



Reports of Cases

ORDER OF THE VICE-PRESIDENT OF THE COURT

6 October 2021 *

(Interim relief – Order on interim measures – Article 163 of the Rules of Procedure of the Court of Justice – Change in circumstances – No such change – Jurisdiction of the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland) – Disciplinary regime applicable to the judges of the Sąd Najwyższy (Supreme Court), of the ordinary courts and of the administrative courts – Procedure for review of the conditions for the independence of those judges – Suspension of application of national provisions)

In Case C-204/21 R-RAP,

APPLICATION for cancellation of an order for interim measures, pursuant to Article 163 of the Rules of Procedure of the Court, made on 16 August 2021,

Republic of Poland, represented by B. Majczyna, acting as Agent,

applicant,

v

European Commission,

defendant,

THE VICE-PRESIDENT OF THE COURT

after hearing the Advocate General, G. Hogan,

makes the following

Order

- 1 By its application, the Republic of Poland requests the Court to cancel the order of the Vice-President of the Court of 14 July 2021, *Commission v Poland* (C-204/21 R, ‘the order of 14 July 2021’, EU:C:2021:593).

* Language of the case: Polish.

- 2 By that order, the Vice-President of the Court ordered the Republic of Poland, pending delivery of the judgment bringing the proceedings in Case C-204/21 to an end:
- (a) to suspend, first, the application of point 1a of Article 27(1) of the ustawa o Sądzie Najwyższym (Law on the Supreme Court), of 8 December 2017, as amended by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws), of 20 December 2019 and others, pursuant to which the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland) has jurisdiction to hear and determine, both at first and second instance, applications for authorisation to initiate criminal proceedings against judges or trainee judges or to place them in provisional detention, arrest them or summon them to appear before it and, second, the effects of the decisions already adopted by the Disciplinary Chamber on the basis of that article which authorise the initiation of criminal proceedings against or the arrest of a judge, and to refrain from referring cases covered by that article to a court which does not meet the requirements of independence defined, in particular, in the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982);
 - (b) to suspend the application of points 2 and 3 of Article 27(1) of the Law on the Supreme Court, as amended, on the basis of which the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court) has jurisdiction to adjudicate in cases relating to the status of judges of the Sąd Najwyższy (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, and to refrain from referring those cases to a court which does not meet the requirements of independence defined, in particular, in the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982);
 - (c) to suspend the application of points 2 and 3 of Article 107(1) of the ustawa – Prawo o ustroju sądów powszechnych (Law relating to the organisation of the ordinary courts) of 27 July 2001, as amended by the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, and of points 1 to 3 of Article 72(1) of the Law on the Supreme Court, as amended, which allow the disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union;
 - (d) to suspend the application of Article 42a(1) and (2) and of Article 55(4) of the Law relating to the organisation of the ordinary courts, as amended, of Article 26(3) and Article 29(2) and (3) of the Law on the Supreme Court, as amended, of Article 5(1a) and (1b) of the ustawa – Prawo o ustroju sądów administracyjnych (Law relating to the organisation of the administrative courts) of 25 July 2002, as amended by the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, and of Article 8 of the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, in so far as they prohibit national courts from verifying compliance with the requirements of the European Union

relating to an independent and impartial tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights;

- (e) to suspend the application of Article 26(2) and (4) to (6) and Article 82(2) to (5) of the Law on the Supreme Court, as amended, and of Article 10 of the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, establishing the exclusive jurisdiction of the Izba Kontroli Nadzwyczajnej i Spraw Publicznych Sądu Najwyższego (Extraordinary Review and Public Affairs Chamber) of the Sąd Najwyższy (Supreme Court) to examine complaints alleging lack of independence of a judge or court, and
 - (f) to communicate to the European Commission, no later than one month after notification of the order of 14 July 2021, all the measures adopted in order to comply in full with that order.
- 3 The Republic of Poland, considering a change in circumstances to have taken place after the making of the order of 14 July 2021, made the present application pursuant to Article 163 of the Rules of Procedure of the Court of Justice. In addition, that Member State requested that the application be examined by the Grand Chamber of the Court.

On the request of the Republic of Poland to assign the case to the Grand Chamber of the Court

- 4 The Republic of Poland considers that, in view of the importance of the present case and the fact that it will set a precedent, the request that the order of 14 July 2021 be cancelled must be examined by the Grand Chamber of the Court.
- 5 In that regard, it should be recalled that, pursuant to Article 161(1) of the Rules of Procedure, read in conjunction with Article 1 of Decision 2012/671/EU of the Court of Justice of 23 October 2012 concerning the judicial functions of the Vice-President of the Court (OJ 2012 L 300, p. 47), the Vice-President of the Court is to either decide on applications for suspension of operation or for interim measures himself or herself or refer those applications immediately to the Court.
- 6 Thus, pursuant to those provisions, competence has been conferred on the Vice-President of the Court to rule on any application for interim measures or, where he or she takes the view that the particular circumstances require the referral of the case to a formation of the Court, to refer such an application to the Court (order of the Vice-President of the Court of 20 September 2021, *Czech Republic v Poland*, C-121/21 R, EU:C:2021:752, paragraph 10).
- 7 It follows that it is for the Vice-President of the Court alone to assess, on a case-by-case basis, whether the applications for interim measures before him or her require referral to the Court for the purpose of their assignment to a formation of the Court (order of the Vice-President of the Court of 20 September 2021, *Czech Republic v Poland*, C-121/21 R, EU:C:2021:752, paragraph 11).
- 8 In the present case, the Republic of Poland's application for cancellation of the order of 14 July 2021 does not disclose any factor of such a kind as to require that it be assigned to a formation of the Court, so that there is no need to refer that application to the Court.

Substance

Arguments

- 9 In support of its application, the Republic of Poland invokes a change in circumstances resulting from the judgment of the Trybunał Konstytucyjny (Constitutional Court, Poland) of 14 July 2021, delivered in Case P 7/20 ('the judgment of the Trybunał Konstytucyjny (Constitutional Court)').
- 10 In that judgment, the Trybunał Konstytucyjny (Constitutional Court) held, inter alia, that the second subparagraph of Article 4(3) TEU, read in conjunction with Article 279 TFEU, is incompatible with Articles 2 and 7, Article 8(1) and Article 90(1) of the Polish Constitution, read in combination with Article 4(1) thereof, on the ground that the Court of Justice exceeded its own competences, namely it ruled *ultra vires*, in having prescribed to the Republic of Poland, taken in its capacity as Member State of the European Union, interim measures relating to the organisation and jurisdiction of the Polish courts, as well as the procedure to be followed before those courts, so the principles of primacy and of direct effect of EU law set out in Article 91(1) to (3) of that Constitution do not apply to those measures.
- 11 According to the Republic of Poland, in the light of the judgment of the Trybunał Konstytucyjny (Constitutional Court), the order of 14 July 2021 is contrary to the Polish constitutional order.
- 12 In that regard, the Republic of Poland recalls that the Trybunał Konstytucyjny (Constitutional Court) has held that it is for it to protect the Constitution of the Republic of Poland, which, in accordance with Article 8 thereof, is the supreme law of that Member State, and that, consequently, in cases of principle governed by the constitutional order, it must be regarded as the 'court having the last word'.
- 13 The Republic of Poland submits that the interpretation according to which the constitutional courts of the Member States are competent to review *ultra vires* acts of the European Union, including judgments of the Court of Justice, has been endorsed by the constitutional courts of many Member States. Those courts have unanimously considered that their respective legal orders have a constitutional identity, which it is for them to define on the basis of their constitutional provisions, the European Union being required to respect such an identity.
- 14 During the oral presentation of the reasons for the judgment of the Trybunał Konstytucyjny (Constitutional Court), the judge-rapporteur is said to have stated that the judicial function entrusted by the Member States to the Court of Justice ends when an interpretation of the Treaties ceases to be intelligible and becomes objectively arbitrary. According to that national court, that was precisely the case with the order of 8 April 2020, *Commission v Poland* (C-791/19 R, EU:C:2020:277). In that regard, the judge-rapporteur reportedly stated that the Trybunał Konstytucyjny (Constitutional Court) found that the Court of Justice had exceeded the limits of its competence because neither the Treaty on European Union nor the Treaty on the Functioning of the European Union confers on the Union any competence in the organisation, establishment and functioning of the judiciary of a Member State, that area remaining the exclusive sovereign competence of the Member States.
- 15 According to the Republic of Poland, the order of 14 July 2021 was adopted in breach of the principle of conferral, enshrined in Article 5 TEU, such that the judgment of the Trybunał Konstytucyjny (Constitutional Court) is also applicable in the light of that order.

Assessment

- 16 In accordance with Article 163 of the Rules of Procedure, on application by a party, an order for interim measures may at any time be varied or cancelled on account of a change in circumstances. The concept of a ‘change in circumstances’ refers in particular to 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 of interim relief is subject (order of the Vice-President of the Court of 20 September 2021, *Czech Republic v Poland*, C-121/21 R, EU:C:2021:752, paragraph 22).
- 17 It is therefore appropriate to ascertain whether the judgment of the Trybunał Konstytucyjny (Constitutional Court) constitutes a ‘change in circumstances’ within the meaning of that article.
- 18 In that regard, it must be borne in mind that, in accordance with the Court’s settled case-law, the principle of the primacy of EU law establishes the pre-eminence of EU law over the law of the Member States. That principle therefore requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States (judgment of 18 May 2021, *Asociația ‘Forumul Judecătorilor Din România’ and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 244 and the case-law cited).
- 19 As the Court has held on numerous occasions, under the second subparagraph of Article 19(1) TEU, every Member State must thus in particular ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law, meet the requirements of effective judicial protection (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 112 and the case-law cited).
- 20 That provision thus imposes on the Member States a clear and precise obligation as to the result to be achieved and that obligation is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law (judgment of 18 May 2021, *Asociația ‘Forumul Judecătorilor Din România’ and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 250 and the case-law cited).
- 21 Thus, although the organisation of justice in the Member States falls within the competence of those Member States, when exercising that competence, the Member States are nevertheless required to comply with their obligations deriving from the second subparagraph of Article 19(1) TEU (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 36 and the case-law cited).
- 22 It follows that the national provisions on the organisation of justice in the Member States may be subject to review in the light of the second subparagraph of Article 19(1) TEU in the context of an action for failure to fulfil obligations, and, consequently, to interim measures aimed, in particular, at their suspension that are ordered by the Court, under Article 279 TFEU, in the same context (order of the Vice-President of the Court of 14 July 2021, *Commission v Poland*, C-204/21 R, EU:C:2021:593, paragraph 54).

- 23 The fact that a national constitutional court declares that such measures are contrary to the constitutional order of the Member State concerned in no way alters the assessment set out in the preceding paragraph.
- 24 Suffice it to recall that, by virtue of the principle of the primacy of EU law, a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law (judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor Din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 245 and the case-law cited).
- 25 It follows from the foregoing that the judgment of the Trybunał Konstytucyjny (Constitutional Court) does not constitute a 'change in circumstances', within the meaning of Article 163 of the Rules of Procedure, capable of calling into question the assessments set out in the order of 14 July 2021.
- 26 Consequently, the Republic of Poland's application seeking that the order of 14 July 2021 be cancelled must be dismissed.

On those grounds, the Vice-President of the Court hereby orders:

1. **The application seeking that the order of the Vice-President of the Court of 14 July 2021, *Commission v Poland* (C-204/21 R, EU:C:2021:593) be cancelled is dismissed.**
2. **The costs are reserved.**

[Signatures]