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JUDICIAL ASSOCIATIONS SUE EU COUNCIL FOR UNBLOCKING MRR FUNDS TO POLAND AMIDST RULE OF LAW CRISIS: LEGAL ISSUES

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European Judges' Associations have just become plaintiffs before the General Court of the European Union (EUGC). They primarily intend to stand for the independence of the judiciary in Poland. But by doing so, their lawsuits also seek to defend the reciprocal trust underlying mutual recognition of judicial decisions within the EU. And last, but not least, they are trying to ensure compliance by the Council (and by the Commission) with the EU's Court of Justice (EUCJ) case-law ordering to put an end to the Polish rule of law crisis. But… Are there standing and merits?

On August 18, 2022, four of such European Judges' Associations filed actions with the EUGC for annulment of the ECOFIN Council's Implementing Decision of July 17, 2022, approving the Polish Recovery and Resilience Plan (PRR) in accordance with Regulation (EU) 2021/241 (T-530/22, Medel v. Council, T-531/22, International Association of Judges v. Council, T-532/22, Association of European Administrative Judges v. Council, and T-533/22, Recthers voor Rechters v. Council).

The EUCJ had previously condemned Poland on June 15, 2021, ordered interim measures, upheld those interim measures on October 6, and three weeks later imposed on Poland a penalty payment of one million

euros per day of non-compliance.

Regardless of both the Commission and the Council's motivations (ad. ex., see here, here, and here), the four actions of annulment cited above raise unprecedented legal issues on both the procedure and the merits.

Settled EUCJ's case-law (ad. ex., C-175/73, Union Syndicale v. Council, C-18/74, Syndicat General v. Commission, or C-135/81, Groupement des agencies de voyages v. Commission) recognizes standing for annulment action to associations, unions, and even third States (C-872/19, Venezuela v. Council), T-512/12, Polisario Front, or T-316/14, PKK v. Council (despite being outlawed in Turkey). Associations are entitled to act on behalf of their members, provided that these also have individual standing to appeal, and that the associative statutes so allow, with the added advantage to the Court of avoiding a multiplication of lawsuits against the same legal EU's legal act (ad. ex., T-254/18, CCME v. Commission, 82-85).

The appeal is admissible only if the appellant, either a natural or legal person, has an interest in annulling the contested act (again, T-254/18, CCME v. Commission, 77) until the action is resolved, for the Court to be able to provide actual advantage to the plaintiff (T-509/2008, Ryanair v. Commission, T-120/10, ClientEarth v. Commission and T-250/14, EEB v. Commission cases).

Judges represented by the complainant associations have a clear interest in the Council not allowing to release funds to Poland until the latter amend legislation undermining independence of its national judiciary and the already sanctioned judges be reinstated. It is also in their interest that the EUCJ annul such an unblocking funds so as not to undermine the persuasive effect of the (still ongoing) periodic penalty payment imposed on Poland by the EUCJ precisely because of the lack of judicial independence.

The complainants are individuals not named as addressees of the contested Decision (Poland is such). It must be then determined, in accordance with Art. 263(4)TFEU and related case-law, whether the admissibility of their lawsuits is governed by the Plaumann or the Lisbon test (in the same vein, see here), depending on which one of the four cases envisaged by that provision they fall within.

The challenged Implementing Decision is not a legislative act, for it did not follow the ordinary legislative procedure, but the one foreseen in its basic Regulation. So, it must be clarified whether it is a binding act without regulatory content, or a regulatory act (non-legislative, but of general scope) that entails implementing measures (the two scenarios to which the Plaumann test applies, requiring individual and direct effect), or not (in which case the Lisbon test applies, requiring only direct effect on the appellant).

Neither does the challenged Decision appear to lack general normative content. Art. 1 thereof, by referring to the same Decision's annex, lays down provisions (legal rules) determining the content of the legislative amendments to be adopted by Poland on judicial independence, and regulating the timeframe of the three chronologically successive milestones to be achieved by that country in accordance with those provisions. Moreover, it regulates the supervision by the Commission and, being it positive, the subsequent disbursement of payments to Poland. Such milestones' methodology, however, has been widely criticized (ad. ex., here, here, and here) for postponing and lowering rule of law requirements on independence of the judiciary.

Since the required changes of rights and duties of Polish judges relating to their independence are made dependent, by the challenged Council's Decision, on national implementing measures, such Decision would not fall under Art. 263.4 TFEU, *in fine*. Hence, the four lawsuits' admissibility would not be governed by the Lisbon test, but by the Plaumann test.

According to EUCJ's case-law, Art. 263.4 TFEU, *in fine*, allows individuals to challenge in annulment EU regulatory acts that do not entail implementing measures, with a view to prevent the appellants from having to break the law in order to obtain effective judicial protection, and from being deprived of such protection for lack of a means of direct access before the EU Courts (C-274/12, Telefónica v. Commission, 27).

But in this instance, the premise of such reasoning fails: that when there is subsequent regulatory implementation and it falls within the competence of the Member States, the individual can plead the invalidity of the EU's basic act before the national courts and induce them to request a

preliminary ruling from the EUCJ, pursuant to Art. 267 TFEU (C-274/12, Telefónica v. Commission, 29; or C-583/11, Innuit v. European Parliament, 93). National judicial challengeability is what precisely has been legally disabled and even pursued in Poland.

Only by admitting the actions for annulment from the four Judges' associations is there a guarantee that the system of judicial control by the Judge of the Union on the challenged Decision's legal validity will continue to be complete, as the own EUCJ generally says it is (again, C-274/12, Telefónica v. Commission, 54). And how? Either by analogically applying Art. 263(4) TFEU, *in fine*, or by adding a third step to the Plaumann test: that the Member State to which the challenged EU act is addressed has not de jure and/or de facto closed the European preliminary ruling control through national judges.

However, if these or similar considerations do not prevail, the EUGC would end up applying the Plaumann test. As regards its first requirement (direct concern), the contested measure must directly affect the legal situation of the applicant and leave no discretion to its addressees who are entrusted with the task of implementing it, with such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules.

That would seem to close the way to lawsuits by judicial associations because the contested Decision provides for its implementation by national legislative amendments. However, there exists case-law considering admissible the annulment action when the possibility that the State to which the EU act is addressed may not adopt the implementing measures provided for in that act is merely theoretical, since it was adopted at that same State's request (C-62/70 Bock v. Commission, 6-8; C-11/82, Piraiki-Patraki v. Commission, 8-10; C-68/94, France v. Commission, 51; C-404/96, Glencore v. Commission, 42). This has happened in the present case.

Such national measures, moreover, can only do what is described in the contested Implementing Decision: eliminating the Disciplinary Chamber and the sanctioning legislation, and allowing for the review of disciplinary sanctions imposed on judges for submitting references to the EUCJ for

preliminary rulings, what amounts to the direct effect of the challenged EU act on the individual complainant (similarly, T-67/18, Probelte v. Commission, 57).

Plaumann test's milestone 2 also appears to be present: the plaintiffs may claim to be individually concerned because the contested Decision affects their represented members by reason of certain attributes which are peculiar to them or of circumstances in which they are individually differentiated just as in the case of the person addressed (C-25/62, Plaumann v. Commission, p. 107; recently, T-254/18, CCME v. Commission, 49).

Judges represented by the plaintiffs distinguish themselves from all other legal actors operating in the Polish judicial sphere, be they private (the Bar, the Prosecutor's Office, potential parties to proceedings before the Polish courts) or even public (the State Attorney's Office or similar, the Public Prosecutor's Office, etc.).

Specifically, those judges already sanctioned are individually affected by the continuity of the national sanctioning legislation and the suspensions accordingly imposed on them, which will continue to be effective during the course of milestones established by the challenged Decision. At least these Polish judges are sufficiently characterized, even with respect to others not sanctioned for having abided by the national legislation that prohibits references to the EUCJ for preliminary ruling.

If admitted (subsequent Commission's decisions on the polish fulfillment of conditions to liberate the funds might be sued instead), the four Judicial Associations' lawsuits raise complex issues on the merits. One lies in whether the contested Decision respects the already existing EUCJ's case-law on Poland's rule of law crisis. Another is whether such case-law, generated by way of infringement procedure, and binding on Poland (Art. 260 TFEU), is also so on the Council, as well as whether this can be asserted by way of annulment.

The guarantee of respect for the law in the interpretation and application of the Treaties, which according to Art. 19(1) TEU must be ensured by the EUCJ and the EUGC, is not limited to the compliance with the sources of primary and secondary EU law. It also encompasses respect for case-law

(ad. ex., Maxcom, 91). Such guarantee applies *vis-à-vis* the Member States, but also *vis-à-vis* the other EU institutions, including the Council and the Commission, which are not excluded from the scope of Article 19(1) TEU.

The contested Decision states that the endorsement of the Polish national PRR is without prejudice to any ongoing or future infringement proceedings, nor to Poland's obligation to comply with European Union law and with the decisions of the Court of Justice (Recital 50 of its Explanatory Memorandum). But both the content of such statement and the dubious legal value of the place where it is made seem insufficient to respect the EUCJ's case-law ordering to put an end to the Polish rule of law crisis in what relates to judicial independence.

Funding Poland when it is subject to a periodic penalty payment imposed by the EUCJ undermines the coercive value of such penalty. Instead, complying with the EUCJ's rulings on the independence of Polish judges would not only stop the penalty. The EU funding to Poland unblocked by the contested EU Council's Implementing Decision would then become legally irreproachable.