgment is adequate and acceptable in the light of the right to freedom of expression.

4.

Now, the European Commission, in response to the Association's petition, gives German institutions a free rein in applying EU law. In particular, Salla Saastamoinen, head of the cabinet of Commissioner Jourova, replied on behalf of the Commissioner that the European Commission is not competent to specify the limits within which national courts may invoke the concept of public policy in order to refuse to recognise a judgment issued by a court of another member state.

The European Commission's refusal to supervise how Germany implements the EU regulations is a signal to the German courts that they are fully at liberty in how they will resolve cases for the recognition of foreign judgments against German entities. The German BGH's interpretation of Article 34(1) of Regulation No 44/2001 in the face of the European Commission's passivity should raise concerns among Polish citizens as well as citizens of other Member States. This disrespectful approach by the German judicial authority seems like a **practice that undermines the credibility of the German justice in all cross-border cases involving German entities**. The example of the case of Mr Karol Tendera shows the **instrumental treatment of EU regulations by the German BGH**. The court omits to apply them when it is desirable for the interests of the German entity or – even more broadly – for German policy (in this particular case, German memory policy).

Of course, another issue is whether, if the European Commission exercises its power to initiate proceedings under Article 258 of the Treaty on the Functioning of the European Union, it can count on an adequate response from the CJEU. Already today, there are some signs that the CJEU may not be an institution that will also be determined or even effective in supervising Germany's implementation of the rule of law in the simplest sense of the word, i.e. compliance with the setting of standards.

First of all, one such signal is the CJEU judgment of 9 July 2020 in case C-272/19, where the subject of evaluation of the Luxembourg judges was the way of appointing judges in Germany. In this case, the Court answered a question referred for a preliminary ruling by a German administrative court as to whether it was an independent court. The German judge asking the question was not sure about this, since he had been selected by the minister of justice. In this case, the CJEU had no doubt that the politicised model of appointing judges in Germany does not threaten the rule of law.

It is hard to resist the impression that Poland is criticised for certain legal solutions and Germany is not. In other words, it turns out that the CJEU has apparently more exorbitant standards of implementation of the rule of law for countries such as Poland than it is the case with Germany, for example.

Secondly, an even more spectacular expression of Germany's disregard for the supremacy of EU law over national law is the ruling of the German Federal Constitutional Court in May in which it declared the application of EU law as defined by the CJEU to be inadmissible as contrary to the German constitution.

In this ruling, the Federal Constitutional Court accused the CJEU of limiting itself to examining whether the European Central Bank had made 'gross' errors in assessing the proportionality of the effects of the so-called Public Sector Purchase Programme to the expected goals. It therefore accepted the ECB's actions that went beyond the bank's treaty powers. **According to the German Federal Constitutional Court, the EU tribunal thus went beyond the judicial function entrusted to it under Article 19 of the EU Treaty and violated, among other things, the principles of separation of powers and democracy stipulated in the German constitution.** On this basis, **the Federal Constitutional Court refused to respect the judgment and assessed the decisions of the ECB itself**. **It found that, in issuing these decisions, the bank had violated the principles of conferred powers and proportionality under Article 5 TEU.** It stated that German state authorities could not execute acts of EU bodies when the latter exceeded their powers. It called on the German government, parliament and central bank to persuade the ECB to adopt a resolution within three months containing a justification for the proportionality of the PSPP to its economic and fiscal consequences. If the deadline was not met, the Bundesbank should withdraw from the programme.[17]

The ruling of the German Federal Constitutional Court is a clear departure from the principle of the supremacy of EU law over a Member State's domestic law. It is also a clear departure from the rule of law, since the German judiciary departs from the fundamental principle of EU law, thus breaking out of the community of law that the EU is supposed to be. It is therefore a 'legal Germanexit' by the German Federal Constitutional Court. The reaction of the European Commission in this regard is very restrained. There have been announcements of an in-depth examination of the Federal Constitutional Court's ruling, and nothing else. The CJEU also refrained from a decisive assessment of the Federal Constitutional Court's judgment. It merely pointed out that '*In order to ensure that EU law is applied uniformly, the Court of Justice alone – which was created for that purpose by the Member States – has jurisdiction to rule that an act of an EU institution is contrary to EU law*.'

Interestingly, German judges do not feel that EU law has been infringed. As explained by a judge at the German Federal Constitutional Court, Dr. Ulrich Maidowski: *'(…) we accused the CJEU of acting outside its competence (ultra vires), but not because the CJEU did things that it could not do – that is, outside its competence – but because it did not do what it should have done within its competence. This is the core of our criticism: We do not want less, but more CJEU – to deal seriously with serious issues. This is the core of our position.'* In other words, **the German Federal Constitutional Court not only guards Germany's constitutional identity, but also assumes the role of a reviewer of the CJEU's rulings.**

There is a saying: do as I say, not as I do. Whether it also applies to the situation described here, each of us can judge for themselves.

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[17] As quoted in: Sebastian Płóciennik, Szymon Zaręba, *Trybunał Konstytucyjny RFN podważa politykę EBC i krytykuje wyrok TSUE*, Komentarz PISM, No 28, 6 May 2020.

However, it does not seem to be necessary to remain passive in this regard. Poland can 'fight' for the protection of the rule of law also against Germany and other Member States against which the European Commission is lenient in cases of obvious breaches of the obligation to apply EU law, as with Germany.

This is because, according to the provision of Article 259 of the Treaty on the Functioning of the European Union, a Member State may bring a case before the CJEU if it considers that another State has failed to fulfil its obligations under the Treaty. However, the submission of the complaint must be preceded by a request to the Commission, which has priority in dealing with the case. Only if the Commission has not issued a reasoned opinion within three months, the requesting State may lodge a complaint with the CJ. However, this does not mean that the state cannot lodge a complaint if the Commission issues a reasoned opinion (cf. 141/78 French Republic v. United Kingdom; L. Prete, B. Smulders, The coming age of infringement proceedings, CMLRev. 47: 9-61, 2010, p. 27).

Therefore, in the face of the passivity of the European Commission, Poland may take the initiative itself and bring the application of the rules on the recognition of judgments by German courts before the CJEU. Importantly, the mere submission of such a request by Poland may force the European Commission to undertake a kind of mediation in order to avoid Poland's possible referral of the case to the CJEU. Even if there are concerns that the CJEU will not be lenient towards Germany, it is necessary to use the available legal means and take the trouble to influence German law in a manner consistent with the interests of Poland. In principle, in this way, Germany has given Poland the strength to point out its problems with the rule of law and respect for EU law.

It is also advisable for Poland in this regard to seek allies among the other Member States that will support it in possible proceedings before the CJEU. It is therefore not only a difficult legal task, but to a large extent also a political or diplomatic one. Nevertheless, it is a significant task.

Chair of the Patria Nostra Association

Legal Advisor Lech Obara

Karpacz, 9 September 2020