

Judicial Legislation as a Form of the Appropriation of Competences Not Conferred upon the EU and the Politicization of the CJEU

Judgment of the Court (Grand Chamber) of 15 July 2021 in Case C 791/19
European Commission v Republic of Poland

The CJEU is competent to judge in matters related to the system of the organs of judicial authority in EU member states.

Jacek Zalesny

University of Warsaw, Poland

zalesnyjacek@gmail.com

ORCID: 0000-0002-8231-4454

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Commentary

Facts

The judgment commented upon¹ was issued as a consequence of a complaint filed against a statement, based on art. 258 TFEU, of an infringement of the obligations of a Member State, filed on 25 October 2019 by the European Commission along with the Kingdom of Belgium, the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden, against the Republic of Poland.

The CJEU² declared that:

¹ The judgment of the CJEU (Grand Chamber) of 15 July 2021 in case C 791/19 *European Commission v Republic of Poland*, ECLI:EU:C:2021:596.

² I omit the issue of whether CJEU judges appointed by politicians are independent and as such competent to adjudicate in case C 791/19. I also omit the legal consequences of the findings of the French daily *Liberation* on the politicization of CJEU judges, their dependence on lobbyists and officials of the European Commission, or the suspicions formulated by *Liberation* journalists concerning the participation of CJEU judges in activities involving corruption and the connection between these findings and case C 791/19. Having independent and impartial judges means above their being appointed apolitically and their remaining separate from the participants in political relations, including those concerning the desired system of political relations. See in the latest literature,

- 1) by failing to guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court, Poland, which is responsible for reviewing decisions issued in disciplinary proceedings against judges (art. 3(5), art. 27 and art. 73 par. 1 of the Law on the Supreme Court read in conjunction with art. 9a of the Law on the National Council of the Judiciary);
- 2) by allowing the content of judicial decisions to be classified as a disciplinary offence involving judges of the ordinary courts (art. 107 par. 1 of the Law on the organization of the ordinary courts and art. 97 par. 1 and 3 of the Law on the Supreme Court);
- 3) by conferring on the President of the Disciplinary Chamber of the Supreme Court the discretionary power to designate a disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts (art. 110 par. 3 and art. 114 par. 7 of the Law on the organization of the ordinary courts) and, therefore, by failing to guarantee that disciplinary cases are examined by a tribunal “established by law”; and
- 4) by failing to guarantee that disciplinary cases against judges of the ordinary courts are examined within a reasonable time (second sentence of art. 112b par. 5 of the Law on the organization of the ordinary courts), and by providing that actions relating to the appointment of defense counsel and the taking up of the defense by that counsel do not have a suspensory effect on the course of disciplinary proceedings (art. 113a of that law) and that the disciplinary tribunal should conduct the proceedings despite the justified absence of the notified accused judge or his or her defense counsel (art. 115a par. 3 of the same law) and, therefore, by failing to guarantee respect for the rights of defense of accused judges of the ordinary courts,

the Republic of Poland failed to fulfill its obligations under the second subparagraph of art. 19(1) TEU.

Assessment of the CJEU Opinion

The following commentary on the sentence discusses the legal foundations of the sentence issued by the CJEU, i.e., the competences of the CJEU to adjudicate in the area of

e.g., M. Dąbrowski, J. Szymanek, M.M. Wiszowaty, J. Zaleśny, *Niezależność sądów i niezawisłość sędziów. Miscellanea*, Warszawa 2020, p. 24 ff. As emphasized by Marek Safjan, without an independent judiciary the right to effective judicial protection is nothing but an illusion. M. Safjan, “Prawo do skutecznej ochrony sądowej – refleksje dotyczące wyroku TSUE z 19.11.2019 r. w sprawach połączonych C-585/18, C-624/18, C-625/18”, *Palestra* 2020, no. 5, p. 6. If the events referred to by the daily *Liberation* indeed took place, the persons participating in them would not fulfill the attributes of independence and as such would not be competent to judge in case C 791/19; any decision taken with their participation would be a non-existent judgment (*sententia non existens*).

issues concerning the system of the organs of judicial authority in EU member states. It does not provide a systemic assessment of the regulations submitted to control.³

Despite the assumption adopted in jurisprudence that the court knows the law (*lura novit curia*), when considering whether in actual fact the CJEU knows (applies) the binding law, the scope of competences possessed by the EU needs to be borne in mind. The competences of the EU are established in title 1 TFEU ("Categories and areas of Union competences"). In accordance with art. 3 TFEU, the Union has exclusive competences in the following areas: a) the customs union; b) establishing rules of competition necessary for the functioning of the internal market; c) monetary policy for eurozone countries; d) conservation of marine biological resources under the common fisheries policy; e) the common commercial policy. The Union also has exclusive competence over the conclusion of international agreements where provided for in a legislative act of the EU and when the conclusion of an agreement is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

By virtue of art. 4 TFEU, the competences shared between the EU and its member states concern the following principal areas: a) the internal market; b) social policy related to the aspects established in the TFEU; c) economic, social and territorial cohesion; d) agriculture and fisheries, excluding the conservation of marine biological resources; e) the environment; f) consumer protection; g) transport; h) trans-European networks; i) energy; j) freedom, security and justice; and k) common safety concerns in public health matters related to the aspects established in the TFEU. In the areas of research, technological development and space, the Union has competence to carry out activities, in particular to define and implement programs; however, the exercise of that competence does not result in Member States being prevented from exercising theirs. In the areas of development, cooperation and humanitarian aid, the Union has competence to carry out activities and conduct a common policy; however, the exercise of that competence does not result in Member States being prevented from exercising theirs.

At the same time, pursuant to art. 6 TFEU the EU has competence to carry out actions aimed at supporting, coordinating or supplementing actions by Member States established in the treaty. Such actions at the European level include the following: a) the protection and improvement of human health; b) industry; c) culture; d) tourism; e) education, vocational training, youth and sport; f) civil protection; g) administrative

³ For a systemic assessment of the regulations submitted to control by the TFEU, see, e.g., A. Bień-Kacała, "Illiberal Judicialisation of Politics in Poland", *Comparative Law Review* 2019, vol. 25; K. Grajewski, "Założenia i rzeczywistość władzy sądowniczej – uwagi w dwudziestą rocznicę wejścia w życie Konstytucji III Rzeczypospolitej", *Przegląd Konstytucyjny* 2018, no. 1; A. Machnikowska, "Odpowiedzialność władzy sądowniczej a odpowiedzialność dyscyplinarna sędziów", *Przegląd Prawa Konstytucyjnego* 2020, no. 4; S. Patyra, "Sądownictwo dyscyplinarne w kontekście ograniczeń konstytucyjnych", *Przegląd Prawa Konstytucyjnego* 2020, no. 4; A. Rytel-Warzocho, "Contemporary Problems of the Judicial Power in Poland", *Gdańskie Studia Prawnicze* 2020, vol. 24, no. 4.

cooperation. This scope does not include the organs of judicial power of EU member states.

An analysis of the TFEU regulations on the categories and areas of Union competences leaves no doubt that, in the areas of exclusive or shared competences, or competences authorizing the EU to take action aimed at supporting, coordinating or supplementing definite actions of Member States defined in treaties, there are no competences concerning the system of the organs of judicial authority in EU Member States. Member States did not transfer these competences to the EU. Unlike the case of, say, Russia, EU law does not recognize the notion of hidden competences of the EU. In accordance with art. 5 of the Treaty on the European Union, the limits of the Union's competences are determined by the principle of conferral, under which the Union may act only within the limits of the competences conferred upon it by the Member States in treaties and in order to attain the objectives set out therein. Competences not conferred upon the Union in a treaty remain with the Member States.⁴

This review of EU competences permits an exegesis of the legal framework established by the CJEU in case C 791/19. In the legal framework of its judgment, the CJEU referred to four provisions: art. 2 TEU, art. 19 item 1 TEU, art. 267 TFEU and art. 47 of the Charter of Fundamental Rights of the European Union (hereinafter the CFR). To show that the CJEU has no authority to control the national legal regulations concerning the system of the organs of judicial authority in Member States, it is only necessary to quote from those regulations. art. 2 TEU states 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". art. 19 item 1 TEU reads as follows: "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". In accordance with art. 267 TFEU, "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. [...]".

⁴ In the Polish doctrine, on the conferral of the state's competences see: K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Kraków 2007, in particular p. 99 ff.; K. Kowalik-Bańczyk, "Zasada kompetencji powierzonych i kategorie kompetencji" [in:] *Podstawy i źródła prawa Unii Europejskiej. System Prawa Unii Europejskiej*, vol. 1, S. Biernat (ed.), Warszawa 2020, p. 386 ff.

Whereas art. 47 of CFR reads: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law [...]".

Article 2 TEU, which the CJEU referred to in its judgment, contains a catalogue of values constituting the foundations of the EU and which are common to all the EU Member States. It says nothing about the competences of the European Union. Article 2 TEU directly confirms that the EU is based on respect for the rule of law. As rightly indicated by the legal service of the Council of the European Union, art. 2 TEU does not provide the Union with any substantive competences. Certain values are enumerated which ought to be observed by Union institutions and those of the Member States when acting within the powers granted to the Union in treaties, though without infringing the limits of those treaties. It follows from this that a violation of Union values by a Member State, including as regards the rule of law, can be ascertained only when the relevant activity of the Member State is in an area where the Union possesses competence based on the provisions of a treaty that establishes those competences. The prohibition against the presumption of competence is a component of the law as it is understood in the European doctrine.⁵ Therefore, since the EU itself declares that it is founded upon respect for the rule of law, it thereby confirms that it acts exclusively within the competences granted to it, i.e. that its bodies can act only within title 1 TFEU ("Categories and areas of Union competence"). Distinguishes distinction must be made between values and competences. The attempt made by the CJEU to adjudicate not on the basis of the competences assigned to it but on the basis of the values on which the EU is founded and which are common to the EU Member States is legally defective. Likewise, the principle of competences being granted is contradicted when competences of international organizations are derived from the EU's objectives.⁶ Interference by the CJEU in the interior matters of a Member State in an area where the CJEU has no competence violates art. 2 TEU in that the EU is obliged to respect the rule of law.

Article 19 TEU, referred to in the legal foundation of the CJEU's decision, lays down how the CJEU is organized (the Court of Justice of the European Union consists of the Court of Justice, Courts and specialized courts) and the tasks entrusted to it (the CJEU ensures that in the interpretation and application of the Treaties the law is observed). It also establishes remedies for national legal protection (Member States provide remedies sufficient to ensure effective legal protection) but – characteristically – solely in fields covered by EU law.⁷ Therefore, for art. 19 TEU to be applicable in the

⁵ Cf. J. Jaskiernia, *Komentarz do Konstytucji RP. Art. 7, 8, 9*, Warszawa 2021, p. 17 ff.

⁶ P. Saganek, "Podział kompetencji pomiędzy Unię Europejską a państwa członkowskie w świetle traktatu konstytucyjnego" [in:] *Współczesne wyzwania europejskiej przestrzeni prawnej. Księga pamiątkowa dla uczczenia 70. Urodzin Profesora Eugeniusza Piontka*, A. Łazowski, R. Ostrihansky (eds), Zakamycze 2005, pp. 110–111.

⁷ This element is also pointed out by K. Prokop, see *idem*, "Normatywny aspekt poszanowania wspól-

case examined by the CJEU, the primary premise concerning the material law with regard to which the CJEU adjudicates must be fulfilled, i.e., the case must concern an area included within EU law. As proven above, this premise was not fulfilled in case C 791/19. None of the areas included within EU law concerns the system of the organs of judicial authority in the EU Member States. Significantly, in this area the EU has neither exclusive competences nor shared competences nor competences authorizing the EU to take action aimed at supporting, coordinating or supplementing definite actions by Member States defined in the treaties. Member states, as parties to the treaties, established the limits of competences transferred to the Union, and did not authorize the EU to presume competences or to derive new competences from existing ones. The non-existence of the material condition of the CJEU's capacity to apply art. 19 TEU means that this regulation cannot provide a legal basis for the ruling.

Article 47 CFR is also not applicable in the case pending before the CJEU due to the fact that, in the meaning of art. 51 item 1 CFR, the application of EU law does not take place in the Charter.⁸ Pursuant to art. 47 CFR, the Charter applies in relation to EU Member States only when they are implementing Union law.⁹ In a situation where a given legal state is not included within the scope of application of EU law, the CJEU is not competent to make an assessment, and the provisions of the CFR cannot constitute a basis for grant the court such competence. Article 19 item 1, second paragraph is not the source of the fundamental right to defense or the right to examine a case within a reasonable period. Disciplinary proceedings against judges on the basis of procedural regulations that are questioned by the EC are of an internal (domestic) character. When establishing the procedures involved, the authorities of the EU Member State did not regulate the issues included within Union law in the meaning of art. 5 TEU (the principle of conferral), art. 3 (EU exclusive competences) or art. 4 (competences shared by the EU and the member states) TFEU.

When settling issues related to the application or interpretation of Union law, the CJEU is obliged to act within the framework of the rule of law binding it.¹⁰ This is the basis of the common European legal space. The long and consolidated line of CJEU jurisprudence is often cited as an argument for the EU Member States not having exclusive competence in the area of establishing the system of courts.¹¹ I do not support

nych wartości. Rozważania wokół Art. 2 TUE" [in:] *Wartości Unii Europejskiej a praworządność*, M. Romanowski (ed.), Warszawa 2020, p. 109.

⁸ Likewise, see: "Opinia rzecznika generalnego Evgeniego Tancheva przedstawiona w dniu 11 kwietnia 2018 r. Sprawa C-619/18 Komisja Europejska przeciwko Rzeczypospolitej Polskiej (obniżenie wieku przejścia w stan spoczynku sędziów Sądu Najwyższego). ECLI:EU:C:2019:325, point 67" [in:] *Problem praworządności w Polsce w świetle orzecznictwa Trybunału Sprawiedliwości UE (2018–2020)*, introduction and selection by J. Barcz, A. Grzelak, R. Szyndlauer (eds), Warszawa 2021, p. 337.

⁹ Cf. M. Blauberger, V. van Hüllen, "Conditionality of EU funds: an instrument to enforce EU fundamental values?", *Journal of European Integration* 2021, vol. 41, no. 1, p. 3.

¹⁰ See the judgment of the Constitutional Tribunal of 11 May 2005, file ref. no. K 18/04, <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?sprawa=3826&dokument=97> (accessed: 2022.05.25).

¹¹ M. Safjan, *Prawo do skutecznej ochrony...*, p. 8. According to R. Szyndlauer, on the other hand, the right of the EU institution to assess the degree of independence of the administration of justice in

this argument. Russia's long, prolonged occupation of parts of Ukraine does not justify the statement that Russia is competent to interfere in Ukraine's political system. European law is not case law.¹² The CJEU does not have law-making power, and the effects of its adjudication are not normative acts. In particular, they cannot modify or revoke primary law as a commonwealth of values based, for example, on the rule of law. Nor is going beyond the competences possessed justified by the statement that if there is a "deficit of democracy", there can also be a "deficit of the rule of law".¹³ Jan-Werner Müller writes that today the EU is part of the problem for democracy in Europe, not part of the solution.¹⁴

The EU legal regulations set very clearly limits on the competences of EU bodies. As pointed out by Ewa Łętowska, rigor requires us to interpret the regulations granting competences very strictly, and prevents us from interpreting the linguistically unambiguous regulations on competence broadly.¹⁵ A detailed analysis of the framework formulated by the CJEU in case C 791/19 permits the statement that that framework is not enshrined in the binding law, and in particular is not enshrined in the TEU or the TFEU. None of the provisions referred to by the CJEU, whether applied separately or jointly, gives the court the competence to pass a substantial judgment in the case pending before it. The settlement established by the CJEU is an expression of its political will, not an act of cognition. In this context, the doctrine perceives the CJEU as an institution that defines the Union's center of attraction.¹⁶ A determination of the CJEU as the "motor" of European integration¹⁷ to develop it¹⁸ does not give the court the competence to create a norm of conduct that both extends its competences and at the same time violates the will of the Member States expressed in contract law, which constitutes part of the European commonwealth. Meanwhile, as pointed out by Leszek Garlicki, modifications of the scope of conferred competences, and a broad-

the Member States also follows from the most recent jurisprudence of the CJEU, which – as admitted by the author – is very active in this area and is under the influence of ongoing events. R. Szyndlauer, "Przebieg dialogu dotyczącego praworządności pomiędzy instytucjami Unii Europejskiej a rządem polskim – perspektywa Komisji Europejskiej" [in:] *Problem praworządności w Polsce w świetle...*, p. 43.

¹² Cf. E. Łętowska, "Czego uczą odpowiedzi na pytania prejudycjalne dotyczące polskiego wymiaru sprawiedliwości", *Palestra* 2020, no. 5, p. 35.

¹³ The "deficit of democracy" in the EU is broadly discussed in the Polish literature by R. Balicki, "Demokracja oraz jej deficyt w Unii Europejskiej", *Przegląd Prawa Konstytucyjnego* 2011, no. 4, pp. 11–27; A. Sikora, "Zagadnienia demokratycznego charakteru Unii Europejskiej" [in:] *Podstawy i źródła prawa Unii Europejskiej. System Prawa Unii...*, p. 478 ff.

¹⁴ J.W. Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, <https://www.princeton.edu/~jmueller/ELJ-Democracy%20Protection-JWMueller-pdf>, p. 7 (accessed: 2022.05.25).

¹⁵ E. Łętowska, "Czego uczą odpowiedzi na pytania prejudycjalne...", p. 50.

¹⁶ T.T. Koncewicz, *Filozofia europejskiego wymiaru sprawiedliwości. O ewolucji fundamentów unijnego porządku prawnego*, Warszawa 2020, p. 404.

¹⁷ D. Kabat-Rudnicka, *Konstytucjonalizacja Unii Europejskiej a sądownictwo konstytucyjne. Wielopoziomowa współpraca czy rywalizacja?*, Warszawa 2016, p. 66.

¹⁸ A. Zawadzka-Łojek, Trybunał Sprawiedliwości Unii Europejskiej na straży przestrzegania prawa unijnego [in:] *Sądowe mechanizmy ochrony praworządności w Polsce w świetle...*, p. 54. Likewise, M. Poboży, *Zasada podziału władzy w systemie instytucjonalnym Unii Europejskiej*, Warszawa 2014, pp. 252–254.

ening of that scope, are possible only by way of an international agreement and on condition that it is ratified by all the states concerned, unless any of them (which did not occur in this case) waived its right to ratify in the content of the agreement.¹⁹ This makes the CJEU judgment wholly contrary to the legal order of the EU. Just as Russia does not have the competence to interfere in the internal matters of other countries (even when assessing the state of their rule of law critically), the CJEU does not have the competence to interfere in the internal matters of its Member States (even when assessing the state of their rule of law critically). For the CJEU to act in this area without a proper legal foundation is symptomatic of a process that we may refer to as a “putinization” of international relations.²⁰ Although the decision issued by the CJEU resembles a judgment in certain aspect, in fact it goes far beyond the competence of the court, and therefore does not have the attributes of a sentence in the meaning of the provisions of the TEU. The court’s decision only seems to be an adjudication and in fact leads to a procedural situation known in the doctrine as *sententia non existens* (a non-existent ruling). The statement by the CJEU in case C 791/19 is a fact of law which did take place, but which causes none of the procedural effects normally associated with the issuance of a sentence. Although it was called a sentence, it does not possess (being formulated beyond the scope of the competences of the court) the attributes of a sentence. What it does do is it creatively enrich the history of the rule of law of certain European states, alongside such milestones as colonialism or national socialism.

The rule of law is a value to which the TEU acknowledges no exceptions. In particular, it acknowledges no exceptions for the CJEU. By acting *ultra vires*, the CJEU weakens the rule of law in the EU and makes the observance of other fundamental principles of Union law and human rights more difficult. At the same time, the conduct of the CJEU is an infringement of the principle of sincere cooperation (solidarity) binding on the court, as a body of the European Union.²¹ In art. 4 item 3 TEU, the EU pledged to respect its Member States. An attempt to appropriate competences not conferred upon the EU breaks that pledge. The actions taken by the CJEU without a proper legal foundation should cause a robust discussion on strengthening mechanisms to safeguard the rule of law, including by increasing the accountability of functionaries for violating EU regulations.

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¹⁹ L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 2009, p. 57.

²⁰ More on this process, see: M. Cappelletti, “Is the European Court of Justice ‘running wild?’”, *European Law Review* 1987, vol. 12.

²¹ For more on this subject, see: D. Miąsik, *Zasady i prawa podstawowe. System prawa Unii Europejskiej*, vol. 2, Warszawa 2022, p. 162.

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Summary

Jacek Zaleśny

Judicial Legislation as a Form of Appropriation of Competences Not Conferred upon the EU and the CJEU

The gloss refers to a judgment of the CJEU of 15 July 2021 in case C 791/19 *European Commission v Republic of Poland*, in which the court adjudicated regarding the EU compliance of national regulations on the system of the organs of judicial authority. It is argued that the problem of the system of the organs of judicial authority in EU member states does not fall within the competence granted to the EU, but remains the exclusive competence of Member States themselves. The CJEU is empowered to adjudicate only within the scope of competences conferred upon the EU, and is not competent to take over the competences of the organs of state power of the Member States. The attempted appropriation of Member States' competences by CJEU is a sign of the politicization of the CJEU, and undermines the character of the EU as an organization that respects the rule of law.

Keywords: CJEU; judicial legislation; rule of law; appropriation of competences; politicization of the CJEU.

Streszczenie

Jacek Zaleśny

Judicial legislation jako forma zawłaszczania kompetencji niepowierzonych UE i upolitycznienia TSUE

Głosa dotyczy wyroku TSUE z dnia 15 lipca 2021 r. w sprawie C 791/19 *Komisja Europejska przeciwko Rzeczypospolitej Polskiej*, w którym sąd dopuścił się orzekania na okoliczność zgodności z prawem UE przepisów prawa krajowego dotyczących ustroju organów władzy sądowniczej. Według autora, problematyka ustroju organów władzy sądowniczej państw członkowskich UE nie jest kompetencją przyznaną UE i jego określanie pozostaje kompetencją wyłączną państw członkowskich UE. TSUE jest powołany do orzekania wyłącznie w zakresie kompetencji powierzonych UE i nie jest kompetentny do przejmowania kompetencji organów władzy państwowej państw członkowskich UE. Zawłaszczanie przez TSUE kompetencji państw członkowskich jest przejawem polityzacji TSUE oraz zakwestionowania charakteru UE jako organizacji respektującej zasadę praworządności.

Słowa kluczowe: TSUE; sądowe tworzenie prawa; praworządność; zawłaszczanie kompetencji; upolitycznienie TSUE.