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ON DISCIPLINARY CHAMBERS, JUDICIAL REMEDIES AND THE RULE OF LAW. THE COURT OF JUSTICE'S RULING IN MIASTO ŁOWICZ AND THE ORDER FOR INTERIM MEASURES IN COMMISSION V. POLAND (C-791/19 R)

Posted on 7 Maggio 2020 by ***Martina Coli***

During the time that will probably be remembered as the lockdown era, the Court of Justice has released two important decisions concerning the guarantees of judicial independence and impartiality and the judicial reforms in Poland. This time the national provisions at stake concerned the newly created disciplinary chamber within the Polish Supreme Court. As a result of a series of reforms, that chamber is competent to rule on disciplinary proceedings against judges of both ordinary and supreme courts, even on the basis of the content of their judicial decisions and including the exercise of their right to request preliminary rulings. Moreover, its components are selected by the National Council of the Judiciary, a body whose members are politically appointed by the Polish Parliament and whose independence has been deeply undermined over the past few years.

Some of the domestic provisions giving jurisdiction to the disciplinary chamber were already at issue in *A.K. and Others* (C-585/18, C-624/18 and C-625/18), where, in the context of a preliminary ruling, the Court hinted

that such a chamber will hardly pass the test of independence required by EU law. Yet, soon after a new legislation, the so-called "*muzzle law*", prevented Polish judges from questioning the independence their peers, thus further restricting their room for manoeuvre. Moreover, whereas in that judgment the Court answered on the sole basis of Article 47 of the Charter, as the case was brought in the scope of EU law by Directive 2000/78, the recent decisions discussed below deal with the lawfulness of the Polish disciplinary chamber under Article 19(1) TEU.

In the Grand Chamber judgment in Joined Cases C□558/18 and C□563/18, *Miasto Łowicz*, the Court of Justice addressees the requests for a preliminary ruling made by two Polish regional courts. Such requests are part of the series of questions raised by (not only) Polish judges about the compatibility of the illiberal measures curbing their independence with EU law, in particular Article 19(1) TEU and Article 47 of the Charter.
The two cases that gave rise to the preliminary requests concerned a dispute between the town of Łowicz and the State Treasury over subsidies and criminal proceedings for kidnapping. Both referring courts feared that, in light of the recent judicial reforms in Poland, biased disciplinary proceedings could be started against the single judges responsible for the cases. At first sight, the cases in the national proceedings seem to have little relation with Union law. And indeed, the Court of Justice declared the requests inadmissible by reason of a lack of connecting factor between the disputes and EU law. Neither the national disputes were connected with the guarantees of judicial independence under Article 19(1) TEU, nor the requests were useful to solve a procedural question. According to the Court, the case differed from both *Associação Sindical*, where the national proceeding challenged directly the compatibility of the national legislation reducing the remuneration of judges with EU law, and *A.K. and Others*, in which the interpretation of EU law was necessary to help the referring court to solve a procedural question.
Considering the seriousness of the matter, somebody could be disappointed by the Court's rejection of the case. However, the Court properly balanced between the protection of the rule of law and the purpose and function of the preliminary ruling mechanism. On the one

hand, the decision is in line with the settled case-law as regards the admissibility of preliminary requests. Only those national courts that genuinely seek a clarification of EU law to solve a dispute arising before them may bring a matter before the Court of Justice (see, *inter alia*, Case C-338/85, *Pardini*). Indeed, the purpose of the mechanism under Article 267 TFEU is neither for the Court to respond to questions of general nature nor reviewing national law directly.
On the other hand, the Court did not miss the opportunity to send an implicit message to Poland and put its foot down against assaults to judicial independence. In the final part of the judgment, it warned that a disciplinary chamber such as the one envisaged by the Polish reform would not be tolerated under EU law. In particular, the Court stressed that "*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 be permitted*".

The much promising infringement procedure against Poland (C-791/19) will soon be an occasion to address the problems of the disciplinary chambers in a direct way. The Commission brought the infringement action before the Court in October 2019 claiming that, by establishing a non-independent disciplinary chamber and allowing judges to be subjected to disciplinary investigations and sanctions on the basis of the content of their judicial decisions, Poland failed to fulfil obligations under Articles 19(1) TEU and 267 TFEU.
In this respect, the Court has already provided us with some guidance in the order for interim measures, where, as requested by the Commission, it instructed Poland to suspend the application of the provisions establishing the jurisdiction of the disciplinary chamber and to refrain from referring the cases pending before it to other chambers that do not comply with the requirements of independence.
The Court firstly rejected the plea of inadmissibility by Poland and found the request for interim measure admissible. In accordance with the settled case-law on the (broad) scope of Article 19(1) TEU, the duty to ensure judicial independence imposed on the Member States by Article 19(1) TEU includes guaranteeing that disciplinary chambers satisfy the

requirements of effective judicial protection such as independence and impartiality.
Then, the Court examined the conditions to grant interim measures. Firstly, it found the *fumus boni juris* satisfied as, in light of the Court's judgment in *A.K. and Others* and the elements given by the following orders of the Supreme Court, the Commission's complaint could not be deemed manifestly unfounded. Secondly, the requirement of urgency was also met. The application of the contested national provisions would cause serious damage to the EU legal order, as from the independence of the disciplinary chamber depends the independence of Polish courts, which is pivotal in guaranteeing effective judicial protection.
Finally, the interest in granting interim measures outweighed the interest in having the disciplinary regime in function. The suspension of the activities of the disciplinary chamber, and thus of the cases pending before it, would cause less damage to the judges concerned than the examination of their cases by a body whose lack of independence and impartiality cannot be excluded.
Poland is now under a duty to comply in full with the order and it has one month to communicate to the Commission the measures adopted to that end. With the final ruling probably to be postponed due to the coronavirus pandemic, the order of the Court has secured judges of the Supreme Court from proceedings before the disciplinary chamber.

Against this background, it is now possible to make a few observations about the answers provided by the Court in the two above decisions and, more generally, the role of judicial remedies in the fight against rule of law backslidings.
First of all, infringements procedures are becoming more and more important in addressing breaches of the rule of law, at least for what concerns judicial independence in the light of Article 19(1) TEU. The infringement procedure on the disciplinary regime for judges has opened the second act of the Commission v. Poland saga. The first act was composed by the two scenes, *Commission v. Poland I* (C-619/18) and *II* (C-192/18), where the subject-matter of the dispute was the retroactive reduction of the compulsory retirement age of judges. While we are still

waiting for the final judgment, a third act might soon follow as the Commission has recently launched another rule of law infringement procedure against the Muzzle law. It seems that the Commission has finally realized that the reliance on timely infringement actions coupled with requests for interim measures is one of the strongest weapons at its disposal to enforce the rule of law. It might be a drop in the ocean of the rule of law crisis, but at least this strategy is finally paying out after years of inadequate (dialogical) responses.

Secondly, one of the most remarkable judicial development in the context of the rule of law backslidings was the tendency to use the preliminary reference procedure as an additional mechanism to enforce EU values. Domestic courts attacked by illiberal measures are seeking the help of the Court of Justice (and the Union) to stop the assaults put in place by their governments. On the one hand, this phenomenon represents probably the uppermost level of judicial dialogue between European courts. On the other hand, the Court of Justice should be careful not to overstep its mandate in addressing rule of law deficiencies through preliminary rulings. The mechanism under Article 267 TEFU is meant to shed light over the interpretation of EU law and not for substituting direct actions. Infringement procedures are better placed to enforce the rule of law and judicial independence. In comparison with preliminary rulings, which "*cannot reverse damage to the rule of law if domestic authorities choose to flout them*" (Adamski: 656), infringement actions are faster, more targeted, and do not rely on national enforcement. Yet, their value depends on not only their effectiveness but also their greater legitimacy, which cuts down criticism of judicial activism.

That is not to say that Polish judges should be dissuaded from asking questions to the CJEU. Nevertheless, we should be careful in celebrating the preliminary ruling as a tool to enforce judicial independence and, more generally, European values. It plays a role in the development of fresh interpretations of EU law provisions, as it happened first and foremost in the case of *Associação Sindical*, but it is not meant to review domestic legislation in light of EU law in a direct way. In this respect, the caution exercised by the Court in *A.K. and Others* and *Miasto Łowicz* is to be

welcomed.