BlogDUE

# Warsaw does not fulfil, and Luxembourg cuts the sanction in half. It doesn't add up!

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SUMMARY: 1. Introduction: Contextual elements. - 2. The order of the Vice-President of the Court. - 3. Analysis: critical issues, contradictions, and paradoxes.

**1.** In his order of 21 April 2023, in case C-204/21 R-RAP, the Vice-President of the Court of Justice reduced by half the amount of the periodic penalty payment that Poland had been ordered to pay based on the order of 27 October 2021 (case C-204/21 R, *Commission v Poland*). Although the Court of Justice, on 5 June 2023, closed the infringement procedure with a judgment establishing Poland's default (case C-204/21, *Commission v Poland*), the order deserves to be commented on because it presents more general and systematic critical profiles, in particular with respect to the role of the Vice-President who, following a change in circumstances, may amend or revoke the interim measure of the periodic penalty payment.

After briefly reconstructing the background of the order, the following paragraphs summarize the reasoning that led the Vice-President to halve the penalty (para. 2) and comment critically on this decision, which arguably has no legal and factual basis (para. 3).

It is worth briefly mentioning just some of the essential points of Poland's rule of law crisis (L. PECH, *7 Years Later: Poland as a Legal Black Hole*, in *verfassungsblog.de*, January 2023). Since 2015, Polish authorities have rushed through more than twenty pieces of legislation – arguably all in breach of Poland's Constitution – regarding Poland's judiciary resulting in the systemic undermining of Polish courts' independence (*Free Courts, 2500 Days of Lawlessness*, November 2022). This triggered, albeit belatedly, the reaction of the Commission, which initiated a series of infringement actions (L. PECH, P. BARD, *The European Commission's Rule of Law Report and EU Monitoring and Enforcement of Art. 2 TEU values*, PE 727.551, February 2022). In particular, the Court of Justice, in Cases C-619/18, *Commission v Poland* (Independence of the Supreme Court), C-192/18, *Commission v Poland* (Independence of ordinary courts), C-791/19, *Commission v Poland* (Disciplinary regime of judges), C-204/21, *Commission v Poland* (Independence and private life of judges), found that the relevant legislative measures violated in multiple instances multiple provisions of EU law and in particular Articles 19(1)(2) TEU and 47 CFREU (L. PECH, *The European*

*Court of Justice's jurisdiction over national judiciary-related measures*, PE 747.369, April 2023; L. S. ROSSI, *Il valore giuridico dei valori. L'Articolo 2 TUE: relazioni con altre disposizioni del diritto primario dell'UE e rimedi giurisdizionali*, in *federalismi.it*, 2020).

In the context of three of these infringement actions, the Commission requested the application of interim measures under Article 279 TFEU as a further tool to address rule of law backsliding (G. GENTILE, D. SARTORI, *Interim measures as "weapons of democracy" in the European legal space*, in *European Human Rights Law Review*, 2023; G. D'AGNONE, *Interim Relief in Commission v Poland: the End Justifies the Means?*, in *Osservatorio europeo DUE*, 2017).

The Vice-President of the Court, on the one hand, ordered the suspension of the law and the restoration of the situation as it existed prior to the forced early retirement of judges of the Polish Supreme Court (case C-619/18 R), and on the other hand, ordered the immediate suspension of the activities of the Disciplinary Chamber of the Polish Supreme Court because it lacked the guarantees of independence and impartiality (case C-791/19 R). Following this last interim measure, the situation in Poland did not improve. Instead of asking the Court of Justice to impose a periodic penalty payment, the Commission decided to open a new infringement procedure, Case C-204/21 (see, L. PECH, *Protecting Polish Judges from Political Control: A brief analysis of the ECJ's infringement ruling in Case C-791/19 (disciplinary regime for judges) and order in Case C-204/21 R (muzzle law)*, in *verfassungsblog.de*, July 2021). In this latest action for failure to fulfil obligations, the Vice-Presidency of the Court adopted a further order for interim measures on 14 July 2021 (case C-204/21 R). That order was openly disregarded again on account of its alleged unconstitutionality by Polish authorities. On 27 October 2021, the Vice-President of the Court ordered Poland to pay a periodic penalty payment of EUR 1 million per day. Polish authorities however continued to violate order.

**2.** As is well known, the order's amendment or revocation can occur if a 'change in circumstances' has occurred. In this specific case, the change would have been represented by Poland's adoption of the Law of 9 June 2022 and certain decisions of the Supreme Court.

In the order under review, the Vice-President found Poland to be fully compliant and partially compliant in respect of several measures previously ordered by the Court.

Firstly, concerning the obligation to suspend the application of the provisions on the basis of which the Disciplinary Chamber has jurisdiction to adjudicate in cases relating to the status of judges of the Supreme Court and the performance of their office (in particular in cases relating to employment and social security law and in cases relating to the compulsory retirement of those judges), the order considers that Poland, by abolishing the Disciplinary Chamber, has 'fully' complied with the provisional measures (para. 27).

Secondly, on the obligation to suspend the effects of the decisions adopted by the Disciplinary Chamber which authorises the initiation of criminal proceedings against or the arrest of a judge, it was held that Poland has only 'partially' complied. Fulfilment would result from the introduction of a review in the case of non-final disciplinary decisions taken and the possibility of a reopening of proceedings in the case of final decisions taken. Fulfilment is considered partial since these instruments do not have the effect of suspending decisions already taken (para. 38).

Furthermore, concerning the obligation to suspend the application of the Polish provisions prohibiting national courts from verifying compliance with the EU requirements for an independent, impartial, and pre-established tribunal by law and the provisions imposing disciplinary sanctions if such verification takes place, the Vice-Presidency considers that there has been partial compliance. Warsaw did not remove the problematic provisions but introduced a new legal remedy for verifying compliance with these requirements, which can be exercised only on application by a party to the procedure concerned (para. 51 and paras 65 - 66).

According to the order, Poland also partially complied with the obligation to suspend the application of the Polish provisions establishing the exclusive jurisdiction of the Extraordinary Review and Public Affairs Chamber to examine complaints alleging lack of independence of a judge or of a court. The provisions remain in force, and the Vice-President submits that the orders of the Supreme Court are not capable of establishing that the Extraordinary Review Chamber can no longer examine pending cases before it, nor that cases falling within the jurisdiction of that Chamber should no longer be referred to it by the ordinary courts (paras 80 and 85).

Also, about the obligation to refrain from referring cases concerning Polish judges to a court that does not meet the requirements of independence, it is considered that Poland has fully complied by abolishing the Disciplinary Chamber and that it is not possible to assess whether the Professional Liability Chamber and Extraordinary Review and Public Affairs Chamber to which the competence has been entrusted are independent and impartial (para. 99).

**3.** The order does not shine in terms of clarity and argumentation; on the contrary, it presents critical aspects, contradictions, and paradoxes.

The first critical aspect concerns the assessment made by the Vice-Presidency about the 'change in circumstances' required by Rule 163 of the Rules of Court. Both in the first order *Commission v Artedogan* (case C-440/01 P(R)), and most recently in *Czech Republic v Poland*, (case C-121/21 R), the Court clarified that 'change in circumstances' means the occurrence of any factual or legal element capable of calling into question the assessments of the judge hearing the application for interim measures as to the conditions to which the grant of a suspension or interim relief is subject. Although no cases clarify how such a change should be assessed, it is worth pointing out that it should be an assessment that is not so much formal as substantive. The fact that a State has adopted a law with the 'intention' to amend the 'offending'

legislation is not enough. Adopting the law must, in substance, fulfil what was stated in the interim order. The Vice-Presidency doesn't endeavour to make this argument, and the assessment does not appear to be thorough, but decidedly thin and contradictory.

To begin with, it is correct that the possibility for judges to request a review of sanctioning decisions was introduced, but it should have been observed more carefully that this is a lengthy and not immediate procedure with a dubious outcome. The interim measure required the immediate suspension of the effects of the decisions. So, it cannot be claimed that there has been any fulfilment, not even partial fulfilment!

Moreover, the 'muzzle law', harshly criticised by the Court and regarded as a deliberate attempt to 'legalise' the violation of its prior ruling in *AK* (L. PECH, *Doing Justice to Poland's Muzzle Law: The Latest ECJ Judgement on Poland's Rule of Law Breakdown*, in *verfassungsblog.de*, June 2023), is still in force in Polish law (M. TABOROWSKI, P. FILIPEK, "*Mustard after lunch?" The Polish Muzzle Law before the Court of Justice*, in *eulawlive.com*, July 2023) with Polish authorities having already indicated they will not comply with the latest ECJ ruling in a context where they no longer recognise as binding the rule of law-related judgments and interim measures adopted by the ECtHR as well (G. STAFFORD, J. JARACZEWSKI, *Taking European Judgments Seriously: A Call for the EU Commission to Take Into Account the Non-Implementation of European Court Judgments in its Rule of Law Reports*, in *verfassungsblog.de*, January 2022; M. FISICARO, *Safeguarding Judicial Independence (and Subsidiarity) Through Interim Measures: The New ECtHR's Strategy at the Height of the Polish Constitutional Crisis*, in *Diritti umani e diritto internazionale*, 2022). This means that the judges who will decide on the re-examination of unlawfully suspended colleagues may themselves be liable to disciplinary sanctions not to forget that not all of the "judges" in the new Disciplinary Chamber (see below) are lawful judges. The problem, therefore, persists and takes on an even greater dimension.

As regards the Disciplinary Chamber, it has been disbanded. However, its competence has been entrusted, on the one hand, to a new Professional Liability Chamber - composed, again, in such a way as to still allow for a high degree of political influence, so much so that in the *Tuleya case* (Report ABA, November 2020) the ECtHR confirmed it is not a legitimate court and that it cannot lawfully adjudicate if it includes post-2018 "judges" - and, on the other hand, to the Extraordinary Control and Public Questions Chamber, whose members, as established in the preliminary ruling *WZ*, are appointed by a procedure that violates Article 19(1) TEU. (W. SADURSKI, *The European Commission Cedes its Crucial Leverage vis-à-vis the Rule of Law in Poland*, in *verfassungsblog.de*, June 2022).

It is precisely on this last aspect that the Vice-President makes an illogical and legally questionable argument. The order states that is not possible to assess the organisation and functioning of either the Professional Liability Chamber or the Extraordinary Review Chamber, since the Court did not take a position on these points when examining an action for failure to fulfil

obligations (para. 95). It submits that such an assessment, the order states, would risk infringing the Court's exclusive jurisdiction deriving from Articles 258 and 260 TFEU and the procedural rights of the State concerned (paras. 103-104).

This reasoning can be criticised on two main grounds. First, it is necessary to state the obvious: a new law necessarily introduces new elements that have not been challenged in the infringement procedure by the Commission and not yet scrutinised by the Court, but this cannot constitute a valid argument for not making an appropriate assessment that applies only for modification or withdrawal of the penalty payment. It is no coincidence that the term 'change' is used because the contingency comes later in time. Secondly, the task of the Vice-President is not to assess the compatibility with EU law of a national practice or legislation that was not the subject of the objections raised in the action for failure to fulfil obligations, but to assess, in substance (and not in form), whether the new measures adopted can comply with the interim measures. The interim measures under Article 279 TFEU that form part of infringement proceedings certainly have an instrumental link with the latter. In fact, the infringement proceedings aim to ascertain the existence of a breach by the State of its obligations under EU law. The interim measures included in the infringement procedure have the objective of preserving the interests involved and encouraging the State to take the necessary measures to resolve the breach. However, both procedures have a life of their own, especially when after the issuance of the order establishing provisional measures, the State requests a review of that measure. In particular, the Court of Justice, when giving final judgment on the infringement procedure, is not called upon to take into account the order (either the order imposing the penalty payment or the order modifying or revoking the penalty payment) of the Vice-President; the latter, in turn, when considering whether to modify the provisional measures, must take into account the change in circumstances (i.e. new elements of fact or law) which the Court, on the other hand, cannot take into account because, as is well known, the Court can rule on the situation crystallised in the reasoned opinion. Therefore, when following a periodic penalty payment, the State intervenes by introducing new national measures, the Vice-President must verify whether these measures are indeed appropriate in order to revoke or amend the penalty. If this were not the case, it would have a paradoxical effect: adopting a law that does not comply with interim measures would be enough to make the penalty cease, thus frustrating the tool of interim measures.

In support of this argument, the Vice-President inappropriately refers to the case *Commission v Portugal*. In this judgment, the Court dealt with issues related to the enforcement of Member States' financial penalties, by Art. 260 TFEU, from the point of view of the scope of the Commission's competencies and the division of competencies between the Court of Justice and the General Court. In particular, the Court highlighted the lack of jurisdiction of the General Court to assess whether a national practice or legislation, not previously examined by the Court, could put an end to the offence sanctioned,

and consequently rule on the quantum of the penalty due. (P. MORI, *Profili problematici dell'esecuzione delle sentenze della Corte di giustizia di condanna degli Stati membri ex art. 260 TFUE*, in *Il diritto dell'Unione europea*, 2015; M. CONDINANZI, C. AMALFITANO, *La procedura di infrazione a dieci anni da Lisbona*, in *federalismi.it*, 2020). The case at hand, on the contrary, arises in the context of the interim measures under Art. 279 TFEU, where the task of the Vice-President is precisely to assess whether the change in circumstances has responded positively to the provisional measures and the penalty imposed can therefore be revoked or amended.

Lastly, although it cannot be considered a change in circumstances because it already existed, one cannot fail to mention the position taken by Poland's Constitutional Tribunal (PTC) concerning interim measures (case of 14 July 2021, P 7/20. See, A. CIRCOLO, *Il valore dello Stato di diritto nell'Unione europea. Violazioni sistemiche e soluzioni di tutela*, Naples, 2023). In particular, the PTC declared *ultra vires* the interim order of 8 April 2020 (which had ordered the suspension of the activities of the Disciplinary Chamber because it was incompatible with the Polish Constitution) on the basis that the organization of the judiciary would be the exclusive competence of the State and the Union is bound to respect national law by Art. 4(2) TEU (P. BARD, N. CHRONOWSKI, Z. FLECK, *Use, Misuse, and Abuse of Constitutional Identity in Europe*, CEU DI Working Paper 2023/06; G. DI FEDERICO, *L'identità nazionale degli Stati membri nel diritto dell'Unione Europea. Natura e portata dell'art. 4 par. 2 TUE*, Naples, 2017). It even went so far as to affirm that the adoption of atypical interim measures, under Article 4(3) TEU and 279 TFEU, extends the jurisdiction of the EU Court beyond what is established by the Treaties, in conflict with the Rule of law and, in particular, with the principle of legality (N. PETERSEN, P. WASILCZYK, *The Primacy of EU Law and the Polish Constitutional Law Judgment*, PE 734.568, June 2022. See, relating the ECHR dimension, PTC's decisions K 6/21 and K 7/21 and the Report by the Secretary-General under Article 52 ECHR on the consequences of the decisions mentioned).

Poland uses this judgment as a rejoinder to contest the existence of the infringements alleged by the Commission in its infringement action and, on the other hand, asks for a review of the interim measures (connected with the same infringement procedure) claiming that it has adapted itself. Paradoxical, but, judging by the Poland result, genial!

These are only some of the factual and legal reasons that should have served as a basis for an order rejecting Poland's request, which in any case would have ceased to have effect with the Court's judgment of 5 June 2023 (Art. 162(3) of the Rules of Procedure of the Court). This point should also be reflected upon. Whereas during the infringement procedure, Poland was obliged to pay a periodic penalty payment, following the final judgment establishing the infringements pursuant to Article 258 TFEU, Poland is no longer obliged to pay any penalty payment.

In conclusion, in a situation where all institutions should, by virtue of the principle of loyal cooperation, use all instruments at their disposal to fight

against the deterioration of the Rule of Law, the Vice-President's shallow assessment is both factually and legally unconvincing.