Protecting Polish Judges from the Ruling Party’s “Star Chamber”

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1. The third order granting interim measures against Poland on rule of law grounds

The European Court of Justice’s [order in Case C-791/19](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:72019C0089&from=EN) is the third time the Court has granted the interim measures applied for by the Commission so as to preserve the rule of law from being seriously and irreparably harmed by Polish authorities.

The first time the Court had to noticeably step in was when Polish authorities openly disobeyed a previous order of the Court to stop their (unlawful) logging in the Biały Ostrów forest. In an unprecedented step, the Court granted the Commission’s request to impose a penalty payment of at least €100,000 per day of non-compliance within the framework of an application for interim relief.

The second time the Court was forced to make history happened at the time of the Polish authorities’ attempt to purge Poland’s Supreme Court, in obvious breach of both the Polish Constitution and EU law. The Court then ordered the immediate suspension of the application of the legislation which retroactively lowered the retirement age for Supreme Court judges. This meant that Polish authorities had to restore the Supreme Court to its situation prior to the entry into force of the law being challenged by the Commission.

In the present and third instance, which is the subject of this post, the Court of Justice has just ordered the immediate suspension of the activities of the so-called “disciplinary chamber” as regards disciplinary cases concerning judges. The Court’s order is particularly significant to the extent that this “disciplinary chamber”, a modern “star chamber”, is for all intents and purposes the stepping stone on which the arbitrary new disciplinary regime put in place by Poland’s ruling party is built.

2. The third infringement action against Poland on rule of law grounds

The Court’s order is connected to [Case C-791/19](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:72019C0089&from=EN), which is itself the third infringement action launched by the Commission on the basis of Article 19(1) TEU in order to protect Polish judges from the ruling party’s political control. This is also the third infringement action which brings to the Court’s attention issues the Commission had repeatedly raised with Polish authorities as part of the Rule of Law Framework and subsequently as part of the Article 7(1) procedure.
In this case, the main subject-matter of the action is the so-called “disciplinary chamber” established in 2017 and whose own “judges”, it may be worth recalling, adopted a resolution in April 2019 whereby they held themselves to have been appointed properly (nemo judex in causa sua, anyone?).

Be that as it may, the lack of independence and impartiality of the “disciplinary chamber” has been an issue repeatedly raised by multiple bodies and experts specialising in rule of law matters. In this context, it is also worth noting that for the very first time, the European Commission simultaneously raised a violation of Article 267 TFEU to the extent that the new disciplinary regime would create “a chilling effect for making use of this mechanism”.

3. A belated application for interim measures

Considering the threat of political control over Polish judges alleged by the Commission, one could find it difficult to comprehend why the Commission did not apply for interim measures when it decided to refer Poland to the Court of Justice on 10 October 2019 (with case effectively lodged on 25 October) although the Commission did request the Court to expedite the proceedings. By contrast, in the case relating to the independence of Poland’s Supreme Court, the Commission requested both interim measures and expedited proceedings. In light of the pattern of systemic violation of judicial independence and multiple instances where rulings of the Court of Justice or national courts were preceded by threats of non-compliance or just openly ignored, not to mention the more recent examples of targeted harassment of national judges seeking to apply Article 19(1) TEU, the Commission’s failure to apply for interim measures could leave one seriously perplexed.

When this stance faced renewed public criticism following Polish authorities’ defiant refusal to comply with the ruling of the Labour and Social Security Chamber of Poland’s Supreme Court which found the “disciplinary chamber” not to constitute a court within the meaning of EU and Polish law by application of the AK preliminary ruling of the Court of Justice, the European Commission belatedly decided to apply for interim measures on 14 January 2020 (with the application effectively lodged with the Court on 23 January 2020). As correctly noted by the Commission itself, “despite the judgments, the Disciplinary Chamber continues to operate, creating a risk of irreparable damage for Polish judges and increasing the chilling effect on the Polish judiciary”.

The Court’s order deals with this aspect, which was predictably raised by the Polish government at the stage of the examination of the urgency of the Commission’s request for interim measures. Instructively, the Court makes clear the Commission’s rationale (paras 97-98). In a nutshell, the Commission decided not to apply for interim measures because it expected the A.K. and others preliminary ruling (joined cases C-585/18, C-6224/18 and C-625/18) to deal with the issue of the disciplinary chamber. While the Court found the Commission’s rationale to be “reasonable”, one may not find it neither coherent nor judicious. As the Court of Justice itself explained in a not so subliminal message to the Commission in the cases of Miasto #owicz and Prokurator Generalny (Joined Cases C558/18 and C563/18), “the task of the Court
must be distinguished according to whether it is requested to give a preliminary ruling or to rule on an action for failure to fulfil obligations” (para. 47, analysis here). Speaking plainly, the Commission’s deferment has meant more months of additional harassment for Polish judges than would have been the case had the Commission apply for interim measures from the start of its infringement action.

In this context, it is also difficult to understand why the Commission did not follow the same path as in the case relating to the independence of Poland’s Supreme Court and requested the Court that it provisionally grants the requested interim measures before the submission by Poland of its observations and until such time as an order is made closing the interim proceedings. Considering the repeated threats of non-compliance with ECJ rulings and current Polish authorities’ track record of non-compliance with rulings of Polish courts, the Commission’s failure to ask the Court to impose a penalty payment in case of non-compliance is also surprising, to say the least. The least the Commission could do was to reserve the right to submit an additional request seeking that payment of a fine be ordered in case of non-compliance in full with the interim measures ordered following its request for interim relief, which the Commission did.

4. Key aspects of the Court’s order

Leaving the issue of likely future non-compliance aside, and to keep this analysis as brief as possible, the Court’s order most significant aspects will be highlighted.

To begin with, following the line of case law developed since its seminal “Portuguese judges” ruling, the Court makes clear that the obligation for every Member State to respect and maintain the independence of their national courts or tribunals (which may apply or interpret EU law) includes an obligation to comply with the principle of independence of judges as far as disciplinary proceedings against judges are concerned. This means inter alia that EU law precludes the setting up of disciplinary bodies which fail themselves to satisfy the guarantees inherent in effective judicial protection, including that of independence. In answer to the tired argument of the Polish government that the Court would lack jurisdiction to review its “reforms”, the Court refers the Polish government to its recent ruling in the cases of Miasto #owicz and Prokurator Generalny. In this ruling, loudly praised by Poland’s Ministry of Justice as the preliminary ruling requests were found inadmissible, the Court yet again reiterated that “although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU” (para. 36).

Secondly, by including unusual developments outlining how its own A.K. ruling and connected rulings issued by the Polish Supreme were disregarded by Polish authorities and in particular the “disciplinary chamber” at the beginning of its order (paras 18-24), the Court implicitly but unmistakeably indicates its disapproval at the disciplinary chamber’s defiant and persistent refusal to obey both EU and Polish law. This was bound to legally matter when the Court had to decide whether the
Commission had correctly established that the granting of the requested interim measures satisfied the condition in relation to the existence of *fumus boni juris* (para. 52 et seq.). Unsurprisingly, having first meticulously recalled what it had previously decided in *A.K.* as regards the scope of the requirements of independence and impartiality, the Court concludes that the Commission’s claim regarding the lack of a guarantee as to the independence and impartiality of the “disciplinary chamber” appears, *prima facie*, not unfounded.

Thirdly, as regards urgency, the Court, in line with its previous case law, strongly emphasises how the so-called “judicial reforms” pushed by Poland’s ruling party threaten to damage the independence of Polish courts and as such, simultaneously threaten to damage the decentralised and interconnected legal order organised by the EU Treaties. In an unprecedented step (to the best of our knowledge), the Court finds that a body such as the “disciplinary chamber” poses a threat of serious and irreparable harm to the EU legal order due to the scope of its disciplinary jurisdiction as regards Polish judges and the fact that its lack of independence and impartiality cannot be, *prima facie*, ruled out. The Court’s holistic approach, which looks at the broader and systemic impact the seemingly lack of independence of the disciplinary chamber could have on ordinary courts and the Supreme Court as a whole, may be viewed as both warranted and compelling. Particularly significant is the Court’s observation (para. 90) that the “mere prospect” for Polish judges to “face the risk of a disciplinary procedure”, which could bring them before a body whose independence would not be guaranteed, is likely to affect their independence regardless of how many proceedings may have been initiated or the outcomes of these proceedings to date.

Fourthly, the Court has suspended, again for the first time to the best of our knowledge, the activity of a body masquerading as a court. With its usual chutzpah, the Polish government claimed that the Commission was asking the Court to take measures which would violate the “fundamental structural principles of the Polish state” (para. 106) having previously claimed a violation of the principle of irremovability of judges (para. 43), which they already been found to have violated twice by the Court in two previous unprecedented rulings (analysed e.g. here and here). Without having to examine the Polish government’s well established track record when it comes to violating the Polish Constitution and annihilating judicial independence, the Court of Justice patiently explained that its order does not in fact require the dissolution of the disciplinary chamber nor the suspension of its administrative and financial services or the dismissal of the individuals appointed – unlawfully one may add – to this body which, let us not forget, was already found not to constitute a court by Poland’s Supreme Court prior to the Court of Justice’s order. The eventual budgetary as well as the limited practical consequences of the suspension of (arbitrary) cases pending before the non-court entity known as the disciplinary chamber (see e.g. the pending kangaroo proceedings against Judge Tuleya), cannot in any event prevail over the general interest of the EU in the proper functioning of its legal order.

Accordingly, and unsurprisingly, the Court granted the Commission’s application for interim measures. A number of weak spots can be identified from this otherwise
compellingly reasoned and, on all points, fully convincing Grand Chamber order. These weak spots are all connected to the limited scope of the Commission’s application for interim relief in a situation where the Commission is furthermore yet to act against the “muzzle law”. Very briefly: (i) Not asking for a penalty payment from the start of the action beggars belief considering the track record of Polish authorities, which the Court itself noted as regards its AK ruling, which means Polish authorities will have all the time in the world to ignore the Court’s order until their capture process is completed; (ii) What about prosecutors who have been similarly harassed and subject to Kafkaesque proceedings and arbitrary sanctions; (iii) How long before we see Polish authorities switching to criminal proceedings against judges to achieve their (autocratic) goals?; (iv) What about the procedural defects characterising the arguably unlawful appointment process of the basis of which additional “judges” were appointed to the Supreme Court by the Polish President?

5. Still Too little, still too late?

Polish authorities have not only been “actively and purposely organising non-compliance with the ruling of the Court of Justice of 19 November 2019 and the judgment of the Supreme Court of 5 December”, they have since also refused to acknowledge, let alone comply with the resolution adopted by three chambers of Poland’s Supreme Court on 23 January 2020 and which reiterated that the “disciplinary chamber” is not a court due to its lack of independence and therefore its “decisions” shall be considered null and void irrespective of when they were issued as they “deserve no protection”.

Viewed in light of this dictatorial pattern and the Soviet-style disciplinary developments witnessed over the past five years, culminating with a suspension and a pay cut of 40% imposed on Juge Juszczyszyn for seeking to apply the Court’s preliminary ruling of 19 November 2019, and the intervention of the “cardboard cut-out Constitutional Tribunal” to (illegally) neutralise the application of the Supreme Court resolution of 23 January 2020 notwithstanding the Constitutional Tribunal’s obvious lack of competence to do so, the Court of Justice was left with no choice but disable a body whose lack of independence and impartiality has been for a long time obvious to all but Poland’s autocratic party and associates.

What else to do when according to the First President of Poland’s Supreme Court – herself one of the targets of the law which sought to retroactively lower the retirement regime of Supreme Court judges later found in breach of Article 19(1) TEU – the EU is faced with a situation where a Member State “no longer have independent courts or a third branch of government, independent of the executive.”

Let that sink in: Poland has no longer independent courts according the President of Poland’s (not-yet-but-soon-to-be-captured) Supreme Court.

To contain this clear and present danger to the rule of law, the von der Leyen Commission must wake up from its current torpor and initiate infringement actions against the “muzzle law”; the ENCJ-suspended “National Council for the Judiciary”; the sham “Extraordinary Control and Public Affairs Chamber”; and last but not least,
the captured “Constitutional Tribunal” whose intervention the Polish PM announced a few hours after the ECJ’s order.

The Polish PM’s latest ploy is just the latest edition of a trick they previously used to disregard a binding resolution of the not-yet-captured chambers of the Poland’s Supreme Court to save the new “National Council for the Judiciary” which was established on the back of yet another obvious breach of the Polish Constitution. The Commission should remove their rose-tinted glasses and face up the harsh reality: They are dealing with rogue officials who have recurrently violated the EU principle of loyal cooperation while repeatedly showing their readiness to break all national rules, constitutional or otherwise, whenever convenient for the party. National governments should similarly stop wasting time with heart-warming rhetoric/no action statements when they have in fact the power to do something about Poland’s descent into authoritarianism by bringing infringements actions directly on the basis of Article 259 TFEU (on this note, we should however be grateful to the governments of Belgium, Denmark, the Netherlands, Finland and Sweden for supporting the Commission’s application. This is the least other governments should do).

Dialogue wasn’t, isn’t and will NEVER be an effective way forward when dealing with bad faith actors engaged in an obvious constitutional coup d’etat. Failing to face up reality will only result in the Commission winning several legal battles, which, no matter how significant, will not prevent it from losing the broader one, similarly to what happened a few years ago in relation to Hungary. To put it concisely, and looking beyond the Commission’s interim relief victory, the von der Leyen Commission must now decide between swiftly pursuing difficult and no doubt controversial infringement actions or accepting the consolidation of a second autocracy within the EU.