Creating a Safe Venue of Judicial Review

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On 24 September 2019, Advocate General Tanchev delivered his opinion in joined cases C-558/18 and C-563/18. It is his latest involvement in a series of cases which concern the rule of law in Poland and which is questionable from a legal as well as factual standpoint.

The cases

Case C-558/18 originated in a Polish civil proceeding for payment, brought by the City of #owicz against the State Treasury (the Republic of Poland in its civil-law capacity), while Case C-563/18 originated from a Polish criminal proceeding. Neither case has any discernible EU element. The preliminary questions in both cases arose out of the judges' fears that judgements not conforming with the expectations of the Polish government (respectively adjudicating money from the State Treasury and mitigation of punishment) may result in reprisals against the judges. In particular, the judges reckon that they may face disciplinary proceedings. Disciplinary proceedings against judges were reformed by the Law and Justice party. According to the preliminary references, the proceedings may be influenced by politicians and employed to control judicial decisions; additionally, fruits of the poisonous tree may be used as evidence in such proceedings.

Thus, in both cases the courts asked whether the second subparagraph of Article 19(1) TEU precludes provisions on disciplinary proceedings when they infringe upon judicial independence as described above. Against this background, the advocate general proposed to declare the questions inadmissible. Interestingly, it was swiftly presented by the Polish government as its success and a confirmation that its reforms are legal (also, the justice minister took this opportunity to offend the judges involved as uneducated). Having a closer look, the opinion does not seem to be a vindication for the Polish government; nevertheless, it seems troublesome – even more so in its argumentation than the conclusion.

Application of Article 19(1) TEU

The conclusion rests on two major points. On the one hand, advocate Tanchev found – against the Polish and Hungarian governments' positions – that Article 19(1) TEU is applicable in the main proceedings and by its force alone the cases fall within the scope of EU law. He thereby relied on the judgments in *ASJP*(C-64/16) and *Commission v Poland* (C-619/18), from which he read that Article 19(2) subparagraph 2 TEU creates a guarantee of judicial independence applying to all national courts that may apply EU law. This guarantee does not depend on an

EU element being present in the case the court actually hears. I find this position unimpeachable: destroying judicial independence hinders effective legal protection of EU rights regardless whether it is done within the scope of EU law. The other major point that carried the opinion is, however, problematic.

AG Tanchev on inadmissibility

Advocate General Tanchev argues that the questions referred are inadmissible as there are no “sufficient bases, both in terms of law and fact, for the Court to determine whether breach of judicial independence protected under the second subparagraph of Article 19(1) TEU has occurred”. These negations are rather problematic, and we shall deal with the factual and legal components separately.

As far as facts are concerned, we should start by recalling that it is not for the CJEU in the preliminary proceedings to determine whether a member state breached EU law. Rather, the CJEU delivers information on the consequences of EU rules sufficient for a national court to determine whether there was such a breach (which may result in a non-application of the non-conforming national law under the principles of primacy and direct effect).

The advocate general relied on Article 94 of the Rules of Procedure, a provision stipulating requirements for a preliminary reference. Having gone through the case law on admissibility, he concluded that in the cases at hand there is no sufficient explanation of the national law nor in its inconsistency with Article 19(1) TEU. For this reason, it is not feasible to tell whether a structural breach of judicial independence occurred. Therefore, the preliminary questions are hypothetical.

It is noteworthy that for the advocate general this *structural breach*, as opposed to any deficiency, would be the necessary threshold to trigger an Article 19(1) infringement. This view, present also in previous opinions by AG Tanchev, might be carried by the concept of systemic deficiencies as elaborated in *Celmer* (C-216/18; and the preceding case law) or perhaps from the thresholds for activating Article 7 TEU. However, it does not seem necessary to bring them to Article 19(1) TEU, especially as the CJEU has done this neither in C-64/16 *ASJP* nor in C-619/18 *Commission v Poland*.

The advocate general concluded that, in the case file, the information is lacking which provisions of Polish law infringe Article 19(1) Subpar. 2 and why they do so – especially, how they are applied. Moreover, the reference to judges’ fear of reprisals is hypothetical as there have yet to be any disciplinary proceedings. The advocate general also notes that the parties to the proceedings have not refuted the Polish argumentation on why the rules in question were consistent with judicial independence and why the disciplinary proceedings against the referring judges were based on valid criteria.

Does the argument hold water?

I must admit I am a bit confused with this part of the opinion. First, preliminary proceedings are not proceedings on fact. Thus, there is no *onus probandi* and therefore nobody is under any duty to refute anybody's statements of facts. Quite to the contrary, the referring court' statements of facts should be taken for their face value. If they are incorrect, the resulting CJEU ruling may be simply inapplicable to the case.

Second, it is rather rich to observe that any fears by the referring judges were hypothetical, only to notice a few lines below that indeed there were preliminary disciplinary proceedings launched against them after they made the preliminary references. The advocate general accepts explanations by the Polish government that the only reason for these proceedings was the suspicious identity between the primary references. This acceptance shows well why the preliminary procedure is not the right place for factual determination.

For me, as somebody living in Poland, it borders on credulity to believe that the preliminary disciplinary proceedings were launched for any other reason than to punish the judges for the preliminary references to the CJEU. I daresay that the opposite view taken by the advocate general is but a result of his incomplete knowledge of the situation in Poland. It is also uncertain what disciplinary offence may be committed by consulting non-secret parts of judicial decisions so that different judges use same wording. The advocate general did not analyze this issue, apparently having decided that it fully belongs to domestic law.

As far as the referring courts might not have explored the full consequences of the new disciplinary systems in their entirety, the Polish Commissioner for Human Rights made a written submission discussing them more thoroughly. The submission is publicly available (unfortunately only in Polish) and, having studied it, I am uncertain why the advocate general did not accept it as a proper refutation of the arguments by the Polish government. The Commissioner literally pointed, page after page, to factors in the new Polish law which enable the interference of the executive power in the judiciary.

It should be borne in mind that all the considerations pertaining to judicial independence should be assessed against the criterion recently recalled by the CJEU in C-619/18 *Commission v Poland.* The CJEU held that "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" (para. 77). The criterion is, therefore, one of preventing *risk* as opposed to actual control. Applying this criterion to the new Polish system of disciplinary proceedings – described briefly by the referring courts and described more elaborately by the Commissioner for Human Rights – the system does not seem to provide required guarantees. Moreover, the lack of guarantees seems to be inherent in the legal provisions themselves, as they empower the executive. The text of these provisions has been delivered to the CJEU

and is present in the opinion – and perhaps it refutes the government's arguments on its own.

I am therefore of the view that it is possible to determine, based on the case file, that the Polish system of disciplinary proceedings for judges infringes EU law. It was clearly possible for the Commission, which – according to the opinion itself – was able to make an argument to this effect. This argument is, in my view, perfectly convincing.

Finally, Advocate General Tanchev himself in his opinion regarding the National Council for the Judiciary (joint cases C-585/18, C-624/18, and C-625/18) found both the Council and the Disciplinary Chamber of the Supreme Court failing to guarantee judicial independence – or at least prone to such perception and infringing the guarantee by this perception. The advocate general's knowledge of Polish law regarding the Council as well as of the recent practice of the Disciplinary Chamber was sufficient at the time for this finding. I do not quite understand why this time he did not consider the existence of the very same Disciplinary Chamber as weighing against the conformity of disciplinary proceedings with EU law.

Were the questions in fact admissible?

This does not mean, however, that the preliminary questions were admissible. There are, indeed, serious doubts as to their admissibility, just not where the advocate general has found them. No answer to the questions may affect outcomes of the main proceedings, or the substance of judgments to be given in these proceedings. Article 19(1) Subpara. 2 may not even be applied in these proceedings. The Commission rightly noted at the hearing that no interpretation by the CJEU would result in any decisions taken by the referring courts.

The Polish Commissioner for Human Rights presented an argument for the admissibility of the questions. He argued that the conditions for allowing a preliminary reference must preserve the right to legal protections, including the embodiment of this right in the preliminary ruling's procedure itself. According to the CJEU in *Unibet* (C-432/05), challenging national law as incompatible with EU law must be possible in other settings than just the threat of sanction. This *dictum* is applicable to national courts seeking judicial review of the conformity of their national disciplinary procedure with EU law. In order to safeguard judicial protection, it is thus not sufficient that a disciplinary court will be able to make a preliminary reference when hearing cases of the judges who referred the present cases to the CJEU. At this stage it will be too late; to probe national law, these judges must have suffered a risk of sanction – they must have been subjected to disciplinary proceedings. Hence the CJEU should decide on the disciplinary proceedings now as this is the only way to provide these judges a safe venue of judicial review. Adopting this solution would require a creative approach, beyond the existing case-law. After all, the review by the CJEU would concern provisions that would not be applied by the referring court. But when dealing with the situation in Poland, creativity is the name of the game. After all, nobody who drafted the Treaties foresaw that one of the member states will one day decide to abolish judicial independence.