

POLAND AND THE RULE OF LAW

Request for a preliminary ruling submitted by the Disciplinary Court of the Bar Association in Warsaw (pending Case C-55/20): Legal opinion for the CCBE

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Summary:

Following an appeal by the Minister of Justice against a decision to discontinue disciplinary proceedings against a lawyer, the Disciplinary Court of the Bar Association in Warsaw (“DCBAW”) decided to submit a request for a preliminary ruling which was lodged with the European Court of Justice on 31 January 2020.

As regards admissibility, it is first submitted that the DCBAW must be considered a court or tribunal within the meaning of EU law. Second, while the dispute is primarily concerned with the limits of a lawyer’s freedom of expression outside a situation where EU law is seemingly implemented, it is procedurally connected with EU law as far as the appeal jurisdiction of a disciplinary body lacking independence and impartiality is concerned. Third, while the question relating to the EU Services Directive may be considered hypothetical, the questions relating to the procedural consequences one must draw from the lack of independence of a disciplinary body such as Poland’s Disciplinary Chamber (“DC”) should be considered as necessary to enable the DCWBA to give judgment. These questions must however be answered on the basis of the second subparagraph of Article 19(1) TEU rather than Article 47 of the Charter, which is arguably inapplicable in the present dispute.

As regards substance, it is submitted that the DCBAW’s questions must be answered as follows: (i) The second subparagraph of Article 19(1) TEU must be interpreted as precluding the existence of a body such as Poland’s DC as it does not satisfy the requirements of judicial independence established by EU law; (ii) The principle of primacy of EU law must be interpreted as requiring the referring court but more generally, all national courts or tribunals to disapply, of their own initiative, any provision of national law which provides first instance or appeal jurisdiction to a body such as Poland’s DC in any situation which falls in the fields covered by EU law to ensure effective judicial protection.

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Request for a preliminary ruling submitted by the Disciplinary Court of the Bar Association in Warsaw (pending Case C-55/20): Legal opinion for the CCBE

1. Context

Poland has been undergoing a process of rule of law backsliding since 2015.¹ By rule of law backsliding, one may understand “the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.”²

In Poland, this process has seen *inter alia* the unconstitutional capture of the Constitutional Tribunal with the result that this previously independent body is no longer considered by the European Commission and the European Parliament as capable of providing effective constitutional review of ordinary legislation.³ In the absence of any effective constitutional review, Poland’s governmental coalition has been able to adopt and implement a number of unconstitutional legislative changes to the retirement regime of the Supreme Court judges, to the structure of the Supreme Court and to the disciplinary regime for judges and prosecutors to name but a few.

The cumulative impact of these changes – some of which have *already* been found to violate EU Law by the European Court of Justice – has enabled the legislative and executive powers to *interfere throughout the entire structure and output of the justice system*.⁴ Due to the persistent nature of the systemic threat to the rule of law created by these changes and Polish authorities’ continuing refusal to remedy this threat, Poland became in 2020 the first ever EU Member State to be simultaneously subject to the exceptional monitoring mechanisms such as the EU’s Article 7 TEU procedure and the Council of Europe’s full monitoring procedure.⁵

This ongoing process of deliberate and systemic dismantlement of all checks and balances was bound to have an impact beyond judges, prosecutors and journalists. And indeed, this process has more recently resulted in Polish authorities targeting critical prominent academics via defamation proceedings⁶ as well as critical prominent lawyers via disciplinary complaints such as the ones aimed at the lawyer at the heart of pending Case C-55/20, following comments he made in defence of Donald Tusk, a staunch critic of current Polish authorities and Poland’s former PM as well as former President of the European Council. The same lawyer, well known for his vocal criticism of Poland’s so-called judicial reforms, recently saw his home searched

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¹ For a five-year assessment of the state of the rule of law in Poland, see Poland’s Civil Development Forum (authors: M. Tatała, E. Rutynowka and P. Wachowiec), Rule of Law in Poland 2020: A Diagnosis of the Deterioration of the Rule of Law from a Comparative Perspective, August 2020.

² For further analysis and references, see L. Pech and K.L. Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU” (2017) 19 *CYELS* 3, pp. 10-11.

³ For further analysis, see Reichters voor Reichters and L. Pech, Third Party Intervention submitted to the European Court of Human Rights on 24 October 2020 in the case of *Żurek v Poland* (application no. 39650/18).

⁴ This is *inter alia* the diagnosis of both the European Commission and the European Parliament. See *ibid.*, para. 31.

⁵ PACE decides to open monitoring of Poland over rule of law, 28 January 2020.

⁶ See e.g. G. de Búrca and J. Morijn, “Repression of Freedom of Expression in Poland: Renewing support for Wojciech Sadurski”, *VerfBlog*, 3 June 2020.

by Polish authorities on account of money laundering charges, with the lawyer being “taken to the hospital after a fall, in circumstances that remain unclear”.⁷ As he could not be arrested due to his health condition, the regional prosecutor’s office controlled by the Minister of Justice, *unlawfully* ordered his professional suspension in addition to other measures such as a prohibition to leave Polish territory.⁸

This legal opinion, commissioned by the CCBE, will offer an assessment of the national request for a preliminary ruling lodged with the European Court of Justice on 31 January 2020 by the Disciplinary Court of the Bar Association in Warsaw (hereinafter: DCBAW). It will first outline the main features of the dispute pending before the DCBAW. The admissibility of the questions submitted to the Court of Justice by the DCBAW will then be assessed. Finally, tentative answers to the questions identified as admissible in relation to the lack of independence under EU law of the body known as Poland’s Disciplinary Chamber (hereinafter: DC), and the procedural consequences one may draw from this lack of independence, will be offered.

2. Dispute

In what may well be the first ever request preliminary ruling submitted by a *disciplinary court* of a national bar association,⁹ the DCBAW is requesting the Court of Justice to clarify the

⁷ M. Pronczuk and M. Santora, “Detention of Government Critic in Poland Raises Fears of a Crackdown”, *The New York Times*, 16 October 2020.

⁸ See M. Jalszewski, “Prokuratura uderza w Giertycha”, *Oko.press*, 17 October 2020; IBA, “Poland: IBAHRI calls for charges against lawyer Roman Giertych to be dropped”, 10 November 2020; Lawyers for Lawyers, ICJ and Amsterdam Bar Association, “Treatment of lawyer Roman Giertych undermines independence of legal profession”, 16 November 2020 (“The suspension of Mr. Giertych’s right to practice his legal profession also raises deep concerns ... The application of the suspension of an advocate’s right to practice by a prosecutor constitutes a threat to human rights and fundamental freedoms. This instrument – due to the fact that an advocate often acts as a trial opponent of a prosecutor – is contrary to the essence of the principle of equality of arms. The legal system in Poland provides for another, constitutional, instrument for suspending an advocate, in the form of a decision taken by a disciplinary court of the advocates’ Bar”). As additional evidence of the politically motivated and arbitrary nature of the different proceedings initiated against Mr. Giertych, see most recently W. Czuchnowski, “Święczkowski o sprawie Giertycha: Sady nas nie powstrzymają” (head of the National Prosecutor’s Office “on the Giertych case: The courts will not stop us”), *Wyborcza.pl*, 24 November 2020.

⁹ It is not, however, the first reference directly submitted by a national bar association. Indeed, one may mention the case of *Gebhard* in which the Italian National Bar Council, acting as an appellate body rather than the first instance disciplinary body, submitted a request for a preliminary ruling in relation to Directive 77/249 of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services in the context of disciplinary proceedings initiated by the Milan Bar Council: Case C-55/94, EU:C:1995:411. In Joined Cases C-58/13 and C-59/13, *Torresi*, EU:C:2014:2088, the Italian National Bar Council similarly submitted two questions to the Court of Justice concerning the interpretation and validity of Directive 98/5 of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. In this case, the applicants in the main proceedings submitted that the National Bar Council is not entitled to refer questions for a preliminary ruling as it would exercise judicial functions only when it acts in connection with a disciplinary matter. In a grand chamber formation, the Court held that in the present instance that National Bar Council constitutes a court or tribunal for the purposes of Article 267 TFEU. Prior to these cases, one may note that questions on the conditions for entry on the rolls of the Bar of a Member State were submitted to the Court of Justice in Case 292/86 *Gullung* [1988] ECR 111, and in Case 65/77 *Razanatsimba* [1977] ECR 2229. In these two cases, the references were made by a court of appeal rather than a bar council directly. Similarly, in C-309/09, *Wouters*, EU:C:2002:98, questions regarding a prohibition on lawyers to work in full partnership with accountants were submitted by the Netherlands Council of State. In the case of *Razanatsimba*, however, it is worth noting the French Bar Council did submit a request for a preliminary ruling but the procedure was not carried out

extent to which national disciplinary proceedings against lawyers¹⁰ may fall within the scope of EU law and the extent to which EU law may preclude an appeal against the rulings of a Bar Association disciplinary court when such an appeal has to be heard by a body which does not constitute an independent and impartial tribunal under Article 47 of the Charter of Fundamental Rights of the EU (hereinafter: EUCFR).

In more practical terms, the dispute at the origin of pending Case C-55/20 concerns an appeal by Poland's Minister of Justice (hereinafter: MoJ) – who is simultaneously the Public Prosecutor General (hereinafter: PPG) following changes made in 2016 severely criticised *inter alia* by the Venice Commission¹¹ – against a decision by the disciplinary court to discontinue disciplinary proceedings against a lawyer. The domestic dispute is primarily about the issue of whether the lawyer would have exceeded the limits of his right to free speech when he made comments regarding the possibility of seeing his client – Donald Tusk then President of the European Council – charged with a criminal offence. For the First Deputy of the PPG, the lawyer in this context would have made unlawful threats amounting to disciplinary misconduct. Following a disciplinary inquiry and successive appeals, the Disciplinary Officer¹² of the Bar Association in Warsaw twice discontinued the disciplinary inquiry due to the lack of merits of the PPG's complaint.

Following yet another appeal by the PPG as well as the MoJ, now pending before the DCBAW, the DCBAW decided to ask the Court of Justice to answer several questions which relate to Directive 2006/123/EC and Article 47 EUCFR. While the substance of the national dispute is primarily about freedom of expression as the PPG alleged professional misconduct due to the content of the public statements made by the lawyer defending Donald Tusk, the referring body did not ask any question regarding Article 11 of the EU Charter of fundamental rights which protects freedom of expression.

3. Admissibility

as this decision was appealed by the Prosecutor General before the relevant court of appeal which agreed with the PG and annulled the order for reference on the main ground that the French Bar Council is not an ordinary court of law but an administrative authority when deciding on admission to pupillage. In doing so, the French court of appeal arguably violated EU law: A. Brunois and L. Pettiti: “Un conseil de l'Ordre peut-il renvoyer en interprétation devant la Cour de justice des Communautés? Les décisions ordinales ont-elles un caractère juridictionnel?”, *Gazette du Palais*, 25 October 1977, p. 513. In his Opinion in Case C-55/94, the Advocate General referred to the “curious” annulment of the decision of the French Council of Bar Associations by the court of appeal, see *infra* fn 13.

¹⁰ On the concept of lawyer in EU law, see recently Joined Cases C-515/17 P and C-561/17 P, *Uniwersytet Wrocławski*, EU:C:2020:73.

¹¹ See Opinion 892/2017, paras 109-111: “The merger of the office of the Minister of Justice and that of the Public Prosecutor General appears to be the most important aspect of the new prosecution system established by the Act on the Public Prosecutor's Office of 28 January 2016 and in this respect as a complete reversal of the model adopted in 2009 (split of both positions) ... The amalgamation between political and prosecutorial functions generates however a number of insurmountable problems as to the separation of the prosecution system from the political sphere (as required by Article 103 of the Constitution). Contrary to a system in which the Minister of Justice gives instructions to the Prosecutor General, this merger falls short of international standards ... the main problem concerns the attribution of extensive powers to the Prosecutor General-Minister of Justice by the 2016 Act, notably with regard to direct intervention in individual cases. This ... creates a potential for misuse and political manipulation of the prosecutorial service, which is unacceptable in a state governed by the rule of law.”

¹² Sometimes arguably wrongly translated as “Disciplinary Spokesperson”.

Three issues will be covered below: Is the DCBAW a court or tribunal within the meaning of EU law? Does the dispute pending before the DCBAW fall within the scope of EU law or is otherwise connected to EU law? Are the questions referred of a general or hypothetical nature or, on the contrary, necessary to enable it to give judgment?

3.1 *Is the DCBAW a court or tribunal within the meaning of EU law?*

It is well established that the status as a court or tribunal must be understood “as an autonomous concept of EU Law”.¹³ In other words, the question of whether the DCBAW is a court or tribunal for the purposes of Article 267 TFEU is governed by EU law alone. In this context, the Court of Justice has historically favoured a flexible understanding of the notion of court or tribunal. Numerous bodies that may not be formally part of the judiciaries of their Member States have nevertheless been held to constitute courts or tribunals within the meaning of EU law.¹⁴ The approach of the Court of Justice is in line with the approach of the European Court of Human Rights which has constantly held that the word “tribunal” used in Article 6(1) ECHR is not necessarily to be understood as signifying a court of law of the classic kind, “integrated within the standard judicial machinery of the country”.¹⁵

In more practical terms, to decide whether the referring body is a court or tribunal within the meaning of EU law, the Court of Justice takes into account the following ‘factors’: (i) whether the body is established by law; (ii) whether it is permanent; (iii) whether its jurisdiction is compulsory; (iv) whether its procedures are inter parties; (v) whether it applies rules of law; and finally (vi) whether it is independent. Regarding the independence criterion, one must note the recent tightening operated in *Banco Santander* in which the Court of Justice has adopted a stricter understanding of the notion of court or tribunal for the purposes of Article 267 TFEU. This led the Court to hold that the Spanish Central Tax Tribunal is not a court due to its lack of independence as Spanish law does not ensure in particular “that the President and the other members of the TEAC are protected against direct or indirect external pressures that are liable to cast doubt on their independence”.¹⁶

As far as disciplinary courts of national bar associations are concerned, the case law of the European Court of Human Rights has already established that they can be considered “tribunals” within the meaning of Article 6(1) ECHR. In a case where the applicant claimed that the Council of the Ordre des avocats did not afford the safeguards inherent in the concept of a tribunal notably because it performs many functions (administrative, regulatory, adjudicative, advisory and disciplinary), the Court held that

¹³ CJEU, *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2019/C 380/01), para 4. See recently Case C-274/14, *Banco de Santander SA*, EU:C:2020:17, para. 51: According to the Court’s settled case-law, the question “to determine whether a body making a reference is a ‘court or tribunal’ for the purposes of Article 267 TFEU [...] is a question governed by EU law alone.”

¹⁴ See e.g. Case C-17/00, *De Coster*, EU:C:2001:651.

¹⁵ See e.g. *Boulois v Luxembourg* [GC] (2012) 55 EHRR 32 [16]: “a “tribunal” is characterised in the substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members’ terms of office; guarantees afforded by its procedure – several of which appear in the text of Article 6 § 1 itself.”

¹⁶ *Banco de Santander SA*, op. cit., para. 68.

This kind of plurality of powers cannot in itself preclude an institution from being a “tribunal” in respect of some of them. Moreover, the Council of the Ordre, when taking its decisions on the application for readmission made by the application [...] was performing a judicial function further to its disciplinary responsibilities.¹⁷

The Court of Justice has also had the opportunity to decide cases relating to professional bodies, including the disciplinary body of a bar association. In the case of *Gebhard*, the Court accepted the request for a preliminary ruling submitted by the National Council of the Italian Bar. The issue of whether the National Council of the Italian Bar (CNF in Italian) is a “court or tribunal” was not seen as problematical. Indeed, for Advocate General Léger, the CNF fulfilled all relevant criteria.¹⁸

By contrast, in the case of *Wilson*, AG Stix-Hackl offered the view that “neither the Conseil disciplinaire et administratif nor the Conseil disciplinaire et administratif d’appel can be regarded as a court or tribunal” for the purposes of ex Article 234 EC (now Article 267 TFEU) in the context of a dispute about the registration of a foreign qualified lawyer.¹⁹ This restrictive interpretation of the term “court or tribunal” was justified on the ground that the dispute was governed by a directive (Directive 98/5), which granted legal protection and laid down minimum guarantees when it came to refusals by local bars to admit lawyers qualified in another EU Member State. The Court of Justice, following some extensive developments on the concept of independence, agreed. For the Court of Justice, “the appeal procedure in which the decision refusing registration must be challenged at first instance before a body composed exclusively of lawyers practising under the professional title of the host Member State and on appeal before a body composed for the most part of such lawyers, where the appeal before the supreme court of that Member State permits judicial review of the law only and not the facts”,²⁰ does not constitute an effective remedy before a court or tribunal. This judgment was however directly motivated by the fact that any European lawyer whose registration is refused by the Luxembourg Bar Council may have “legitimate grounds for concern that either all or the majority, as the case may be, of the members of those bodies have a common interest contrary to his own, that is, to confirm a decision to remove from the market a competitor who has obtained his professional qualification in another Member State.”²¹

In the present dispute, however, no competition/market entry considerations apply. Furthermore, we are not in a situation where different bodies of a bar association are acting as a decision-maker and the appellate review body. Rather, we are in a situation where the executive – Poland’s MoJ and the PPG being in practice one and the same – is seeking to force the disciplinary officer of a Bar Association to take a disciplinary decision (the disciplinary officer has discontinued the disciplinary inquire twice to date), no matter the lack of merits of the allegations made. The aim pursued by Poland’s MoJ and the PPG is obvious: To involve on appeal a disciplinary body, the DC, which is de facto controlled by the MoJ. In this respect,

¹⁷ *H v Belgium* (1987) ECHR Series A no 127-B, para 50. However, in the light of the two procedural shortcomings identified by the European Court of Human Rights – difficulty to adduce appropriate evidence of the “exceptional circumstances which might justify restoration to the roll and the lack of a provision allowing the applicant a right of challenge – and the fact that the applicant’s applications to the Council of the Ordre were not heard in public, the Court held that that the Council did not satisfy in this instance the requirements of Article 6(1) ECHR.

¹⁸ AG Léger Opinion in Case C-55/94, *Gebhard*, EU:C:1995:194, paras 13-17.

¹⁹ AG Stix-Hackl Opinion in Case C-506/04, *Wilson*, EU:C:2006:311, para. 56.

²⁰ Case C-506/04, *Wilson*, EU:C:2006:587, para. 62.

²¹ *Ibid.*, para. 57.

and as will be detailed below, it is crucial to note that the Court of Justice has since ordered the suspension of the activity of this body regarding judges on 8 April 2020, with three chambers of Poland's Supreme Court previously holding that the DC cannot be considered a court due to its lack of independence.²²

Submission: In the present instance, and considering the provisions of the Polish Advocate Profession Act of 26 May 1982, the DCBAW must be recognised as (i) a body established by law; (ii) of a permanent nature; (iii) with compulsory jurisdiction over disciplinary cases involving lawyers; (iv) which acts on a party's request rather than *ex officio* and adopts binding rulings on the basis of parties procedures; (v) applies applicable rules of law; and (vi) whose independence is guaranteed from other bodies of the bar self-government and public authorities.²³

3.2 Does the dispute pending before the DCBAW fall within the scope of EU law or is otherwise connected to EU law?

It is well established that a “request for a preliminary ruling must concern the interpretation or validity of EU law, not the interpretation of rules of national law or issues of fact raised in the main proceedings” and that the Court of Justice “can give a preliminary ruling only if EU law applies to the case in the main proceedings.”²⁴ To put it differently, this means that the Court of Justice “has no jurisdiction to give a preliminary ruling where a legal situation does not come within the scope of EU law”.²⁵ However, in practice, it is not always easy to assess whether a national dispute falls within the scope of EU law. To oversimplify, one may distinguish between two main national scenarios: (i) when national disputes concern national measures applying, enforcing or even merely interpreting provisions of EU law and (ii) when national disputes concern national measures derogating from provisions of EU law, for instance, EU free movement rules.²⁶ In these two situations, provisions of EU law such as Article 47 EUCFR, which is at the heart of all the questions submitted by the DCBAW, may be relied upon if relevant.

It is not obvious however that the national dispute in Case C-55/20 falls within the scope of EU law as understood above. The referring court refers to chapter III of Directive 2006/123 (“The Services Directive”), which deals with freedom of establishment for providers of services, and stresses the possible relevance of Article 10(6) of the Services Directive which deals with the conditions which must govern authorisation schemes and in particular the need for any national decision such as a decision to refuse or withdraw an authorisation to “be open to challenge before the courts or other instances of appeal”. The dispute pending before the

²² See *infra* Section 4.

²³ Regarding the requirements of independence and impartiality in relation to the Italian Bar Council, see in particular Joined Cases C-58/13 and C-59/13, *Torresi*, EU:C:2014:2088, para 25: “In those circumstances, it must be held that the Consiglio Nazionale Forense meets the requirements of independence and impartiality which are characteristic of a court or tribunal within the meaning of Article 267 TFEU”.

²⁴ CJEU, *Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings*, 2016/C 439/01, paras 8 and 9.

²⁵ *Ibid*, para. 10.

²⁶ X. Groussot, L. Pech, G. Pertursson, “The Reach of EU Fundamental Rights on Member State Action after Lisbon” in de S. de Vries, U. Bernitz and S. Weatherhill (eds), *The Protection of Fundamental Rights in the EU after Lisbon* (Hart, 2013), 97.

referring court does not however concern an authorisation within the meaning of the Services Directive. It is rather concerned with a disciplinary procedure connected to the expression of critical statements in which the applicant “commented on the hypothetical possibility of his client ... being charged with a criminal offence”.²⁷ This is therefore about the limits of the right to freedom of expression of a lawyer rather than the legality of any national restriction regarding the provision of services within the meaning of the Services Directive. Furthermore, one may note that Article 17 of the Services Directive provides one derogation to the freedom to provide services as detailed in Article 16 of the same Directive. In other words, matters covered by Council Directive 77/249 of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services are not covered by Article 16 of Directive 2006/123.

It is however submitted that the dispute in Case C-55/20 falls within the fields covered by EU law within the meaning of the second subparagraph of Article 19(1) TEU. This additional “option”, which has been made clear by the Court of Justice in 2018, is normally only considered in situations where the national dispute cannot be said to fall within the scope of EU Law, which means *inter alia* that Article 47 EUCFR cannot be relied upon. While the second subparagraph of Article 19(1) TEU and Article 47 EUCFR guarantee the same principle,²⁸ the substantive reach of the second subparagraph of Article 19(1) TEU is much wider as it currently

captures any and all national rules and practices that may have a negative impact on the obligation of Member States to set up effective remedies, including the independence and impartiality of those judicial systems. Moreover, the scope of the second subparagraph of Article 19(1) TEU does not appear to possess any internal, quantitative limits. There is no *de minimis* rule. Thus, there is neither an area-based, nor a seriousness-based exclusion. Anything and everything ... be it national judicial organisation, procedure, or practice, potentially falls within Article 19(1) TEU ... the only limiting condition pertains to admissibility: there needs to be a functional link. The questions referred for a preliminary ruling must be necessary to enable the referring court to give judgment in the specific case.²⁹

Before examining the admissibility of the questions asked by the referring court in Case C-55/20, it may be helpful to further clarify the Court’s case law to date regarding which national measures or practices may be reviewed in light of Article 19(1) TEU.

In 2018, in the seminal *Associação Sindical dos Juízes Portugueses* judgment (informally known as the *Portuguese judges* ruling), the Court of Justice confirmed that the right of individuals to effective judicial protection, as guaranteed under the second subparagraph of Article 19(1) TEU law, may be relied upon when a national dispute falls within the fields covered by EU law, *irrespective* of whether the relevant EU Member State is implementing

²⁷ Case C-55/20, summary of the request for a preliminary ruling made available by the Court of Justice, para 1.

²⁸ The principle of the effective judicial protection of individuals’ rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law which is enshrined in Article 47 EUCFR, so that the former provision requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of the latter provision, in the fields covered by EU law. See *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paras 49 and 54. See also Opinion of AG Bobek in Joined Cases C-83/19, C-127/19 and C-195/19, Case C-291/19 and Case C-355/19, EU:C:2020:746, para. 213: “recent case-law shows that the content of the second subparagraph of Article 19(1) TEU coincides with the guarantees required by the second paragraph of Article 47 of the Charter, at least expressly as far as the elements of independence and impartiality of the judiciary are concerned”.

²⁹ Opinion of AG Bobek, *ibid.*, paras 208-209.

Union law strictly speaking.³⁰ This judgment originated from a national dispute initiated by a national association of judges who challenged salary-reduction measures which were directly applied to judges. It was left unclear to what extent, if at all, a national court could refer questions regarding national measures targeting the referring judges themselves and/or undermining judicial independence in the context of a domestic dispute pending before the national referring court when the dispute itself does not fall within the scope of EU law. In other words, it was unclear whether the Court of Justice would accept to answer Article 19(1) TEU related questions *if the main national case did not fall itself within the scope of EU law* or whether the Court would accept to answer these questions if the referring court is raising the issue of “incidental” national measures which affect the independence of a court which “may” rule on EU law, even if the main case pending before the said court is not itself connected with EU law?³¹

The Court offered the beginning of an answer to these questions in its judgment issued on 26 March 2020 in *Miasto Łowicz and Prokurator Generalny* following two requests for a preliminary ruling originating from two Polish courts.³² In its judgment, the Court confirmed the following points: First, in their capacity as ordinary Polish courts, these courts can rule on questions relating to the application or interpretation of EU law and, as such, they come under the Polish judicial system in the fields covered by Union law, within the meaning of the second subparagraph of Article 19(1) TEU.³³ This means *inter alia* that these courts must be independent and their independence not undermined by national authorities. Second, and however, there must “be a connecting factor between that dispute and the provisions of EU law whose interpretation is sought, by virtue of which that interpretation is objectively required for the decision to be taken by the referring court”.³⁴ In this instance, the Court found the two references inadmissible for two main reasons:³⁵

- (i) Substantive reason: the disputes in the main proceedings are *not* substantively connected to EU law, in particular to the second subparagraph of Article 19(1) TEU to which the questions referred relate, which means that the referring courts are not required to apply that law, or that provision, in order to determine the substantive solution to be given to those disputes;
- (ii) Procedural reason: the questions submitted to the Court are neither concerned with the interpretation of procedural provisions of EU law which the referring courts would be required to apply in order to deliver their judgments nor concerned with provisions of EU law whose interpretation would allow the referring court to resolve procedural questions of national law before being able to rule on the substance of the disputes before it.

On this basis, the Court concluded that the questions referred by the two Polish courts were of a general nature. In other words, the disputes pending before them did *not* require an interpretation of EU law to resolve them.³⁶

³⁰ Case C-64/16, EU:C:2018:117.

³¹ L. Pech and S. Platon, “Judicial independence under threat: The Court of Justice to the rescue” (2018) 55 *Common Market Law Review* 1827, at 1842.

³² C-558/18 et C-563/18, EU:C:2020:234.

³³ *Ibid.*, para. 35.

³⁴ *Ibid.*, para. 48.

³⁵ *Ibid.*, paras. 49-51.

³⁶ For a recent application of the guiding principles laid down in *Miasto Łowicz and Prokurator Generalny*, see Case C-623/18, *Prokuratura Rejonowa w Słubicach v BA*, EU:C:2020:800 (national request for a preliminary

As the above developments show, this is a rather intricate area but to put it concisely, a national dispute not otherwise failing within the scope of EU law because the disputed national measure does not implement EU law strictly speaking, may still be subject to the second subparagraph of Article 19(1) TEU and justify the intervention of the Court in a situation where the national dispute concerns one of the following measures (non-exhaustive list):

- (i) a national measure which *directly affects* all judges and is challenged on judicial independence grounds (e.g. a general salary-reduction measure);
- (ii) a national measure which *individually affects* a judge (e.g. a disciplinary investigation and/or sanction) and which is being challenged on judicial independence grounds before a national court by the judge acting as a claimant;
- (iii) a national measure which *directly affects* the referring judge/court itself and raises judicial independence issues (e.g. a disciplinary investigation targeting the referring judge on account of the decision to refer a request for a preliminary ruling or a national law which prohibits such a request);
- (iv) a national measure which *gives (first instance or appeal) jurisdiction* to a body (e.g. Poland's disciplinary chamber) which arguably violates the requirements of effective judicial protection.

However, if issues relating to judicial independence are “neither directly nor indirectly linked to the main proceedings but external to it”,³⁷ for instance, the initiation of a disciplinary investigation targeting the referring judge but not in connection to the pending dispute, the Court of Justice will find any reference for a preliminary ruling inadmissible in the absence of any other connecting factor with EU law.

In the present dispute, the DCBAW must be considered a court within the meaning of EU law which national law compels to recognise the appeal jurisdiction of a body which, according to the DCBAW, lacks independence as required under EU law. To that extent, one may argue that we are in the situation (iv) as outlined above. The second subparagraph of Article 19(1) TEU may therefore be considered relevant and applicable as regards the dispute pending before the DCBAW. However, as we shall see below when examining the relevance of the questions submitted to the Court, the DCBAW did not request the Court to interpret Article 19(1) TEU but rather to interpret Article 47 EUCFR. This is however not problematic as the Court can decide to give an interpretation of Article 19(1) TEU instead of the provision of EU law identified by the referring court to resolve the issue of whether the referring court may or may not disregard relevant provisions of national law so as to guarantee effective judicial protection.

Submission: The Court of Justice has jurisdiction to interpret the second paragraph of Article 19(1) TEU in the present case. Indeed, as a national body which can rule, as a court or tribunal within the meaning of EU law, on questions concerning the application or interpretation of EU law, the DCBAW falls within the fields covered by EU law. While the resolution of the main proceedings in the present cases is substantively connected to the second subparagraph of Article 19(1) TEU, the dispute pending before the DCBAW cannot be said to be a dispute

ruling held inadmissible due to the absence of any objective need to answer the question asked in relation to Article 19(1) TEU to solve the dispute pending before the referring court).

³⁷ Luke Dimitrios Spieker, “The Court gives with one hand and takes away with the other: The CJEU’s judgment in Miasto Łowicz”, *VerfBlog*, 26 March 2020.

where national authorities are implementing EU law such as the Services Directive. As such, Article 47 EUCFR is not applicable.

3.3 *Are the questions connected to the dispute?*

With respect to the issue of whether the questions submitted to the Court of Justice meet an objective need for the resolution of the dispute pending before the DCBAW, the first question submitted by the referring court may be found inadmissible. Indeed, due to the arguable inapplicability of Article 47 EUCFR and the lack of relevance of the Services Directives, the first question submitted by the DCBAW amounts to asking the Court to provide an advisory opinion on a general or hypothetical question rather than a question which is ‘necessary’ to enable the referring court to ‘give judgment’ in the case before it.

By contrast, the second question, which concerns the national provisions establishing the appeal jurisdiction of the DC over the disciplinary decisions of the referring court, may be considered admissible as it is necessary to enable the referring court to give judgment. In this respect, one may recall that according to settled case-law, the Court of Justice has the jurisdiction to explain points of EU law which may help solve the problem of jurisdiction with which that national referring court is faced.³⁸

The third question, which is closely related to the previous one, relates to an inconsistency identified by the referring court between the position of the Criminal Chamber of Poland’s Supreme Court and the position of the body known as the DC. The referring court is asking the Court of Justice whether Article 47 EUCFR may be interpreted as precluding an appeal on a point of law. According to the referring court, in disputes such as the one in the main proceedings, neither the parties nor the PPG or the Ombudsman have a right to lodge an appeal on a point of law. However, uncertainty has arisen following a decision of 27 November 2019 of the DC which concerned the same plaintiff as in the present dispute and which contradicted the established case law of the Criminal Chamber. Arguably, this question will not require an answer from the Court of Justice should it answer the second question above by holding that EU law precludes the appeal jurisdiction of a body such as the DC which is not established by law and/or lacks independence.

The fourth and last question raised by the referring court is whether EU law should prevent any appeal by the MoJ from being lodged with the DCBAW even though the MoJ is *not* a party to the proceedings as this special form of appeal would lead to the judgments of the DCBAW being subject to review by a body which is not an independent and impartial tribunal. One may note that in Poland, following the “reforms” of the judiciary, the MoJ not only *de jure* controls the PPG – the complainant in the present disciplinary dispute – but also *de facto* controls the composition of the DC following the unconstitutional reconstitution of the NCJ.³⁹ This fourth question may also be found admissible.

³⁸ *N. CO. GE. '90 and Others*, Cases C-10/97 to C-22/97, EU:C:1998:498, para. 15 and the case-law cited.

³⁹ The new National Council for the Judiciary was established in 2018 in breach of the Polish Constitution. It has since been suspended by the ENCJ. For further analysis and references, see *Rechtens voor Rechtens* and L. Pech, written submission to the European Court of Human Rights in *Żurek v Poland* (application no. 39650/18), 24 October 2020.

Submission: The first question is inadmissible as the situation in the main proceedings is not one which is connected to the implementation of the Services Directives. The situation in the main proceedings however falls within the material scope of the second paragraph of Article 19(1) TEU with the second, third and fourth questions admissible as an answer to each of them by the Court of Justice on the basis of the second paragraph of Article 19(1) TEU is necessary to enable the referring court to give judgment.

4. Substance

The questions submitted by the DCBAW found admissible above raise different issues which are all however connected with the procedural consequences the referring court may draw from the lack of independence of Poland's DC with respect to the dispute pending before it. These questions can be answered by building on the judgment of the Court of Justice in Joined Cases C-585/18, C-624/18 and C-625/18, *AK and others*,⁴⁰ and the order of the Court of Justice in Case C-791/19 R, *Commission v Poland*.⁴¹ Considering the factual pattern of systematic non-compliance existing in Poland with respect to this judgment and order, it is further submitted that the Court of Justice ought to go beyond providing the referring court with relevant guidance under EU law. In other words, the Court must directly and unambiguously hold that a body such as the DC does not satisfy the requirements of judicial independence under the second subparagraph of Article 19(1) TEU.

4.1 Court of Justice's answers and interim measures to date

By its judgment of 19 November 2019 in *AK*, the Court of Justice, on the basis of several requests for a preliminary ruling submitted by the Labour and Social Insurance Chamber of Poland's Supreme Court, held that:

- (i) EU law (i.e. Article 47 EUCFR but also Article 19(1) TEU⁴²) precludes cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal within the meaning of EU law;
- (ii) A court lacks independence where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law;
- (iii) The primacy of EU law requires the referring court to disapply any provision of national law which reserves exclusive jurisdiction to the DC should the referring court find it not to constitute an independent and impartial court so that relevant cases may be examined by a court which meets the requirements of independence and impartiality and which, were it not for incompatible provision(s) of national law, would have jurisdiction.

⁴⁰ EU:C:2019:982.

⁴¹ EU:C:2020:277.

⁴² *AK*, op. cit., para. 169: “[I]t does not appear necessary to conduct a distinct analysis of Article 2 and the second subparagraph of Article 19(1) TEU, which can only reinforce the conclusion already set out in paragraphs 153 and 154 above, for the purposes of answering the questions posed by the referring court and of disposing of the cases before it.”

The Court of Justice, however, decided to leave the referring court apply the guiding principles and specific factors laid down in its *AK* judgment so as to establish whether the DC is an independent and impartial tribunal within the meaning of EU law. As will be shown below in Section 4.2, the referring court did determine that the DC lacks independence but the referring court's judgments were ignored by Polish authorities, including the solemn resolution adopted by the remaining independent chambers of Poland on 23 January 2020 which held inter alia the DC to be a body lacking judicial independence and established in violation of Poland's Constitution. The adoption of this resolution led one deputy minister to publicly declare: "I don't give a damn about these 60 professors, because I'm with the Polish People".⁴³ This led, in turn, the Commission to lodge an application for interim measures with the Court of Justice within the broader framework of the infringement action against Poland lodged with the Court on 25 October 2019.⁴⁴

By its order of 8 April 2020 in *Commission v Poland*,⁴⁵ the Court of Justice granted the interim measures applied for by the Commission and ordered:

- (i) The immediate suspension, until delivery of the final judgment of the Court of Justice on the infringement action, of the application of the provisions constituting the basis of the jurisdiction of the DC to rule, both at first instance and on appeal, in disciplinary cases concerning judges;
- (ii) To stop the referring of all the cases pending before the DC before a panel whose composition does not meet the requirements of independence defined, in particular, in *AK*.

4.2. Polish authorities' record of non-compliance to date

Applying the *AK* ruling, the referring court, in its judgments of 5 December 2019 and 15 January 2020, held specifically that, having regard to the circumstances in which it was formed, the extent of its powers, its composition and the involvement of the new NCJ in its constitution, itself found to lack independence,⁴⁶ the DC cannot be regarded as a tribunal for the purposes of either EU law or Polish law.

The two rulings of 5 December 2019 and 15 January 2020 were subsequently and unusually mentioned in the Court of Justice's interim relief order issued on 8 April 2020 in Case C-791/19 R,⁴⁷ where the Court stressed that despite these two judgments, the DC continued to perform its judicial functions. One may add that the DC has also openly disregarded the solemn resolution adopted on 23 January 2020 by the three (then still independent) chambers of the Poland's Supreme Court. As noted above, this resolution held the DC not to constitute a court under EU and Polish Law with the consequence that the DC's past and future decisions "deserve no protection".⁴⁸ Yet the DC has continued to operate and adopt disciplinary sanctions

⁴³ J. Cienski and Z. Wanat, "Legal chaos descends on Poland", *Politico*, 24 January 2020.

⁴⁴ See pending Case C-791/19.

⁴⁵ Case C-791/19 R, EU:C:2020:277.

⁴⁶ The ENCJ has since proposed to expel Poland's NCJ. See e.g. M. Pankowska, "European Judges favour expelling the neo-NCJ from the European Network of Councils for the Judiciary", *Rule of Law in Poland*, 6 May 2020.

⁴⁷ Case C-791/19 R, op. cit., paras 19-21.

⁴⁸ Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, Case BSA I-4110-1/20, para. 55. For further analysis and references, see L. Pech, "Dealing

against judges in cases relating to the waiving of their judicial immunity on the basis of dubious charges put forward by prosecutors which, as previously explained, are controlled by the executive.⁴⁹

In line with their track record of deliberate non-compliance with binding rulings they do not like, Polish authorities refused to comply with these judgments and resolution of Poland's Supreme Court by hiding behind the unlawfully composed "Constitutional Tribunal" which unlawfully suspended before it unlawfully voided these judgments and resolutions.⁵⁰ In parallel, Polish authorities have legislated to deny any legal force to the Court of Justice's judgment in *AK*. In a nutshell, notwithstanding the repeated and strong warnings not to adopt what has become informally known as the "muzzle law", Polish authorities adopted a Law amending the Law on the organisation of the ordinary courts, the Law on the Supreme Court and several other laws on 20 December 2019. This "muzzle law" provides *inter alia* – in order to render the *AK* judgment ineffective – "that, if the validity of a judge's appointment or the legitimacy of a constitutional body is called into question by a court, disciplinary measures will be taken against the judge or judges sitting in that court."⁵¹

Subsequently, the DC openly and repeatedly violated the Court's order of 8 April 2020 by processing and deciding judicial immunity cases.⁵² While Polish authorities have preposterously claimed that these cases do not amount to disciplinary proceedings, they have resulted in the immediate adoption of disciplinary sanctions by a body which has *already* and *repeatedly* been found not to constitute a lawful body by three chambers of Poland's Supreme Court – agrees to waive judicial immunity.⁵³ In yet another instance of flagrant violation of EU law, on 23 September 2020, the DC decided to formally void the *AK* preliminary ruling by denying it any legal force within the Polish legal order.⁵⁴

Finally, and intriguingly, on 4 November 2020, the Extraordinary Control and Public Affairs Chamber of the Supreme Court – another recent body established by the current Polish authorities in arguable flagrant violation of Poland's Constitution whose members may be said to have been unlawfully appointed⁵⁵ – decided to suspend a case dealing with the reopening of a disciplinary case against a barrister and his/her motion to disqualify the DC from hearing the case until the Court of Justice rules on the merits in Case C-791/19. According to the reasoning developed by a single judge, the Court of Justice's order of 8 April 2020 must be understood as covering disciplinary proceedings regarding lawyers and indeed, any professional whose

with 'fake judges' under EU Law: Poland as a Case Study in light of the Court of Justice's ruling of 26 March 2020 in *Simpson and HG*", *RECONNECT Working Paper No. 8*, May 2020.

⁴⁹ See examples mentioned in see *Rechtters voor Rechtters* and L. Pech, op. cit.

⁵⁰ See A Bień-Kacała, "[Polexit is coming or is it already here? Comments on the judicial independence decisions of the Polish Constitutional Tribunal](#)", *Int'l J. Const. L. Blog*, 28 April 2020. The text of these two "judgments" issued by the unlawfully composed body known as the "Constitutional Tribunal" have yet to be published at the time of writing.

⁵¹ Joined Cases C-558/18 and C-563/18, op. cit., para. 25.

⁵² This was most recently confirmed by ECJ Judge Safjan in an interview with A. Wójcik, "[Sędzia TSUE: Izba Dyscyplinarna nie ma prawa orzekać takich sankcji jak wobec Tulei i Morawiec](#)", OKO.press, 25 November 2020.

⁵³ For further analysis, see also L. Pech, "Protecting Polish judges from Poland's Disciplinary "Star Chamber"", forthcoming in *CML Rev.*

⁵⁴ *Iustitia*, "[Disciplinary chamber denies validity of CJEU ruling and intends to rule in the case of waiving Igor Tuleya's immunity](#)", 2 October 2020.

⁵⁵ For further analysis and references, see L. Pech, "[Dealing with 'fake judges' under EU Law](#)", op. cit.

disciplinary case may be decided by the DC.⁵⁶ One may however note that this goes against both the interpretation of the order defended by Polish authorities but also the current interpretation of the order by the European Commission.

4.3 Suggested answers to the DCBAW's admissible questions

Considering the Court of Justice's case law to date, Polish authorities' track record of deliberate and sustained non-compliance with *inter alia* national and EU rulings as well as the legislative prohibition to "examine the question of institutional independence of Polish courts by those courts themselves" failing what disciplinary sanctions can be adopted against relevant judges,⁵⁷ it is submitted that the DCBAW's questions must be answered as follows:

- The second subparagraph of Article 19(1) TEU must be interpreted as precluding the existence of a body such as the DC as it does not satisfy the requirements of judicial independence established by EU law;
- The principle of primacy of EU law must be interpreted as requiring the referring court but more generally, all national courts or tribunals to disapply, of their own initiative, any provision of national law which provides first instance or appeal jurisdiction to a body such as the DC in any situation which falls in the fields covered by EU law to ensure effective judicial protection.

5. Conclusion

Looking beyond the present dispute and considering the "vital contribution of lawyers to the effective administration of justice" at a time where we are witnessing an increasing number of "violations of lawyers' rights, including attacks on their safety and independence",⁵⁸ it would be welcome to see the Court of Justice emphatically emphasising the crucial importance of lawyers, alongside judges and prosecutors, in the EU's "rule of law chain", to borrow the very apt expression recently used by Emmanuel Crabit of the European Commission's DG Justice.⁵⁹

⁵⁶ It is our understanding that this case was transferred to the Extraordinary Control and Public Affairs Chamber, in accordance with the controversial not to say unconstitutional muzzle law and which is furthermore currently the subject of an EU infringement action, following the lawyer's motion that the DC judges lack independence. The DC accepted the transfer of the case but denied the suspension of its disciplinary verdict while the motion was pending before the Extraordinary Control and Public Affairs Chamber. The full text of the "judgment" by this body in Case no. I NWW 72/20 is available here: <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/i%20nww%2072-20.pdf>

⁵⁷ Venice Commission, *Joint urgent opinion on amendments to the law of the common courts, the law on the supreme court and some other laws*, Opinion no. 977/2019, 16 January 2020, paras. 31 and 36. See also OSCE/ODIHR, *Urgent interim opinion* (14 January 2020) [Opinion no. JUD-POL/365/2019](#) [AIC], para 36: "the muzzle bill *inter alia* de facto limits "the scope of judges' adjudicative functions by preventing them from ruling on the independence or impartiality of a tribunal, whereas this is a key component of the right to a fair trial guaranteed by Article 6 of the ECHR and Article 14 of the ICCPR. This provision also conflicts with Poland's obligation under EU law to guarantee the power of courts to refer cases to the CJEU if and when the issue of the status of a judge is linked with interpretation and/or requirement of the Treaties."

⁵⁸ PACE, *The principles and guarantees of advocates*, Resolution 2348 (2020), paras 1-2.

⁵⁹ Quoted by the CCBE, 22 October 2020: <https://twitter.com/CCBEinfo/status/1319180012633939969>

In addition, due to the central and crucial role played by lawyers when it comes to the protection of effective judicial protection and in particular, respect with the right to a fair trial, national measures and/or actions which aim or result in the structural undermining the independence of lawyer's work can be reviewed under the second subparagraph of Article 19(1) TEU. In other words, in addition to the cases connected to the implementation of EU law which relates to the profession of lawyer such as instances where, for instance, Directive 98/5 applies,⁶⁰ and where Article 47 EUCFR can be relied upon, the Court of Justice should interpret the second subparagraph of Article 19(1) TEU as not only covering national disciplinary proceedings initiated against lawyers when these proceedings involve a body such as Poland's DC but more generally, as precluding national *transversal* measures which *systemically* undermine the EU principle of effective legal protection, by *structurally* impairing the independence of lawyers.⁶¹

Indeed, as it has been rightly observed,

The effective protection of society from potential threats emanating from the abuse of power and the circumvention of basic democratic principles rests on, inter alia, the existence of a system of checks and balances. The independence of the judiciary and the legal profession is a fundamental pillar of this system. (...) The duty of a lawyer, and the duty of the bars a whole, is to serve the rule of law and the wider public interest. The independence of the legal profession enables lawyers to fulfil this function by acting for the benefit, and in the legitimate interest of, the client and society as a whole, without fear of abusive prosecution, and free from improper influence of any kind.⁶²

⁶⁰ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998] OJ L 77/36.

⁶¹ One may note that for AG Bobek, the “apparently limitless” reach of the second subparagraph of Article 19(1) TEU “is not only a strength of that provision, but it is also its main weakness”, with the Advocate General further suggesting that Article 19(1) TEU ought “to remain an extraordinary tool for extraordinary cases”. See Opinion of AG Bobek in Joined Cases C-83/19, C-127/19 and C-195/19, Case C-291/19 and Case C-355/19, EU:C:2020:746, paras 222-223. There are indeed possible dangers of opening the gates of Article 19(1) TEU too widely. However, one may argue that there are even more pressing dangers of not opening the gates of Article 19(1) TEU widely enough to cover the *deliberate* and *systemic* undermining of the foundational values which underlie the EU's interconnected legal system. This indeed amounts to an existential threat to the EU legal order which, as the Court of Justice itself has repeatedly emphasised, is based on the fundamental premise “that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values. That premiss both entails and justifies the existence of mutual trust ...”, Case C-619/18, paras 42-43. And there cannot be any effective legal protection in a system where judges, prosecutors and/or lawyers can be subject, at any point in time, to arbitrary disciplinary proceedings/sanctions by a body controlled by a country's ruling party.

⁶² IBA, *The Independence of Legal Profession. Threats to the bastion of free and democratic society*. A Report by the Presidential Task Force on the Independence of the Legal Profession, September 2016, p. 5.