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DON'T TRY TO DISCIPLINE YOUR JUDGES (AND PREVENT THEM FROM APPLYING EU LAW): THE COURT OF JUSTICE'S JUDGMENT IN COMMISSION V. POLAND (C-204/21)

Posted on 12 Luglio 2023 by ***Martina Coli***

On 5 June 2023, the Court of Justice delivered the judgment related to the fourth – but not last – infringement procedure against Poland on rule of law matters. In *Commission v Poland* (C-204/21), the Court was called to assess a series of amendments to the laws on the judiciary adopted by Poland in late 2019. These reforms are better known as the *muzzle law* because they introduced, *inter alia*, new disciplinary offences and sanctions for judges and rules to prevent them – with the exception of two disciplinary chambers created within the Supreme Court – from questioning the legitimacy and independence of any national court. At issue were thus the jurisdiction of the two chambers – the *Disciplinary Chamber* and the *Extraordinary Review and Public Affairs Chamber* (Extraordinary Chamber) –, as well as other judicial measures of dubious compliance with EU law. The Commission raised five complaints, challenging the compatibility of the muzzle law with the requirements of judicial independence – stemming from Article 19(1) TEU, second subparagraph, and Article 47 of the EU Charter of Fundamental Rights (CFR) –, the principle of primacy, Article 267 TFEU, and the rights to private

life and protection of personal data granted by Articles 7 and 8(1) CFR and the General Data Protection Regulation 2016/679 (GDPR).
The practical implications of the case will probably be limited, especially for what concerns the Disciplinary Chamber. The judgment came rather late in respect to the launch of the infringement procedure in April 2020, and, in the meantime, things have changed in Poland. Notably, the Union blocked Polish funds under the Recovery and Resilience facility and made their release conditional on compliance with a series of milestones concerning judicial independence. To (partially) meet those requests, Poland dismissed the Disciplinary Chamber, and substituted it with another, but not less controversial, Chamber of "Professional Liability". The judgment is nonetheless still relevant in many respects for the enforcement of the rule of law in the European Union, and was rightly considered both compelling and comprehensive in the first reaction of the doctrine.
Yet, a complete analysis of the legal issues touched upon by the 389 paragraphs of the judgment would exceed the limits of this blogpost. Therefore, after presenting the essential findings of the Court, this post focuses on two issues. First, it discusses the role of the context of Polish rule of law crisis in supporting the reasoning of the Court. Then, it highlights three interesting elements of the Court's legal reasoning that might well be relevant for the future of the enforcement of the rule of law.

1. The unsurprising outcome of the judgment: Poland's legal defeat

The outcome of the judgment was largely expected by those following the issue closely. This in light of not only the Opinion of Advocate General Collins, who sided with the Commission, but also two previous orders for interim measures of the Court. Indeed, while the Court is not compelled to follow the opinion of its Advocates General, it generally looks for coherence within its caselaw. On 14 July 2021, the Vice-President of the Court ordered Poland to suspend both the application of the muzzle law and the effects of the decisions of the Disciplinary Chamber authorizing criminal proceedings against judges. A second order of 27 October 2021 introduced a periodic penalty payment of 1 million euros per day until Poland's compliance with the order of the Vice-President of the Court. On

21 April 2023, that amount was the reduced to 500.000 euros per day.
In the judgment in question, the Court upheld all complaints of the Commission, except for the part of the first complaint related to Article 267 TFEU, which was found inadmissible because the Commission raised it only at the stage of the reply. The Court dealt first with the *fourth* complaint, which related to the jurisdiction of the Disciplinary Chamber on cases concerning, first, the status of judges and the performance of their office, including the authorization to initiate criminal proceedings and, second, the employment and social security law of Supreme Court judges. That complaint was quickly decided on the basis of the previous judgment in *Commission v Poland III* (C-791/19) where that Chamber was found not to be independent. Indeed, Article 19(1) TEU requires that rules on the jurisdiction of the Disciplinary Chamber are assessed by an independent body.
The Court subsequently discussed the *third* complaint. It started by saying that Article 19(1) TEU and Article 47 CFR would be infringed "*ipso facto*" if the compliance of a national court with the obligation to give effect to those provisions constituted a disciplinary offence (§132). Then, it found incompatible with Articles 19(1) TEU and 47 CFR the classification as disciplinary offences of "acts or omissions of such a kind as to prevent or seriously undermine the functioning of a judicial authority" and "acts calling into question the existence of the employment relationship of a judge, the effectiveness of the appointment of a judge or the legitimacy of a constitutional organ of the Republic of Poland" (§134). Indeed, the broad and imprecise wording of those provisions, combined with the context of the Polish rule of law crisis (on which see below), resulted in the risk that they "may be used in order to prevent the national courts concerned from making certain findings or assessments, which, however, are required by the provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, and, accordingly, to influence the judicial decisions expected from those courts, thus undermining the independence of the judges of which those courts are composed" (§152). Since those national provisions also risked that such disciplinary offences could apply as sanctions for Polish judges who made references for a preliminary ruling,

they also infringed Article 267 TFEU.

Discussing then the *first* complaint, the Court considered that the impossibility for national judges to call into question the legitimacy of domestic courts and the constitutional organs and to "establish or assess the lawfulness of the appointment of a judge or of the power to carry out tasks in relation to the administration of justice that derives from that appointment" was incompatible with Articles 19(1) TEU and 47 CFR. Moreover, the Court found incompatible with those provisions, and with the primacy of EU law, the fact that national provisions on the allocation of cases and designation of court formations "cannot be a basis for determining … that a court is improperly composed or that a person not authorised or competent to give judgment forms part of that court" (§220).

As regards the *second* complaint, the Court considered that the exclusive jurisdiction of the Extraordinary Chamber on several matters concerning the jurisdiction and independence of Polish judges had the effect of preventing the other chambers of the Supreme Court from ruling on such questions of law and from referring preliminary questions to the Court of Justice. In particular, the exclusive jurisdiction of the Extraordinary Chamber included matters relating to the recusal of judges and the designation of the competent court to hear judicial independence cases, matters of judicial independence which arise before the Supreme Court, and appeals against rulings or final judgments considered unlawful on the ground of the status of judge who ruled in the case concerned. Thus, the Court found it incompatible with Articles 19(1) TEU, 267 TFEU and 47 CFR, and with the primacy of EU law. Instead, it did not have the chance to discuss the independence of the Extraordinary Chamber as such, since the Commission raised that point too late in the proceeding, that is, at the stage of the reply.

Finally, the *fifth* complaint related to the obligation compelling Polish judges to make a written declaration concerning their membership of associations, non-profit foundations, and political parties, as well as the positions held therein, and requiring the publication of such information in the "Public Information Bulletin". The Court found that obligation

unlawful under Article 6(1) and 6(3) GDPR, and also infringing the prohibition of processing sensitive data under Article 9(1) GDPR, as well as the right to respect for private life and the right to protection of personal data under Articles 7 and Article 8(1) CFR. Indeed, in a context of "extended disciplinary system" such as the Polish one, it risks "to expose the judges concerned to risks of undue stigmatisation" (§377).

2. The role of context

The case is part of a general saga, that of the EU fight for the rule of law in Poland. More specifically, it adds a new chapter to previous cases that already dealt with the use of disciplinary regimes and other means to prevent Polish judges from assessing the independence of their peers. The decision is indeed to be read together with the Court's preliminary ruling *A.K. and Others* and the judgment on the previous infringement procedure against Poland in C-791/19. To complete the picture, one must add the follow up decision of the Polish Supreme Court after *A.K. and Others* and the several preliminary requests from Polish courts.

In the 2019 preliminary ruling in *A.K. and Others* (C□585/18), the Court of Justice provided guidance, in light of the appearance of independence, on how national courts shall assess compliance with Article 47 CFR of a national disciplinary chamber and a council of the judiciary such as the Polish ones. Then, in July 2022, the Court directly found the Polish Disciplinary Chamber not independent in *Commission v Poland III* (C-791/19). Yet, in the meantime, three sections of the Polish Supreme Court followed the guidance provided by the Court in *A.K. and Others* and ruled that the Disciplinary Chamber was not an independent court under Article 47 CFR. Right after, several preliminary requests of Polish courts started to reach the Court of Justice. They concerned the interpretation of the EU principle of judicial independence in relation to various reforms of Polish judiciary and gave rise to judgments such as *W.Ż.* (C□487/19) and *Prokuratura Rejonowa* (C□748/19 to C□754/19). The muzzle law was enacted as a response to this challenge: the transformation of the preliminary ruling procedure into a bottom-up instrument to enforce the rule of law in Poland. The purpose of the law was indeed to prevent Polish judges from applying the EU requirements of judicial independence as

defined in *A.K. and Others* and subsequent judgments of the Court of Justice. Remarkably – and it is no coincidence –, the same context provided the background of the constitutional reference made by the Polish government that led to the (in)famous judgment of the Polish Constitutional Court of October 2021, which rejected the principle of primacy of EU law.

The context outlined above does not only add flavor to the story. It had an important role in the Court's legal reasoning in the judgment of 5 June 2023. In relation to all complaints but the fourth (and easiest) one, the Court took into account the "the particular circumstances and context" in which the muzzle law was adopted in order to clarify its scope (§139). In particular, to reach its conclusions on the first and third complaints, the Court noticed that the muzzle law was adopted as a matter of urgency and its provision did "echo a series of questions raised by various Polish courts as regards compliance with EU law and, more specifically, with the requirements arising from the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of various recent legislative amendments affecting the organisation of justice in Poland" (§140). This reference to the context was essential to unveil the scope pursued by the national measure: preventing national courts that referred preliminary requests to the Court of Justice, or called to rule on similar cases, to do so in the future by means of disciplinary liability.

As regards the second complaint, the Court considered the context in which the exclusive jurisdiction to verify compliance with certain essential requirements of the principle of judicial independence was conferred on the Extraordinary Chamber. Such a context was characterized by the prohibitions and disciplinary offences imposed on judges (§285), as well as of increased "attempts by the Polish authorities to discourage or prevent national courts from referring questions concerning interpretation to the Court of Justice for a preliminary ruling regarding the second subparagraph of Article 19(1) TEU and Article 47 of the Charter" (§291). Against this background, the exclusive jurisdiction of the Extraordinary Chamber reveals its true nature, that of "weakening even further" the effective review of the respect of the fundamental right to effective judicial

protection (§286).

3. Highlights from the Court's reasoning

At least three points of the Court's reasoning deserve close attention. The first emerged in the discussion of the Court's own jurisdiction on the case, which was challenged by Poland. The latter claimed that, in light of the jurisprudence of the Polish Constitutional Court, "upholding the complaints made by the Commission would amount, for the Court, to exceeding its own powers and those of the European Union", thus undermining, *inter alia*, the Polish national identity as protected by Article 4(2) TEU (§61). Already in the conditionality judgments (C-156/21 and C-157/21), the Court of Justice shed light on the relationship between Articles 2 and 4(2) TEU. It made clear that the identity clause in Article 4(2) TEU could not be abused to avoid respect for EU values under Article 2 TEU. This time, however, the Court decided to respond to Poland's claim in even plainer terms. Indeed, it stated that "there is *no ground* for maintaining" that the requirements arising from Article 2 TEU and Article 19(1) TEU "are capable of affecting the national identity of a Member State, within the meaning of Article 4(2) TEU" (§72, emphasis added). In the same paragraph, the Court also provided some guidance on how to interpret Article 4(2) TEU. That provision "*must be read taking into account the provisions, of the same rank*, enshrined in Article 2 and the second subparagraph of Article 19(1) TEU". As a result, the identity clause "cannot exempt Member States from the obligation to comply with the requirements arising from those provisions". The Court also linked the above with the principle of non-regression introduced in the *Repubblika* judgment (C□896/19). Indeed, it specified that, in choosing the constitutional model that fits its national identity, each Member State shall not only respect the obligations stemming from Article 2 TEU but also ensure that "in the light of the value of the rule of law, any regression of their laws on the organisation of justice is prevented" (§74). It thus seems that the Court took another small step towards developing (a kind of) "identity doctrine" in the context of rule of law enforcement.

Second, the Court established some red lines that further clarified the content of the obligations stemming from the EU principle of judicial

independence. It made crystal clear that broad and imprecise wording of provisions establishing disciplinary offences are problematic in terms of EU law. The same applies to the provisions prohibiting national courts from assessing the legitimacy of courts and tribunals. Indeed, such wording may lead to several judicial acts or conducts being classified as disciplinary or caught by the prohibitions. These may include situations in which "judges examine and rule on whether they themselves or the court in which they sit, or other judges or courts to which they belong satisfy the requirements arising from the provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter" (§137). Moreover, in relation to the second complaint, the Court upheld the Commission's suggestion that the questions relating to judicial independence are *horizontal issues*. This means that any national court called to apply EU law must examine whether it constitutes an independent and impartial tribunal previously established by law in the light of the requirements stemming from Articles 19(1) TEU and 47 CFR, and must be able to make a reference for a preliminary ruling on that matter. Thus, it is not permissible that such a review falls "in a general and indiscriminate manner, within the jurisdiction of a single national body" (§278).

Finally, contrary to its previous judgments related to rule of law infringement procedures against Poland, the Court acknowledged, in relation to the first, second and third complaints, the violation of Article 19(1) TEU "read in conjunction with Article 47 of the Charter". Yet, the Court omitted to make any considerations over the applicability of the Charter under its Article 51(1) in relation to those complaints. So far, the Court had consistently excluded that Article 19(1) TEU – whose scope of application is broader than that of the Charter – can alone trigger the application of the Charter, and, in particular, Article 47 (see e.g. *AB and Others*, C-824/18). Yet, by shielding under the vague formula that, in interpreting Article 19(1) TEU, Article 47 CFR must be "duly taken into consideration", it had established that the two provisions have an equivalent content. In particular, in the previous infringement procedure in C-791/19, the Court interpreted Article 19(1) TEU as including the fundamental right under Article 47 CFR. The language of the judgment of

5 June 2023 seems instead to suggest a step towards another direction, that is, the possibility that Article 19(1) TEU, with its broad scope of application, fully triggers the application of (at least) Article 47 CFR. Yet, the Court failed (once again) to clarify the relationship between the Article 19(1) TEU and Article 47 CFR in light of their different scopes of application, leaving us with more questions than answers. But how long can the two provisions be applied while avoiding such a clarification? Once again, the ball is in the court of the Court.