Why the Polish Supreme Court's Reference on Judicial Independence to the CJEU is Admissible after all

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On 2 August 2018, the Polish Supreme Court has referred questions to the European Court of Justice about whether or not the forced retirement of most of its senior judges and other infringements of judicial independence are compatible with EU law. That decision is a landmark step in the serious constitutional crisis in Poland that has been going on for several years. The Supreme Court attempts to defend itself against its subordination to the legislative and executive authorities, requesting that the CJEU express its view on the EU standards of irremovability of judges as element of the independence of the judiciary. Among many problems arising in connection with the discussed matter, only one issue will be presented below, which, however, is of fundamental importance and therefore deserves consideration first: Is the SC's preliminary reference to the CJEU admissible?

Several statements of the politicians connected to the Law and Justice Party (PiS) indicate, that the first and main allegations of the Polish Government will concern the fact that the interpretation of EU law that is sought by the SC is inadmissible as it is irrelevant to the resolution of the dispute in the main proceedings.

The preliminary questions were referred by the enlarged composition of the SC, competent to examine the legal issue presented by the bench of three judges. According to the Act on the Supreme Court, if, while hearing cassation or another appeal, the SC has serious doubts as regards the interpretation of law, it may adjourn the hearing of the case and submit the question of law for adjudication to the enlarged composition of that Court consisting of seven judges. The main proceedings relate to the coordination of social security systems stipulated in Regulation 883/2004, mainly the determination of the appropriate legislation in the case of Polish citizen who pursued an activity as an employed person in Slovakia and at the same time conducted his business activities in Poland.

The SC's questions

The SC decided that, before proceeding with the substantive examination of the main case, it was necessary to explain some issues in view of EU law. The purpose of the expected decision of the CJEU is to clarify the legal status of the two judges, members of the panel, adjudicating the main proceedings. Both of the judges were 65 years of age or older and according to the newly amended Act on the Supreme Court shall retire unless they submit a declaration of will to remain on their positions and present a health certificate. In order to remain at their positions, the judges have to obtain the consent of the President of the Republic.

The SC referred five questions for a preliminary ruling. The first two concern the principle of the irremovability of judges (Articles 2, 4(3), 19(1) TEU, 267 TFEU and 47 of the Charter of Fundamental Rights), which the SC considers to be infringed as the national law lowers the retirement age of judges against their will and makes the continuation of their position dependent on the consent of the executive. The third question concerns prohibition of discrimination on grounds of age (Articles 2 and 6 para. 1 of the Council Directive 2000/78). The last two questions relate to ensuring the effectiveness of EU law by the national courts that are obliged to set aside national provisions being contrary to the EU prohibition of discrimination on grounds of age. Furthermore, the SC has decided to apply interim measures by suspending the application of three provisions of amended Act on the Supreme Court.

It can be concluded that the motive for the preliminary reference was to obtain guidance from the CJEU as to whether the SC can rule on the substance of the main case with a EU element in a special situation: when the composition of the SC court and the legitimacy of some judges would be incompatible with provisions of the new national law the consistence of which with EU law is in doubt. The judgment of the CJEU would clarify these doubts as a result of the interpretation of the relevant provisions of EU law (the Treaties and the Charter). Depending on the response, the SC in its current composition may or may not be able to proceed with the main case.

Presumed Relevance

The position of the CJEU towards the admissibility of preliminary references may be found in numerous judgments: It is solely for the national court to determine both the need for a preliminary ruling in order to enable it to deliver its judgment, and the relevance of the questions which it submits to the CJEU. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling. It follows that questions referred by a national court enjoy a presumption of relevance. This presumption may be however rebutted. The CJEU may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, judgment in *Melloni*, C399/11, EU:C:2013:107, para. 29 or *Gauweiler*, C-62/14, ECLI:EU:C:2015:400, para. 25 and the case-law cited).

The case law of the CJEU has evolved towards the recognition of a broader relevance of the preliminary questions to the purpose of the main action. The Court has recently applied a wide concept of the phrase 'give judgment' within the meaning of Article 267(2) TFEU since only a liberal interpretation of that term would make it possible to prevent many procedural questions from being regarded as inadmissible and thereby being barred to be subject of interpretation by the CJEU. That concept must therefore be understood as encompassing the whole of the procedure leading to the judgment of the referring court, in order to enable the CJEU to interpret all procedural provisions of EU law that the referring court is required to apply in order to render its judgment. In other words, that concept covers the entire process of creating the judgment, including even issues relating to the responsibility for the costs of proceedings (see, judgment in *Weryński*, C-283/09, ECLI:EU:C:2011:85, para.s 41 and 42; *Fahnenbrock*, C-226/13, EU:C:2015:383, s30; *Pebros*, C-511/14, ECLI:EU:C:2016:448, para. 28). The Court also held, that it has the power to explain to the national court points of EU law which may help to solve a problem of jurisdiction (see, judgment in *Bozzetti*, 179/84, ECLI:EU:C:1985:306; para. 18; *SEIM*, C-446/93, ECLI:EU:C:1996:10, para. 33; *IN.CO.GE*, C-10/97, ECLI:EU:C:1998:498, para. 15).

In the cases cited above, the preliminary questions concerning the procedural matters have a somewhat remote but essential link to the fact and purpose of the main action, that the referring court is required to apply in order to give judgment. Article 267 TFEU extends to cases where a question is raised by the national court or tribunal itself which considers that a decision thereon by the CJEU is "necessary to enable it to give judgment" (see, judgement *Salonia*, 126/80, ECLI:EU:C:1981:136, para. 7).

It should be noted that in previous judgments the CJEU has considered also the independence of national courts. However, these issues remained in connection with the subject of the main proceedings. Thus, for example in *Wilson* (C-506/04, ECLI:EU:C:2006:587) the problem of independence and its elements occurred in the context of rules governing the composition of bodies competent to hear appeal proceedings. In *Associação Sindical dos Juízes Portugueses* (C-64/16, ECLI:EU:C:2018:117) the issue was whether the salary reduction measures infringe the principle of judicial independence of national judges.

A functional connection

It should be observed, that the reference of the Polish SC does not have substantial relevance in the traditional sense of the term to the main proceedings concerned with the coordination of the social security systems. This does not mean, however, that there is no such link, but it deviates from typical situations assessed so far by the CJEU as part of the examination of preliminary references' admissibility before adjudicating on the merits.

The link between the preliminary references and the substance of the main proceedings is about confirming the ability of the national judges to hear the case where EU law shall be (even potentially) applied. Therefore, it is not a connection between the content of the questions referred and the subject of the main proceedings. It is a close relationship of a different kind that can be described as functional. The judgement of the CJEU will determine the power of the national judges to adjudicate on the merits of the case.

Press reports indicate that the Polish Government will rely on the case *Falciola* (C-286/88, ECLI:EU:C:1990:33), where the CJEU declared the reference concerning the impartiality of the Italian judges inadmissible – a case on the Italian law about compensation for damages caused in the exercise of judicial functions and the civil liability of the judiciary which, according to the national court, seemed to compromise the impartiality of the judges. The CJEU found the case inadmissible since "it is clear from the actual wording of the order for reference that the tribunal is in doubt only as to the possible psychological reactions of certain Italian judges as a result of the enactment of the Italian Law (...) Consequently, the preliminary questions submitted to the Court do not involve an interpretation of Community law objectively required in order to settle the dispute in the main action". It shall be emphasized that the preliminary reference brought by the Polish SC differs from the case Falciola since it relates to legal position of the Polish judges rather to their "psychological reactions" to the amended Act on the Supreme Court.

A Union of values

The issue of the admissibility of the preliminary references regarding the independence of the national judiciary and irremovability of judges should be considered in the light of the current state of EU law considerably shaped by the latest innovative case law of the CJEU (e.g. *Associação Sindical dos Juízes Portugueses*, C-64/16, ECLI:EU:C:2018:117, *Achmea*, C-284/16, ECLI:EU:C:2018:158; *LM*, C-216/18 PPU, ECLI:EU:C:2018:586).

Under Article 2 TEU the Union is founded on values, such as the rule of law, that are common to all Member States. Pursuant to Article 19(1) TEU, in the legal order of the EU, judicial review is also exercised by national courts. These courts discharge, in cooperation with the CJEU (Article 267 TFEU), common tasks, which serve to ensure respect for the law in the interpretation and application of the Treaties. One of the court's features is independence. The independence of national judges, in which jurisdiction fall the application of EU law, and elements of that independence, irremovability and prohibition of interference by other authorities, are thus regarded as elements of the fundamental right to fair trial and to an effective remedy (Article 47 CFR). The independence of the Member State's courts has become, in the light of the above cited judgements of the CJEU, a constitutional principle of the EU. Only independent courts can provide effective legal protection in areas where EU law is applied, i.e. referring preliminary questions, participating in cooperation in civil matters, as well as, in criminal matters (e.g. EAW procedure). Therefore, doubts as to the independence of the national court, in particular noticed by the court itself whose situation has changed adversely as a result of legislative changes in a Member State, can be effectively raised in the preliminary ruling procedure to assess (indirectly) whether national law ensures such independence.

In this situation, it should be assumed that the SC's preliminary reference is relevant to the main action, although this is a new type of relevance. Assessing the legal status of the SC judges as members of the adjudicating panel is a prerequisite for the

proper settlement of the main case. Therefore, there are fair reasons to believe that the reference of the Polish Supreme Court is admissible.

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