DRAFT SUBMISSION OF WORKING GROUP OF EXPERTS ON ASPECTS OF DISCIPLINARY PROCEEEINGS IN POLAND

Introduction:

1. The International Association of Judges was founded in Salzburg Austria in 1953. It is a non-political profession organisation comprising member associations of judges from some 90 countries, and divided into four regional associations. It has consultative status with the United Nations and the Council of Europe. Its current President is Tony Pagone, a recently retired judge of the Federal Court of Australia. Its senior Vice President and President of the European Association of Judges is José Manuel Igreja Matos, a Court of Appeal judge from Portugal.

2. One of the principal aims of the Association is the promotion and protection of judicial independence from all forms of illegitimate interference. In 2018 at its annual meeting of the Central Council in Santiago Chile, it adopted the Universal Charter of the Judge, consolidating and revising existing international statements of principle and best practice.

3. In 2019 at its annual meeting in Nur Sultan, Kazakhstan, it constituted a working party with a view to establishing a commission of experts to advice the association its regional affiliates and national associations of relevant international principles and practice with respect to potential conflicts with judicial independence in respect of national provisions for the appointment of judges, their terms and conditions and procedures for sanctioning them. The current chair of the working party is Sir Nicholas Blake, who recently retired as a full-time judge of the High Court of England and Wales. There are 14 other members of the Working Party with representatives from Judicial Associations in Netherlands, Iceland, Poland, Slovenia, Spain, Portugal, Liberia, Lebanon, USA, Canada, Puerto Rico, Bermuda, Brazil and Ecuador.

4. The IAJ is aware of recent changes of law, practice and personnel with respect to the judiciary of Poland, and the expression of serious concerns by national courts, regional organisations and the Court of Justice of the European Union as to whether the current arrangements meet the standards required by European Union to respect the rule of law and judicial independence[1].

5. The IAJ is further aware that notwithstanding orders from the Court of Justice and pending proceedings in that Court, that some disciplinary and related proceedings have been listed for hearing before Polish bodies that claim to have the status of a court or tribunal within the meaning of European Union law[2].

[1] There have been a whole series of decisions of the CJEU on Poland including Case C 619/18 on 24 June 2019 and Case 192/18 5 November 2019; Joined cases C 558/18 and C 563/18 March 2020; critical comments by the Council of Europe Venice Commission; and directions given by the Court of Justice in Case C 719/19 R staying pending disciplinary proceedings.

[2] The Presidency Council of the International Association of Jurists issued a statement of concern on 8th June 2020 about the pending application to remove judicial immunity from Judge Igor Tuleya.

6. In the light of these concerns the working party has been requested to prepare an opinion as a matter of urgency on three questions relevant to some or all of pending Polish cases, namely: -

    i) Whether in a disciplinary system complying with internationally accepted standards a judge can be disciplined for statements made or actions undertaken in their capacity as a judge;

    ii) Whether in a state such as Poland that is a member of the European Union, a judge is entitled to apply clear and binding principles of European Union law as opposed to national provisions;

    iii) Where European Union law is applicable but not clear is a judge at whatever level of the national judicial hierarchy entitled to make a reference to the Court of Justice of the European Union despite national provisions restricting the making of such a reference to a particular court.

7. This opinion has been drafted as a matter of urgency by Sir Nicholas Blake with assistance from other members of the working party.

2. Question 1: sanctions for judicial acts

8. The concept of the rule of law in a democracy implies that there is a separation of powers between the judiciary, the legislature and the executive and each part of the system acknowledges and respects the different decision-making functions of the other. Judicial decisions may involve challenges to decisions of the executive or rules promoted by the legislature on constitutional, due process or other grounds such as compatibility with international treaties incorporated into domestic law. It is the very essence of the judicial function that the judge must free to reach the decision considered appropriate fearlessly and with complete independence. Any threat of disciplinary sanction because of what a judge has decided or for the reasons given for a decision would undermine independence.

9. There are a number of provisions of the Universal Charter of the Judge that accurately reflect international standards on this topic.

    “Article 2-1 – Warranty of the independence in a legal text of the highest level

    Judicial independence must be enshrined in the Constitution or at the highest possible legal level. Judicial status must be ensured by a law creating and protecting judicial office that is genuinely and effectively independent from other state powers. *The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary.* “

"Article 2-5 – Protection of the judge and respect for judgments

The judge must benefit from a statutory protection against threats and attacks of any kind, which may be directed against him/her, while performing his/her functions. Physical security for the judge and his/her family must be provided by the State. In order to ensure the serenity of judicial debates, protective measures for the courts must be put in operation by the State. *Any criticism against judgments, which may compromise the independence of the judiciary or jeopardise the public's confidence in the judicial institution, should be avoided.* In case of such allegations, appropriate mechanisms must be put in place, so that lawsuits can be instigated and the concerned judges can be properly protected."

"Article 7-1 – Disciplinary proceedings

The administration of the judiciary and disciplinary action towards judges must be organized in such a way, that it does not compromise the judge's genuine independence, and that attention is only paid to considerations both objective and relevant. Disciplinary proceedings should be carried out by independent bodies, that include a majority of judges, or by an equivalent body. *Save in case of malice or gross negligence, ascertained in a definitive judgement, no disciplinary action can be instituted against a judge as the consequence of an interpretation of the law or assessment of facts or weighing of evidence, carried out by him/her to determine cases."*

(Emphasis in italics supplied)

10. In substance these principles mean that to preserve judicial independence and prevent improper influences from operating on a judge, judicial decisions reached in good faith cannot be the subject of disciplinary sanction. It is different if a judge acts corruptly or in the knowledge that he has no power to entertain a case; this would be example of a failure to act in good faith or malice. Although there are differences in national practice as to the absolute nature of the immunity and the level of judicial officer to whom it applies, in general, where a judge acts in good faith any challenge to the decision should be by way of appeal or judicial review and not by disciplinary inquiry. If judges act in good faith to apply the law as they understand it to be, the fact that such a view has been found to be wrong by another judge is not a sufficient basis for disciplinary sanction. Persistent serious error when the law is clear may be another matter. In such a case it is the wilful refusal to apply the law that could amount to an abuse of process, a class of bad faith, that is the focus of the sanction. Otherwise, the law is applied and clarified through an appellate structure or legislative amendment and not disciplinary sanction.

11. The provisions of the Universal Charter reflect and develop well-known statements of principle such as the 1985 UN Basic Principles on Judicial Independence; the work of the UN Special Rapporteur on Judicial Independence from 1994 onwards; the decisions of the Human Rights Committee of the UN applying the fair trial principles of the International Covenant on Civil and Political Rights and the adoption of the Bangalore Principles on Judicial Conduct in 2002 by the judicial working group under the auspices of the UN ODC.

12. The Council of Europe has promulgated a large number of statements to similar effect such as Recommendation CM/Rec (2010)12 on Judges Independence; the CCJE Magna Carta of Judges (2012 but first promulgated in 2010) and the Venice Commission Rule of Law Check list of 2016 as well as numerous decisions of the European Court of Human Rights as to the meaning of a fair and impartial trial.

13. The European Union recognises the rule of law as a fundamental principle in Article 2 of the consolidated Treaty on the European Union and this has given rise to increasing case law on the meaning and substance of judicial independence to which reference will be made below

14. Effect is given to these principles by democratic countries recognising the separation of powers in national regulations, codes of conduct and statements from judicial leaders. Thus, in England and Wales the judicial web site explains:

    "Safeguards are needed to ensure that Judges are free to make their judicial decisions without fear or favour and thus to preserve their independence. For example, if a politician or senior judge felt able to sack a particular judge, or remove him or her from a case, simply because they did not like the decision reached, the principle of judicial independence would be greatly undermined and there could be no possibility of a fair trial. It could also lead judges to make decisions they felt might be more acceptable to whoever had the right to decide whether they should continue serving as judges or be promoted."

15. One of the safeguards in England and Wales is that the Judicial Conduct Investigations Office explains to potential complainants that it cannot investigate as a disciplinary matter either a judges' decision or the reasons for it.

16. The law of the US is to similar effect. Judicial-Conduct Rule 4(b)(1) states "Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse." There is absolute immunity from sanction for the contents of a judicial decision.

17. Canada like the USA has historical links to the common law constitutional history of England and Wales[3] . In the leading authority of R v Beauregard (1986 2 SCR 56) the Supreme Court of Canada described judicial independence at paragraphs 21-22

[3] For an illuminating account of the constitutional events in the 17th century before judges had security of tenure that gave rise to these principles See Sir Henry Brook **Judicial Independence – Its History in England and Wales (www.jud.comnsw.gov.au).**

"Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider--be it government, pressure group, individual or even another judge--should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence. Nevertheless, it is not the entire content of the principle. Of recent years the general understanding of the principle of judicial independence has grown and been transformed to respond to the modern needs and problems of free and democratic societies. The ability of individual judges to make decisions in discrete cases free from external interference or influence continues, of course, to be an important and necessary component of the principle. Today, however, the principle is far broader. In the words of a leading academic authority on judicial independence, Professor Shimon Shetreet: "The judiciary has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions in shaping the life of its community"[4].

18. What constitutes legitimate judicial activity may be a matter of debate, although as Shetreet noted 35 years ago it now includes appropriate participation in the life of the community. Whilst it is well recognised that judges should not engage in political activity, and has to curb the exercise of their rights as a citizen to free expression, the UN Basic Principles recognise that judges have the right to join judicial associations. Further the judiciary have a special responsibility for educating the public about potential threats to judicial independence and whether as a member of a judicial association or as a simple judge may be entitled to speak to schools. Community groups and others about what the rule of law means and how it may be undermined.

19. In a 2017 speech Beverly McLachlin, the former Chief Justice of Canada, noted the threats to the rule of law and judicial independence that had taken place in a number of countries of the world and asked what could be done about it. She said:

    "The best antidote to the causes of the slippage of the rule of law is probably education – education geared at helping people understand the broad sweep of history and the importance of the rule of law and constitutional democracy of which an independent judiciary is a vital part. More concretely, individuals and governments that respect the rule of law must speak out and act out against its weakening, whether in their own country or in other countries."

    Whilst recognising that judges could not undertake political activities, they had a role to play

[4] The Shetreet quotation is referenced as "The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration", in S. Shetreet and J. Deschênes (eds.), Judicial Independence: The Contemporary Debate (1985), at p. 393)."

"Here are some of the things I suggest that we, as judges, can do to keep our constitutional guarantees of rule of law and judicial independence vibrant and strong. The Canadian Judicial Council has prepared a kit on judicial independence to assist judges in speaking to community groups and schools. We can do this without getting drawn into partisan politics. Beyond this, we can strengthen understanding of the importance of the rule of law and judicial independence abroad by participating in judicial education in other countries. Many Canadian judges do this."

20. Both the right for judges to make appropriate comment on matters affecting judicial independence and the need for judges to educate the public on judicial ethics are reflected in the Universal Charter.

"Article 3-5 – Freedom of expression and right to create associations:

Judges enjoy, as all other citizens, freedom of expression. However, while exercising this right, they must show restraint and always behave in such a way, as to preserve the dignity of their office, as well as impartiality and independence of the judiciary. *The right of a judge to belong to a professional association must be recognized in order to permit the judges to be consulted, especially concerning the application of their statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests and their independence."*

"Article 6-1 – General Principles:
"In all circumstances, judges must be guided by ethical principles. Such principles, concerning at the same time their professional duties and their way of behaving, must guide judges and be part of their training. *These principles should be laid down in writing in order to increase public confidence in judges and the judiciary. Judges should play a leading role in the development of such ethical principles.* "

"Article 6-2 – Impartiality, dignity, incompatibilities, restraint:

In the performance of the judicial duties the judge must be impartial and must so be seen. The judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved. *The judge must refrain from any behaviour, action or expression of a kind effectively to affect confidence in his/her impartiality and independence*."

(Emphasis supplied)

21. There is also ample case law from the European Court of Human rights on the right of judges individually or collectively to comment on legal reforms that impacts on the administration of justice. A helpful summary is to be found in the recent urgent opinion of the Venice Commission on the recent legislative changes in Poland[5]:

"26. Judges have a duty of restraint and discretion in cases where the authority and impartiality of the judiciary are likely to be called in question. In principle, it is appropriate for the law to limit the political activity of judges and to prohibit them from

[5] Opinion No. 977 / 2019; CDL-PI(2020)002; Strasbourg, 16 January 2020

being "involved in public activities that are incompatible with the principle of judicial independence and the impartiality." On the other hand, as the ECtHR held in the case of Baka v. Hungary (Case 2026/12 23 June 2016), "questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10. Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter (§ 165). ….. In the case of Previti v. Italy the ECtHR considered that judges, being legal experts, may criticise legal reforms initiated by the Government, where such criticism is expressed in an appropriate manner (Case 45291/06 8 December 2009)."

22. Whilst there is a distinction between immunity from sanction for judicial decisions made in good faith and the scope of legitimate judicial comment on matters affecting the administration of justice, sanctions for either act may contravene the principle of judicial independence and the rule of law.

23. The law of the European Union as to the requirements of judicial independence are authoritatively set out in the Judgment of the Court of Justice in joined cases C-585/18; C-624/18 and C-625/18 AK v Krajowa Rada Sądownictwa and others (18 November 2019)

"108 The requirement that courts be independent, a requirement which the Member States must — under the second subparagraph of Article 19(1) TEU — ensure is observed in respect of national courts which, like the ordinary Polish courts, are called upon to rule on issues relating to the interpretation and application of EU law, has two aspects to it (see, to that effect, judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 71).

109 The first aspect, which is external in nature, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 44 and the case-law cited, and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 72).

110 The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 65 and the case-law cited, and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 73).

111 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 66 and the case-law cited, and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 74).

112 As is also clear from settled case-law, the necessary freedom of judges from all external intervention or pressure requires certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 64 and the case-law cited, and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 75).

113 The principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed (judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 76).

114 In that latter respect, it is apparent, more specifically, from the Court's case-law that the requirement of independence means that the rules governing the disciplinary regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. Thus, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 67, and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 77).

115 Having regard to the cardinal importance of the principle of irremovability, an exception thereto is thus acceptable only if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the courts concerned to external factors and their neutrality with respect to the interests before

them (see, to that effect, judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 79)."

24. It is clear that these are provisions of EU law directly binding on Poland so long as it remains a Member State of the European Union. Further taking disciplinary sanctions against for judges because they have reached legal decisions in good faith would be an obvious example of breach of the rule of law by 'being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions'.

25. Further comment will be made on the implications of this decision when this opinion addresses the second and third questions.

Question 2: EU law

26. The treaties establishing the European Union indicate that it is a very special kind of international institution in that member states of the European Union are required to give effect to European Union law, ensure its legislation is in conformity with EU law and provide effective remedies in its judicial system to enforce these obligations[6]. In the event that national law fails to do so and an issue of European Union arises, the national judge will have to apply European Union even if it conflicts with national law.

27. In the United Kingdom the nature of this obligation was brought into public consciousness with the vexed issue of fishing rights. In the Factortame litigation (see R v Secretary of State for Transport ex p Factortame Limited [1990] UKHL 7; Case C 213/89 Factortame No 1 ECJ 1990 EC 1 2433 and joined cases C 46/93 and C 48/93 Brasserie du Pecheur and others v Secretary of state for Transport [1996] ECR 1 1029) the UK judiciary was required to suspend the operation of its criminal law regulating access to UK coastal waters of the fleets of other EU member states. It is understandable if such conflicts result in public controversy and debate but the duty of the judge to apply the law, in this case binding international law, is clear.

28. The Court of Justice has explained the duty of member states and their judiciaries to apply European Union law on many occasions. Relevant to this question and the following one is Opinion 1/09 given on 11 March 2011 in respect of a draft treaty between EU states for an European Patents Court that was intended to have exclusive competence to refer questions of the interpretation of European Union law to the Court of Justice. This explained the legal position in the following terms:

> "65. It is apparent from the Court's settled case-law that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only

[6] See article 19 Treaty on European Union

Member States but also their nationals (see, inter alia, Case 26/62 *van Gend & Loos* [1963] ECR 1, 12 and Case 6/64 *Costa* [1964] ECR 585, 593). The essential characteristics of the European Union legal order thus constituted are in particular its primacy over the laws of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (see Opinion 1/91 [1991] ECR I-6079, paragraph 21).

66. As is evident from Article 19(1) TEU, the guardians of that legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States.

67. Moreover, it is for the Court to ensure respect for the autonomy of the European Union legal order thus created by the Treaties (see Opinion 1/91, paragraph 35).

68. It should also be observed that the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for European Union law (see, to that effect, Case C-298/96 *Oelmühle and Schmidt Söhne* [1998] ECR I-4767, paragraph 23). Further, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 38 and case-law cited).

69. The national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed (see Case 244/80 *Foglia* [1981] ECR 3045, paragraph 16, and Joined Cases C-422/93 to C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 15).

70. The judicial system of the European Union is moreover a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions (see, inter alia, Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 40)."

29. Accordingly, there can be no room for doubt that a judge of a national court or tribunal must apply European Union that is clearly applicable and of direct effect whenever an issue arises involving such law.

30. This is a necessary part of the national judge's function in a Member State of the EU. The specific requirements of EU law are therefore *a fortiori* the general principles of international law that doing one's best to apply the law cannot be the subject of disciplinary action.

31. It appears that the Polish legislature has responded to the November 2019 decision of the Court of Justice (cited at [23] above) by amending the law preventing a national judge

from deciding whether another court or tribunal in Poland including those concerned with disciplinary decisions over the judiciary is independent and restricting the circumstances when a national judge can make a reference.

32. In its January 2020 Opinion the Venice Commission expressed its concern that these measures were both designed to 'nullify' the effect of the CJEU decision albeit that one Member State cannot decide for itself what EU law is and when it should apply and second that the legislation placed an intolerable dilemma on the national judge as to whether to apply EU law.

33. Whatever issues the legislature of Poland may have with the case law of the EU, it is a clear violation of the principle of judicial independence to sanction a judge for applying EU law (accurately and in good faith) when that is part of the judge's duty.

Question 3: Making a reference to the CJEU

34. Article 267 of the Treaty on the Functioning of the European Union (TFEU) provides:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."

35. It is thus clear from the text of this Article that *any* court *or* tribunal may make a reference to the CJEU where it considers that a decision is necessary for the national court's own decision and a final court from whose decision there is no appeal must make a reference in such a case, unless previous rulings of the CJEU have put the matter beyond doubt.

36. In the European Patents case (noted at [28] above), the Court of Justice explained the central importance of the reference procedure for ensuring the rule of European Union law as follows:

> "83. It should also be recalled that Article 267 TFEU, which is essential for the preservation of the Community character of the law established by the Treaties, aims to ensure that, in all circumstances, that law has the same effect in all Member States. The preliminary ruling mechanism thus established aims to avoid divergences in the interpretation of European Union law which the national courts have to apply and

tends to ensure this application by making available to national judges a means of eliminating difficulties which may be occasioned by the requirement of giving European Union law its full effect within the framework of the judicial systems of the Member States. Further, the national courts have the most extensive power, or even the obligation, to make a reference to the Court if they consider that a case pending before them raises issues involving an interpretation or assessment of the validity of the provisions of European Union law and requiring a decision by them (see, to that effect, Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33, paragraphs 2 and 3, and Case C-458/06 *Gourmet Classic* [2008] ECR I-4207, paragraph 20).

84. The system set up by Article 267 TFEU therefore establishes between the Court of Justice and the national courts direct cooperation as part of which the latter are closely involved in the correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order.

85. It follows from all of the foregoing that the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties."

37. In the particular case the Court explained that the proposed provision of the European Patents draft treaty that would give exclusive competence to the international tribunal to make a reference was contrary to EU law as any national court or tribunal must also be able to make a reference.

38. In the light of such clear guidance, it is surprising that the Polish legislator should seek to restrict the power of national judges to make a reference to the CJEU. Whilst the validity of that provision in European law is outside the scope of the questions on which the Presidency Committee have sought an opinion, there must be a substantial risk that it will be found to be inconsistent with EU law and just as in the Factortame sequence of cases, national courts will be called on to prevent any inconsistent rule of national law being enforced pending clarification and the state may well be responsible for damages for any losses incurred by failing to apply clear provisions of EU law[7].

39. At the very least, there can be no doubt that the general principles outlined in question 1 as well as the express terms of EU law set out above, mean that a case cannot be disciplined in national law for making a reference when permitted by EU law although purportedly restricted by national law.

40. In fact, in an opinion given in the course of proceedings in joined Cases 558/18 and C 563/18 Miasto Łódź and others given in March 2020 the CJEU has already expressed its view.

"56. In accordance with equally settled case-law, Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a

[7] See citations above and in particular Brasserie du Pecheur [1996] ECR 1 1066 see also Case 224/01 Kobler 30 September 2003 on the liability for Member States for failing to apply national law even where it results from a judicial decision.

case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them. National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate (judgments of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 26, and of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 42 and the case-law cited).

> 57. Therefore*, a rule of national law cannot prevent a national court from using that discretion, which is an inherent part of the system of cooperation between the national courts and the Court of Justice established in Article 267 TFEU* and of the functions of the court responsible for the application of EU law, entrusted by that provision to the national courts (judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 103 and the case-law cited).

> 58. Provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot therefore be permitted (see, to that effect, order of the President of the Court of 1 October 2018, *Miasto Łowicz and Prokuratura Okręgowa w Płocku*, C-558/18 and C-563/18, not published, EU:C:2018:923, paragraph 21). Indeed, the mere prospect, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions referred to in the preceding paragraph.

> 59. For those judges, not being exposed to disciplinary proceedings or measures for having exercised such a discretion to bring a matter before the Court, which is exclusively within their jurisdiction, also constitutes a guarantee that is essential to judicial independence (see, to that effect, order of 12 February 2019, *RH*, C-8/19 PPU, EU:C:2019:110, paragraph 47), which independence is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 54 and the case-law cited).

> (Emphasis in italics at paragraph 57 supplied)

41. So clear are the relevant principles in the case of EU law generally and the ability to make a reference to the CJEU where the national judge considers necessary, it is puzzling why the Polish executive permits disciplinary proceedings to be taken or continued on these grounds. The issue has been raised forcefully in the Venice Commission's report of January 2020 (see question 1 above). On the 5th June 2020 Mr Justice Fordham sitting in the Administrative Court of England and Wales in an application for permission to appeal in a Polish EAW case noted at [6]:

> "A key concern articulated in relation to the latest legislative developments in Poland concerns possible disciplinary and penalising consequences against judges, for the content of what they say in the course of their judicial acts, as courts, if what they say constitutes 'acts or omissions which may prevent or significantly impede the

functioning of an organ of the judiciary' or which constitute 'an infringement of the dignity of the office'. The Venice Commission Report say this 'threatens the principle of legality' because these provisions 'invite very subjective interpretations and could easily be abused to interfere improperly in judicial role' (paragraph 44). This is a concern about 'disciplinary responsibility of judges for judicial acts' (paragraph 25). It is, on the face of it, a very serious concern. There are other concerns raised in the Report (summarised at paragraphs 59 to 60), relating to the 5 key features of the latest legislative developments (paragraph 19). …. I would not have granted permission to appeal in this case, but for the concern relating to disciplinary implications regarding the content of judicial acts. I am not going to shut out reliance on the other points, and their effect in combination. I can see that the nullifying effect problem is a particularly important issue, and its implications for extradition seem at least appropriate for consideration".

42. It is thus not merely Poland's relationship with the EU that is placed in jeopardy by such a course but also relations with other Member States in terms of the basic duty to cooperate with Polish courts for example in the mutual enforcement of European Arrest Warrants.[8]

Conclusions

43. This opinion is limited to the three questions that have been posed to the working Committee by the Presidency Council and does not engage on other questions that are likely to come before the Courts in Poland and the CJEU in Luxembourg in due course.

44. It is rare for the legal context of those questions to include not merely the general principles of international law and practice accurately reflected in the Universal Charter but the specific judgments of two European Courts and in particular the CJEU in Luxembourg.

45. Here EU law provides the specific context to Question 1 and mandates the answers to Questions 2 and 3. It is the duty of the national judge to apply EU law where applicable it is clear and authoritatively decided by the Court of Justice or to make a reference to that Court for clarity. Judges who perform their judicial duties in accordance with those binding obligations cannot be said to acting other than in good faith or outside their powers.

46. National systems may differ in terms of sanctions that can be applied if a judge acts with malice or conscious that they have no power to adjudicate on an issue, but otherwise whether expressly or impliedly national systems reflect the international principles set out in the Charter of the Judge 2018 that conveniently summarises best practices identified in a variety of other instruments.

[8] Although the author has seen no judgment in English there is information that the Amsterdam District Court has refused extradition on the basis of concerns about the independence of the Polish court.

47. In the view of this working party, it would be a shocking breach of the core principle of judicial independence and respect for the rule of law in a democratic society for a judge to face disciplinary sanction for a good faith exercise of judicial powers and functions.

Sir Nicholas Blake

30 June 2020