REPORT OF THE WORKING GROUP

WAYS TO BRUSSELS

EAJ – ATHENS MEETING – JUNE 2023

INTRODUCTION

The "Ways to Brussels" working group was established by the EAJ for the purpose of monitoring legislative initiatives, and implementing actions, by institutions of the European Union that have the potential to impact on the judiciaries of member states, or more widely. This is with a view to making timely representations to the legislators or policy makers concerned in the hope that legitimate concerns of EAJ members would be recognised and considered.

We met in Paris (and remotely) in January to research the topics and divide the work.

We agreed on Cristina Marzagalli's proposal to provide an overview of the European Court of Justice decisions about the independence of judges in 2022 (see annex).

I – THE "ANTI-SLAPP" DIRECTIVE

In order to protect journalists and human rights defenders, the European parliament and the Council published in April 2022 a proposal for a directive of on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation" - SLAPP):
https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2022/0177/COM_COM(2022)0177_EN.pdf

The proposal is awaiting committee decision and may be discussed during the plenary session of the Parliament in July.

The type of litigation with which the Directive is concerned is described thus by the Commission in the opening paragraph of the Explanatory Memorandum accompanying the proposal:

"Manifestly unfounded or abusive against public participation (commonly referred to also as 'strategic lawsuits against public participation' or 'SLAPPs') are a recent but increasingly prevalent phenomenon in the European Union. They are a particularly harmful form of harassment and intimidation used against those involved in protecting the public interest. They are groundless or exaggerated court proceedings typically initiated by powerful individuals, lobby groups, corporations and state organs against parties who express criticism or express messages that are uncomfortable to the claimants, on a matter of public interest. Their purpose is to censor, intimidate and silence critics by burdening them with the cost of a legal defence until they abandon their criticism or opposition. Unlike regular proceedings, SLAPPs are not initiated with a view to exercising the right of access to justice and the purpose of winning the legal proceedings or obtaining

redress. Instead, they are initiated to intimidate the defendants and to drain their resources. The ultimate goal is to achieve a chilling effect, silence the defendants and deter them from pursuing their work."

Article 3 of the Directive contains definitions of the concepts by which a SLAPP is delineated. The Directive applies in civil and commercial matters with cross-border implications. The Directive specifies how to appreciate these cross-border criteria.

The Directive requires Member States to ensure that when such litigations are brought defendants can apply for measures on procedural safeguards and it contains a list of the measures that can be considered.

The courts of a Member State must also refuse recognition or enforcement of a third-country judgment, given in proceedings on account of engagement in public participation, as manifestly contrary to public policy or *ordre publique* if the proceedings would have been considered manifestly unfounded or abusive if they had been commenced in the Member State in which recognition or enforcement is sought.

Member States are also directed to ensure that, where abusive court proceedings on account of engagement in public participation have been raised in a third country against a person domiciled in the Member State, their courts have jurisdiction to entertain an action by that person for compensation for damages and costs incurred in connection with the third-country proceedings.

Human rights and journalists associations, inter alia, have welcomed the proposal, that will for sure have an impact on many judiciaries, as the number of "SLAPP" cases is increasing in many European countries.

Note that the German Judges' association (Deutscher Richterbund) issued a critical opinion about this proposal: DRB_230329_Stn_Nr_8_Anti-SLAPP-Richtlinie_ENG.pdf.

II –JUDICIAL COOPERATION

In December 2021, the European parliament and the Council issued a proposal for a regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation: COM_COM(2021)0759_EN.pdf (europa.eu)

The proposal seeks to guarantee a common approach towards the use of modern technologies in cross-border judicial cooperation and access to justice. It is awaiting position of the Parliament in 1st reading

The proposal will certainly have an impact on the national judiciaries in establishing a standard for courts to communicate with each other and with individual parties in civil and criminal lawsuits on cross-border cases. The proposed regulation would require those judiciaries which have not foreseen means of digital communication and the use of video-conferencing tools yet to make use of those in cross-border cases. As digitization is changing work and life across the world faster than some judiciaries could catch up with, the proposal as such is going into an inevitable direction.

What seems to be important in light of judicial independence and the individual rights of the involved parties, however, is that the proposed regulation:

- lays down rules on the use of videoconferencing for purposes other than taking of evidence under Reg. (EU) 2020/1783 (Art. 1 (1) (a));

- foresees that a request for conducting an oral hearing through videoconferencing or other distance communication in civil and commercial matters may be refused by the judge or prosecutor where the particular circumstances of the case are not compatible with the use of such technology (Art. 7 (2)); furthermore, as a prerequisite such technology must be available and the other party to the proceedings was given the possibility to submit an opinion on the use of videoconferencing tools (Art. 7 (1) (a) and (b));
- forsees that in criminal proceedings the suspect, accused or convicted person should be allowed their participation to the hearing by videoconferencing or other distance communication only if the particular circumstances of the case justify the use of such technology (Art. 8 (1) (b)); furthermore, as a prerequisite such technology must be available and the suspect, accused or convicted person must have expressed her or his consent on the use of videoconferencing tools in that case (Art. 8 (1) (a) and (c)).

Furthermore, since not all the judiciaries in Europe do have the means to develop the technical tools to comply with these new standards, it is important that the Commission shall be responsible for the creation, maintenance and development of reference implementation software which Member States may choose to apply as their back-end system instead of a national IT system (Art. 13 (1)).

III –ASSET RECOVERY AND CONFISCATION

The proposal for a directive of the Parliament and the Council on asset recovery and confiscation has been published in May 2022: COM_COM(2022)0245_EN.pdf (europa.eu). It is awaiting committee decision in Parliament.

The purpose set out is to "establish minimum rules on tracing and identification, freezing, confiscation and management of property in criminal proceedings."

The Europol 202 Serious and Organised Crime Threat Assessment (SOCTA) highlighted the rising threat of organised crime and criminal infiltration. Revenues generated are estimated at 139 billion euros per annum. The laundering and systems that support such are seen as a threat to the integrity of economies and societies. It is seen as necessary, with increased use of technology allowing for ever more sophisticated criminal activity in this field, to provide the competent authorities with stronger means to trace, identify, freeze, confiscate and manage the instruments of crime as well as the property which crime generates. There is the added complication of the proceeds of illegal activity becoming mingled into the legal economy.

The proposal requires initiation of asset tracing investigations to facilitate cross-border cooperation and easy accessibility through asset recovery offices to enable a Member State to act swiftly to temporarily freeze assets, upon the request of another Member State (70% of criminal groups are active in more than 3 Member States).

In 2022 the landscape became more complicate with the Russian offensive against Ukraine. Restrictive measures, initially established in 2014, have been expanded to include clauses to prohibit knowing and intentional participation in activities that seek to circumvent the restrictive measures imposed on Russia.

This proposal may be one which would warrant further consideration. It contains elements of cooperation but also important elements of Human Rights law as well as the necessity to keep at the forefront of any

legislation the rule of law, and international financial regulations, together with interplay between bona fide activities and corruption both on a macro and micro scale.

The proposal aims at ensuring a common minimum standard for freezing and confiscation methods, as well as imposing obligations, and legal clarity, which aim to reduce differences in the jurisdictions in Member States that can pose obstacles in cooperation. There are 4 options being considered, ranging from non-legislative measures through targeted amendments, or detailed requirements for all phases of the recovery process, or, the most prescriptive, to extend the provisions of the requirements to extend to all crimes.

With the financial aspect to crime, this is also important in the context of judicial independence.

It may be an area that the IAJ study commissions would be interested in exploring with international colleagues outside the European group, given that it is a worldwide problem. The added complexity of the situation vis a vis Russia at present is also an area which may be of interest.

IV –THE RULE OF LAW WITHIN THE EU

The 2023 Rule of Law report is due in July. This annual European Commission' report presents a synthesis of the rule of law situation in the EU, with the objective of promoting and defending the values of the UE. It also includes an assessment of the situation in each Member State and recommendations addressed to Member States to encourage positive developments, needed improvements and reforms.

Céline Parisot

President of the working group

ANNEX:

DECISIONS OF THE COURT OF JUSTICE ON THE INDEPENDENCE OF JUDGES DELIVERED IN 2022

Court of Justice of the European Union, judgement in case C-430/21|RS (effect of the decisions of a constitutional court), 22 february 2022

The Court of Justice was called upon to rule on the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, read in conjunction in particular with the principle of the primacy of EU law, in a context in which an ordinary court of a Member State (Romania) has no jurisdiction, under national law, to examine the conformity with EU law of national legislation that has been held to be constitutional by the constitutional Court of that Member State, and the national judges adjudicating are exposed to disciplinary proceedings and penalties if they decide to carry out such an examination.

The Court finds that EU law precludes a national rule under which national courts have no jurisdiction to examine the conformity with EU law of national legislation, which has been held to be constitutional by a judgment of the constitutional court of the Member State. The application of such a rule would undermine the principle of the primacy of EU law and the effectiveness of the preliminary-ruling mechanism

Court of Justice of the European Union, judgement in joined cases C-562/21 PPU and C-563/21PPU| Openbaar Ministerie, 22 february 2022

Two European arrest warrants ('EAWs') were issued in April 2021 by Polish courts against two Polish nationals. Since the persons concerned are in the Netherlands and did not consent to their surrender, the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) received requests to execute those EAWs. That court has doubts concerning its obligation to uphold those requests. In that respect, it notes that since 2017 there have been in Poland systemic or generalised deficiencies affecting the right to a fair trial and in particular the right to a tribunal previously established by law. That court asked the Court of Justice whether the two-step examination, enshrined by the Court in the context of a surrender on the basis of the EAWs, under the guarantees of independence and impartiality inherent in the fundamental right to a fair trial, is applicable where the guarantee, also inherent in that fundamental right, of a tribunal previously established by law is at issue.

The Court holds that, where the executing judicial authority called upon to decide on the surrender of a person in respect of whom an EAW has been issued has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, in particular as regards the procedure for the appointment of the members of the judiciary, it may refuse that surrender, under Framework Decision 2002/584, only if it finds that, in the particular circumstances of the case, there are substantial grounds for believing that there has been a breach – or, in the event of surrender, there is a real risk of breach – of the fundamental right to a fair trial before an independent and impartial tribunal previously established by law.

In that regard, the Court states that the right to be judged by a tribunal 'established by law' encompasses, by its very nature, the judicial appointment procedure.

The fact that a body, such as the National Council for the Judiciary (KRS), which is involved in the judicial appointment procedure, is made up, for the most part, of members representing or chosen by the legislature or the executive, is not sufficient to justify a refusal to surrender. Moreover, it is for the person in respect of whom an EAW has been issued to adduce specific evidence to suggest that systemic or generalised

deficiencies in the judicial system had a tangible influence on the handling of his or her criminal case or are liable, in the event of surrender, to have such an influence.

Court of Justice of the European Union, judgement in case C-132/20| Gent Noble Bank, 29 march 2022

The Polish Supreme Court must rule in the final instance a case concerning the Gent Noble Bank. In that context, that court asks whether the three appellate judges who previously heard that dispute meet the requirements of independence and impartiality laid down by EU law.

One of them started his career as a judge under the communist regime and did not swear a new judicial oath after that regime ended. The other two were appointed appellate judges at a time (namely between 2000 and 2018) when, according to the Polish Supreme Court, the National Council for the Judiciary (the KRS), which was involved in their appointment, did not operate transparently and its composition was contrary to the Constitution.

As regards the appellate judge who started his career under the communist regime, the Court of Justice considers that that mere fact as such does not affect the independence and impartiality of the said judge in the exercise of his subsequent judicial functions. It points out that the Republic of Poland accessed the European Union and its values, inter alia that of the rule of law, without the circumstance that some Polish judges had been appointed at a time when that State was not yet a democratic regime being an issue in that context.

As regards the other two appellate judges, the Court of Justice notes that the Polish Supreme Court did not rule on the independence of the KRS when it declared, in 2017, that the composition of the latter, as it was at the time two judges in question were appointed, was contrary to the Constitution. That unconstitutionality as such is therefore not sufficient to affect the independence and impartiality of the KRS in its composition at the time and, consequently, that of the judges in whose appointment it was involved.

Advocate General's Opinion in Joined Cases C-615/20 and C-671/20 | YP and Others (Lifting of a judge's immunity and his or her suspension from duties), 15 december 2022

On 18 November 2020, the Disciplinary Chamber of the Supreme Court (Poland) lifted Judge I.T.'s immunity from prosecution, reduced his remuneration and suspended him from office. Due to his suspension, Judge I.T. may not hear any of the cases that had been assigned to him.

The referring court raises numerous objections regarding the independence and impartiality of the Disciplinary Chamber and doubts whether its authorisation to prosecute and to suspend a judge from office is a 'judicial ruling'.

In his Opinion, Advocate General Anthony Michael Collins reaffirms that – notwithstanding the abolition of the Disciplinary Chamber – the legitimate doubts as to its independence and impartiality, already identified in the Court's case-law, persist. Subject to verification by the referring court, the direct and indirect institutional links between the Minister for Justice, the public prosecutor, the Krajowa Rada Sądownictwa (National Council of the Judiciary, KRS) and the Disciplinary Chamber add to the already considerable risk that the latter may not be perceived as an entirely neutral adjudicator when it rules upon applications for authorisations to prosecute judges and to suspend them.

Poland must ensure that the Disciplinary Chamber's jurisdiction is exercised by an independent and impartial tribunal previously established by law. Poland must also, without delay, nullify the effects of the resolutions that chamber adopted.

Advocate General's [Opinion in Joined Cases C-181/21 and C-269/21 |] G. and Others (Appointment of judges to the ordinary courts in Poland), 15 december 2022

In separate references for preliminary ruling, Regional Courts in Katowice and Kraków (Poland) asked the Court to rule upon the compatibility with EU law of procedures to appoint judges to the ordinary courts in Poland.

In his Opinion, Advocate General Anthony Michael Collins finds that the requirement of prior establishment by law applies without distinction to all Member State courts and tribunals. In the Advocate General's view, the referring courts have not put forward any specific evidence, either of a systemic or of an individual nature, to substantiate the existence of legitimate and serious doubts in that regard.

Advocate General's [Opinion in Case C-204/21] | Commission/Poland, 15 december 2022

Following the adoption by Poland on 20 December 2019 of a law amending, in particular, national rules on the organisation of the ordinary courts and on the Supreme Court (the Amending Law), the Commission brought an action against that Member State.

The Commission asserts that the Amending Law limits or excludes the possibility for a national court to ensure that individuals claiming rights under EU law have access to an independent and impartial tribunal previously established by law. The Commission also claims that, insomuch as the Amending Law conferred on the Disciplinary Chamber of the Supreme Court, whose independence and impartiality are not guaranteed, jurisdiction over matters relating to the status of judges, that law affects the independence of judges whose status is subject to review by the Disciplinary Chamber. Moreover, the Commission alleges that, by obliging judges to provide information on their public and social activities in associations and non-profit foundations, including membership of a political party, prior to their appointment, and to publish that information, the Amending Law infringes their rights to respect for private life and to the protection of personal data.

In his Opinion, Advocate General Anthony Michael Collins finds that Poland's law amending rules on the organisation of its ordinary courts and on its Supreme Court infringes EU law**.** The infringement consists of depriving national courts of the possibility to ensure that EU law is applied by an independent and impartial tribunal in all cases, conferring on the Disciplinary Chamber of the Supreme Court jurisdiction over matters relating to the status of judges and violating the rights of judges to respect for private life and to the protection of personal data.