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ECJ annuls a national measure against an independent central banker

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Case C-202/18 (Ilmārs Rimšēvičs v Republic of Latvia) and Case C-238/18 (European Central Bank v Republic of Latvia); Opinion of AG Kokott of 19 December 2018, ECLI:EU:C:2018:1030; judgment of the Court of 26 February 2019, ECLI:EU:C:2019:139.

A recent judgment of the ECJ underlined the increasing interweaving of EU law and national law in the area of central bank law, not only in substantive matters but, also procedurally. In the first cases since the provision providing for this anomaly was inserted in the Treaty[1] in 1993, the ECJ confirmed that review of a *national* legal act affecting the independence of the monetary authority lies with the *European* Court of Justice. Normally, only legal acts of EU institutions, bodies, offices and agencies can be challenged before the CJEU (Article 263 TFEU); national legal acts with an EU law connotation may come before the CJEU through a reference for a preliminary ruling (Article 267 TFEU) or in infringement proceedings (Article 258 TFEU). Admittedly, this is a singular and exceptional case as it concerns review of a Member State measure by which a Governor of a National Central Bank (NCB) is "relieved from office". Together with the Executive Board of the European Central Bank (ECB), NCB Governors in the Eurosystem[2] form the ECB's Governing Council, which has ultimate decision-making power[3] for monetary policy in the Euro Area[4]. Since monetary policy is an exclusive Union competence[5], at least for the Member States[6], to be pursued in independence[7], the Court found that it has jurisdiction to assess the legality of a measure that interferes with an NCB Governor performing his functions and annulled the relevant national decision in so far as it prohibits the Governor from performing his duties as NCB Governor. There is more that's exceptional about this case: alleged corruption at a central bank, allegations of money laundering and of a misinformation campaign…..

The Court's judgment comes against the backdrop of alleged corruption and money laundering in a Baltic state, and alleged misinformation from outside the EU[8]. The cases from Latvia originate in allegations of improper conduct by the Latvian central bank governor in connection with *Trasta Komercbanka*, a commercial bank allegedly engaged in money laundering. This bank's licence had been withdrawn[9], with its shareholders engaging in a battle before the CJEU[10] to be heard in their grievances[11] against the ECB[12], which has been responsible since 2014 under the newly established 'banking union' for licensing credit institutions across the Euro Area. In February 2018, the allegations[13] against the Latvian NCB Governor, Mr. Ilmārs Rimšēvičs, led the Latvian Anti-Corruption Office (*Korupcijas novēršanas un apkarošanas birojs*, or *KNAB*) to arrest[14] and interrogate him[15], and to issue an order temporarily prohibiting him from performing his duties as Latvia's NCB Governor[16]. Both Mr. Rimšēvičs and the ECB contested the Latvian measure in court on the basis of Article 14.2 ESCB Statute.

This is not the place to go into the wider background or on the money laundering scandals. The allocation of competences for AML/CTF oversight[17] is in discussion after recent outrages, possibly seeing the ECB having more powers in this field[18]. Nor can I go into the issue of presumption of innocence and the requirements that need to be met for relieving a Governor from his post for corruption to be justified, namely an independent

court judgment or incontrovertible evidence of wrong-doing[19]. Mr Rimšēvičs' guilt has not been proven in court.

What interests us here is the appeal at the CJEU against a State measure. Article 14.2 ESCB Statute contains guarantees for the independence of NCB Governors. A Governor may not be dismissed on policy grounds but "only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct". Within two months, "[a] decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of this Treaty or of any rule of law relating to its application." This is one of the four grounds for annulment proceedings against an EU legal act[20]. The AG asked if "the remedy in Article 14.2 of the [ESCB Statute] therefore [must] be analysed as an action for annulment although, in the system of remedies established in the [TFEU], an action for annulment may in principle be brought solely in order to challenge the acts of the bodies and agencies of the European Union?". After an extensive exploration, she found that an action under Article 14.2 did not constitute a direct appeal. Rather, she approached the action as seeking "a declaration by the Court that, in adopting with regard to Mr Rimšēvičs restrictive measures that prevent him from performing his duties as Governor of the Bank of Latvia, the Republic of Latvia failed to fulfil its obligations under Article 14.2."

The Court disagreed. Even though the ECB itself had merely requested the Court to declare that Latvia had infringed Article 14.2 by adopting the measure (paragraph 64 of the judgment)[21], the Court held that "both the literal and the systematic and teleological interpretations of Article 14.2 of that statute entail the action provided for in that article being classified as an action for annulment" (para. 66). Acknowledging that "expressly entrust[ing] the Court with power to review the lawfulness of an act of national law in light of '[the] Treaties or of any rule of law relating to their application', the second subparagraph of Article 14.2 of the [ESCB Statute] derogates from the general distribution of powers between the national courts and the courts of the European Union". Such derogation "can be explained by the particular institutional context of the ESCB within which it operates", adding: "The ESCB represents *a novel legal construct in EU law* which brings together national institutions, namely the national central banks, and an EU institution, namely the ECB, and causes them to cooperate closely with each other, and within which a different structure and *a less marked distinction between the EU legal order and national legal orders prevails*." (para. 69)

Article 14.2

> **"reflects the logic of this highly integrated system which the authors of the Treaties envisaged for the ESCB and, in particular, of the dual professional role of the governor of a national central bank, who is certainly a national authority but who acts within the framework of the ESCB and sits, where he is the governor of a national central bank of a Member State whose currency is the euro, on the main decision-making body of the ECB.**" (para. 70)

The Court emphasises the specific, unique and exceptional nature of the remedy (para. 71), so the judgment is not opening the floodgates to similar leapfrogging of national proceedings by going directly to the CJEU[22]. Yet, the judgment does underline the unique character of the ECB which, in its monetary policy and other central bank tasks, as well as in its SSM-related[23] novel supervisory tasks (see the *L-Bank* judgment)[24], is the centre of a dual[25] system in which traditional lines between Union and State spheres become blurred. Noteworthy in this respect is the requirement for the ECB, as prudential supervisor, to apply national law[26] implementing (directives of) the Single Rulebook for banks in the EU.

The possibility of a direct appeal against a measure which, even though not outright dismissal, equally relieves the Governor from office[27], was grounded by the Court on the independence of the ESCB. Referring to earlier case law on the ECB[28], the Court stresses that the Treaty "is intended to shield the ESCB from all political pressure" (para. 47). It finds that also temporary prohibiting an NCB Governor from performing her or his duties "is likely a form of pressure" (para. 52). Prohibiting a Governor from performing his duties must be reviewable under Article 14.2 because, if this were not so, a series of temporary measures could be adopted evading judicial review (para. 53). In this context, the Court notes that the restrictions applied to Mr Rimšēvičs may well last until the end of his term of office (para. 54) in December 2019.

Comment

Personally, I like that the judgment confirmed my reading of Article 14.2, defended in my thesis[29] in 1997, when I wrote: "A direct appeal to the European Court against a national decision (NCB Governors are appointed and 'relieved from office', as the [ESCB] Statute expresses it, under national procedures by State organs) is a novelty which crept into Community [now: Union] law through the backdoor of EMU provisions".

A different outcome would have done less for the independence of the central banks: as the Court notes (para. 49): "By directly conferring jurisdiction on the Court to determine the lawfulness of the decision to relieve the governor of a national central bank from office, the Member States have demonstrated the importance which they attach to the independence of the holders of such positions". And: unjustified measures to "relieve" an NCG Governor from office would "severely undermine" the independence of the ECB's Governing Council, as the Court notes in para. 51. There is a direct road of redress to Luxembourg instead of an indirect route: finding merely an infringement by Latvia would have required that Member State to take the necessary steps to comply with the Court's judgment (Article 260 TFEU) rather than providing immediate relief to the affected person (the NCB Governor) and entity (the ECB).

Also relevant in respect of the guarantee of independence is that the ESCB Statute allows both the affected Governor and the Governing Council to appeal against a national decision affecting the Governor's position in the ultimate ECB decision-making body "so that one does not have to rely on the willingness of the Governor concerned to fight in court against the appointing (and 'relieving') authority", as I wrote back in 1997. These joint cases, brought by the Latvian NCB Governor and the ECB respectively, were evidence of these paths.

The judgment[30] underscores the independence of the ESCB and the members of its decision-making bodies, while it also highlights the measure in which Union and State law permeate in central banking in Europe.

Footnotes

1. Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank (ESCB Statute). ↩
2. The Eurosystem is the term for the ECB and the NCBs of the Member States which have adopted the euro: Article 282(1) TFEU. This term is used to differentiate the EU's monetary authority from the ESCB, which includes the Union's non- Euro Area central banks. ↩
3. Articles 8 and 12.1 ESCB Statute. ↩
4. Articles 127(2) TFEU and 3.1 ESCB Statute. ↩
5. Article 3(1)(c) TFEU. ↩
6. That is for 19 out of the 28 Member States, with two States having an opt-out from adopting the single currency (the United Kingdom and Denmark; see Protocol Nos. 15 and 16 to the TFEU), with the other 7 having the status of a Member State with a derogation (Article 139(1) TFEU and the Accession Treaties of 2003, 2005 and 2012), i.e. being obliged to adopt the euro once they have met the convergence criteria (Article 140 TFEU and Protocol No. 13). ↩
7. Article 130 TFEU and Article 7 ESCB Statute. ↩
8. See the press release of the Latvian Defence Ministry of 20 February 2018: "Ministry of Defence of Latvia: Information operation conducted against Latvia". ↩
9. And the bank put into liquidation. See the notice on the appointment of a liquidator, published pursuant to Directive 2001/24/EC on the reorganisation and winding-up of credit institutions in OJ C 123/2, 7.4.2016. ↩
10. See Case T-247/16 (*Trasta Komercbanka and others v ECB*, renamed *Fursin and Others v ECB*), notably the Order of the General Court of 12 September 2017 rejecting the claim of *Trasta Komercbanka* as inadmissible and upholding the shareholders' claim as admissible ECLI:EU:T:2017:623. This Order is subject to a threefold appeal: by the ECB (Case C-663/17 P), by the Commission (Case C-665/17 P) and by *Trasta Komercbanka* itself (Case C-669/17 P). A hearing was held in these appeal cases on 11 February 2019. See, also, Case T-698/16 (*Trasta Komercbanka and others v ECB*). ↩
11. I gave a description of the *Trasta* cases in *Interplay of administrative review and judicial protection in European prudential supervision - Some issues and concerns*, in *Quaderni di Ricerca Giuridica della Consulenza Legale*, number 84, pp. 43-46. ↩

12. At a proposal from the *FKTK*, the Financial and Capital Market Commission, the Latvian competent authority. ↩

13. He is alleged to have received bribes to keep the Latvian financial sector supervisor from investigating *Trasta*. The Court summarises the allegations as follows in paragraph 15: "Mr Rimšēvičs is suspected of having sought and accepted a bribe in 2013 in his capacity as Governor of the Central Bank of Latvia, with a view to exerting influence in favour of a private Latvian bank." ↩

14. See the statement by the Latvian Prime Minister on the situation at the Latvian NCB, 18 February 2018. ↩

15. Mr. Rimšēvičs' story is recorded by Bloomberg in an interview published on-line on 25 September 2018. ↩

16. The decision of 19 February 2018 by *KNAB* prohibited the Latvian NCB Governor from performing decision-making and from remaining in his post as Governor and prohibited him to leave Latvia without prior authorisation. The monthly meetings of the ECB's Governing Council mostly take place in Frankfurt am Main. ↩

17. AML/CTF stands for Anti Money Laundering and Counter Terrorist Financing. Based on international standards, adopted by the Financial Action Task Force (FATF), the EU has adopted AML Directives (AMLDs) in 2015 (AMLD4) and 2018 (AMLD5). ↩

18. The Commission proposed in September 2018 to enhance the powers of the European Banking Authority. ↩

19. As stated by AG Kokott in paragraph 107 of her Opinion. She goes into the requirements of independence of courts and finds that the documents that Latvia has submitted to the CJEU "contain no factual material capable of substantiating the Latvian authorities' allegations and, consequently, of establishing the facts in respect of which Mr Rimšēvičs is accused" (paragraph 128). She finds that "Latvia has not communicated to the Court the evidence required to justify the measures adopted against Mr Rimšēvičs" (paragraph 136). ↩

20. Article 263 TFEU lists four grounds: "lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers". ↩

21. Mr. Rimšēvičs himself had requested that the decision be declared unlawful. ↩

22. Even in the specific case at hand, the CJEU is not the appropriate jurisdiction "to give a ruling on the criminal liability of the governor involved, nor even to interfere with the preliminary criminal investigation being conducted in respect of that person by the competent administrative or judicial authorities under the

law of the Member State concerned." Its role is to verify if a temporary prohibition on performing the duties of a governor is justified by serious misconduct. The Court finds that Latvia provided insufficient indications to the CJEU so that it upholds the plea that *KNAB*'s decision is unjustified (paragraphs 91-96 of the judgment). ↩

23. SSM stands for Single Supervisory Mechanism, the conjunction of the ECB and the National Competent Authorities (NCAs) responsible for prudential supervision of credit institutions in the Euro Area under Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63, 29.10.2013 ('SSM Regulation'). ↩

24. In this judgment of 16 May 2017 in Case T-122/15 (*Landeskreditbank Baden-Württemberg* v *ECB*), EU:T:2017:337, under appeal, the General Court had found that the supervisory powers given in the SSM Regulation are exclusive ECB competences which, when NCAs are tasked, are implemented as derived, delegated powers under a decentralised system of operation of the SSM. See AG Hogan's Opinion of 5 December 2018 in the appeal proceedings (Case C-450/17 P); ECLI:EU:C:2018:982. ↩

25. I.e. Eurosystem and SSM. Although in many member states NCBs are also NCAs, the ECB plus State prudential supervisory authorities are known as the SSM, with 'ESCB' standing for the ECB and NCBs pursuing traditional central bank tasks and 'Eurosystem' denoting the ECB and NCBs as the Euro Area's central banking system. ↩

26. Article 493) SSM Regulation: "(…) the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options." ↩

27. Latvia had argued that the *KNAB*'s measure did not entail a severing of links between the NCB and its Governor, did not amount to his dismissal and only sought to guarantee effective conduct of the investigation. ↩

28. The judgment of 10 July 2003 in Case C-11/00 (*Commission* v *ECB*); EU:C:2003:395 on the competences of the Commission's anti-fraud office at the ECB, and the judgment of 16 June 2015 in Case C-62/14 (*Gauweiler and Others*); EU:C:2015:400 on the non-standard monetary policy measure (Outright Monetary Transactions) that the ECB envisaged to undertake in 2012 to ensure transmission of its monetary policy across the Euro Area and ensure the irreversible nature of the euro. ↩

29. *The European Central Bank – Institutional Aspects* (PhD thesis), 1997. ↩

30. Rendered in an expedited procedure in which interim measures were imposed on Latvia, ordering it to allow Mr. Rimšēvičs to designate a substitute member of the ECB's Governing Council; see the Order of the Vice-President of the Court of 20 July 2018; C-238/18 R, EU:C:2018:581. ↩