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RIVISTA DEL CONTENZIOSO EUROPEO
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THIS CHAPTER IS CLOSED, BUT THE SAGA CONTINUES: *MEDEL AND OTHERS V. COUNCIL OF THE EUROPEAN UNION*

Un capitolo è chiuso, ma la saga continua: MEDEL e altri c. Consiglio dell'Unione europea

Un chapitre est clos, mais la saga continue : MEDEL et autres c. Conseil de l'Union européenne

General Court, Order of 4 June 2024, Joined Cases T-530/22 to T-533/22, *MEDEL and Others v. Council of the European Union*

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Introduction

A saga is a "a long, complicated series of related, usually negative, events" (Cambridge English Dictionary). The term is a fitting description of the EU's still ongoing struggle with rule of law backsliding in some Member States. Part of that saga are the many cases that have been brought before the Court of Justice of the European Union ('CJEU') since the judgment in Case C-64/16, *ASJP*, in 2018. The majority of these cases were preliminary references from national courts (like Case C-585/18, *A.K.*), which have played a pivotal role in developing the Cour of Justice's case law on this issue. Others were direct actions by the Commission (like Joined Cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland*). A third, much smaller category are direct actions brought by individuals. One of these is the action brought by four judges' associations (EAJ, AEAJ, Judges for Judges, and MEDEL) against the Council's decision to release funds previously withheld from Poland if it achieved certain rule of law-

* The views expressed in this contribution are strictly personal and do not reflect those of the Council of State.

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milestones. The four associations argued that these milestones were insufficient to achieve full compliance with the Court's rulings and, by implication, would allow Poland to (partially) escape its obligations to restore the rule of law under articles 2 and 19 TEU, as interpreted by the Court of Justice. Shortly after the four associations announced this direct action, I shared some initial thoughts on the case and its probability of success. My main concern at the time was that the four associations were unlikely to have standing before the General Court, because they lacked individual concern and would not pass the Plaumann-test (Case 25/62, Plaumann v. Commission). It turns out that I was wrong. In this review of the General Court's order of 4 June 2024 in Joined Cases T-530/22 to T-533/22, *MEDEL e.a.*, I will discuss the General Court's decision and offer some brief reflections on it.

The General Court's (Grand Chamber) Order

The direct action of the four associations was examined by the Grand Chamber of the General Court, indicating the significance of the case. In its order of 4 June 2024, the Grand Chamber considered the Council's plea of inadmissibility, granted it, and subsequently dismissed the direct actions. Notably, this happened after the General Court had previously decided that it would reserve the decision on the plea of inadmissibility for the final judgment [paras. 34-37]. In short, the GC ruled that neither the applicants, nor the individuals they represented, were directly affected by the Council's decision and therefore lacked standing under article 263(4) TFEU. The General Court does therefore also not consider the question of whether the Council's decision is a regulatory act in the sense of article 263(4) TFEU. The substantive part of the General Court's order can be split into two parts. The first part concerns the question of direct effect. In the second part, the Court addresses the applicant's argument that the Plaumann-test should be eased.

The issue of direct concern

The General Court first assesses whether the four associations meet the requirements to have standing in accordance with its settled case law [para. 40]. These requirements are, alternatively, that (1) the associations have expressly been granted procedural powers to do so; (2) that they represent the interests of individuals who would themselves be entitled to bring legal proceedings, or; (3) that the associations are distinguished individually because their own interests as an association are affected, in

particular because their negotiating position has been affected by the act in respect of which annulment is sought.

The Court quickly concludes that the first requirement is not met, because neither the Council's Decision, nor the Regulation under which that Decision was adopted, grant such procedural powers. The General Court further notes that such powers are also not implicitly granted to the applicants by article 2 TEU [paras. 42 and 43]. It then moves on to the third requirement, which it reviews in similarly brief fashion: the mere fact that the four associations act as interlocutors on rule of law issues before the EU's institutions "is not sufficient to confer on them the status of negotiator". Neither is their observer status at Council of Europe bodies or interventions before the European Court of Human Rights [paras. 46–50]. This leads the General Court to the conclusion that the four associations cannot bring proceedings in their own name.

The General Court then moves on to consider whether the four associations can derive standing from that of the members whose interests they represent. The question is whether those individuals are directly affected by the Council's Decision. The Court begins with a preliminary issue: does it matter that the members of the four (international) associations are mostly (national) associations themselves [para. 54]? Without much discussion, the General Court simply concludes that it does not:

The case-law set out in para. 40 may be applied to the specific situations referred to in paras. 54 and 56 above in the event that the members of the associations, the latter being members of the applicants, themselves are entitled to bring proceedings. In the present case, it is necessary to examine the locus standi of the judges who are members of the associations which are members of the applicants [para. 57].

This paragraph is noteworthy not only because the Court appears to be putting its foot down without engaging with the case law that the applicants had referred to [para. 55]. The General Court also glosses over the fact that the fourth association (Judges for Judges) is actually a foundation that does not have any members at all. Curiously, the General Court was not forced to engage with this issue at all. It could have left this issue unaddressed, since the four associations would not have had standing regardless.

The Court then turns to core of the order: the question of whether individual judges would have had standing to challenge the Council's Decision and, thus, whether they are directly affected by it? According to the CJEU's settled case law, direct effect requires the individual's legal position to be directly affected and for the addressee of the EU's legal act to not have any discretion in bringing about that effect [para. 62]. The

General Court address this question first for the Polish judges affected by decisions of the Disciplinary Chamber, and then for all other Polish judges and their colleagues in the other Member States.

With regard to the Polish judges affected by decisions of the Disciplinary Chamber, the General Court concludes that the Council's decision does not affect their legal position, because it does not alter it. The Court's analysis focusses on milestone F2G, which requires Poland to ensure that judges affected by decisions of the Disciplinary Chamber have access to procedures reviewing those decisions. Instinctively, one might think this affects those Polish judges directly. The General Court concludes otherwise: the milestones approved by the Council are not meant to protect the interests of individuals [paras. 74, 77 and 87; see also the analysis of the decision's aim and purpose in paras. 63–75]. Rather, they ensure that funding is only released once it is ensured that "the deficiencies in the Polish judicial system do not adversely affect the financial interests of the European Union" [para. 75; emphasis added]. Furthermore, compliance with the milestones is voluntary, in the sense that the only consequence of non-compliance is that Poland will not receive the funding it requested itself. Thus, the milestones do not "definitively impos[e] specific obligations on [Poland] in its relations with the judges affected by decisions of the Disciplinary Chamber [para. 87]."

The inverse conclusion, then, is that the milestones are not meant to ensuring Poland's full compliance with its obligations under articles 2 and 19 TEU, 47 CFREU and the Court of Justice's rulings against it. However, they do not weaken (and thereby affect) the position of Polish judges affected by decisions of the Disciplinary Chamber either, as the four associations had claimed. The Council's Decision in general, and the milestones specifically, do not alter Poland's obligation to comply with EU law [paras. 79 and 91] and it could not have done so either [paras. 78, 80 and 90]. This leads the General Court to the conclusion that the Polish judges affected by decisions of the Disciplinary Chamber, are not directly affected by the Council's decision.

With regard to all other Polish judges and their colleagues from the other Member States, the General Court reaches a similar conclusion. It dismisses the argument that the milestones were setting the wrong example and could therefore have a chilling effect on other judges in light of its previous conclusion that the milestones did not lower Poland's rule of law-obligations [paras. 95 and 96]. The argument that other Polish judges would be affected because milestone F1G, which required Poland to introduce a number of reforms aimed at strengthening judicial independence, was insufficient to restore the rule of law is similarly dismissed. The applicants had failed to demonstrate how that general

assertion actually affected Polish judges directly [paras. 97–100]. Again, the General Court reiterates that the Council's decision does not affect Poland's obligations under article 19 TEU [para. 101]. Lastly, the General Court concludes that the effects that the rule of law deficiencies in Poland and their effects on the work of judges in other Member States are not of such a nature that they also affect the legal situation of those latter judges. The same goes for potential spill-over effects [paras. 102–107]. The General Court strictly separates the professional and legal situation of judges, it seems.

Whether the Plaumann-test should be eased

The final question that the General Court addresses is whether the conditions for locus standi should be eased in the present case. The core of the applicants' argument is that the Plaumann-test presupposes the proper functioning of the 'complete system of legal remedies' of article 263(4) TFEU, which in turn presupposes that all Member States uphold the rule of law [para. 111]. After all, the preliminary reference mechanism is a critical means for individuals who wish to challenge EU legal acts that do not directly and/or individually affect them (Case C-50/00 P, *UPA*, para. 40]. Yet it is exactly that mechanism that has been under threat in Poland (Case C-791/19, *Commission v. Poland*).

The General Court dismisses this argument, though its reasoning is rather thin. The Court begins by pointing out that the although the Plaumann-test must be viewed in light of the right to an effective legal remedy (article 47 CFREU), that right cannot lead to "setting aside the conditions expressly laid down in that Treaty" [para. 113]. After all, the Charter is not meant to change the Treaties' system of legal remedies and neither does it grant "an unconditional entitlement to bring an action for annulment" [para. 115]. This does not change even in light of the systemic deficiencies plaguing the Polish judiciary. I will return to this argument below.

Apparently seeking to dispel any concern that its order could be (mis)read as permitting Poland to treat its obligations under EU law or the Court of Justice's judgments against it less seriously, the General Court concludes with a strongly worded reminder that Poland must comply with these obligations as soon as possible and that it is for the Commission to ensure this is done [para. 118].

Some reflections

The two main parts of the order deserve some reflection. I will start with the issue of standing. In an earlier contribution on this case, I wrongly assumed that direct effect could be established with relative ease. Yet like the four associations, I blurred the lines between the 'legal situation' of the Polish judges and their colleagues in other Member States and what could be referred to as their 'professional situation'. The General Court makes it clear that as regrettable as the effects of rule of law backsliding in Poland and their effects on the remainder of the EU's multi-level judiciary may be, it merely affects the professional situation of other judges. Furthermore, I underestimated the importance of Poland's obligations to restore the rule of law under the Treaties and overestimated the effects that the Council's Decision (and the milestones) would have on these obligations.

Though the General Court's reasoning with regard to the issue of direct effect is certainly complex, I struggle more with its rather concise response to the plea that the Plaumann-test should be eased in the face of systemic rule of law deficiencies. To begin with, the case law invoked by the General Court predates the rule of law crisis by several years, the seminal judgment in Case C-398/13 P, *Inuit Tapiriit Kanatami*, dating from 2013. The issue raised by the applicants had surely not been considered by the Court of Justice when it referred to the 'complete system of legal remedies' in para. 92 of that judgment. A similar point can be raised with regards to the argument on article 47 CFREU. While it is true that the right to an effective legal remedy is neither absolute nor "intended to change the system of judicial review laid down by the Treaties" [para. 114], it is equally true that the connection between the essence of that right and articles 2 and 19(1) TEU had yet to be established at the time of the *Inuit Tapiriit Kanatami* judgment. Neither had it been considered in the 2020 judgment in Case C-313/19 P, *Associazione GranoSalus*, that the General Court cites in para. 115.

It is regrettable that the General Court did not consider articles 2 and 19(1) TEU, because it might have shed new light on the interpretation of article 263 TFEU. Once those provisions are brought into the picture, the argument that the Charter is not meant to modify the system of legal remedies in the Treaties is no longer conclusive. The issue is no longer the interpretation of article 263 TFEU in the light of a fundamental right, but in the light of another, possibly higher ranking, Treaty provision (see Spieker, 2013, p. 116-120). The question then becomes this: should the requirements of direct and individual effect be deemed more easily met in cases concerning rule of law deficiencies that effectively prevent the

applicants from accessing the preliminary reference procedure via their national courts? That question was not considered by the General Court, but it is certainly worth discussing. The General Court is right when it notes that these two conditions are prescribed by article 263(4) TFEU [para. 117] – but that does not mean that the way they are interpreted or applied cannot be changed.

So, while the chapter of the four associations' action before the General Court is now closed, the rule of law-saga will certainly continue. And is becoming more intertwined with the Plaumann-saga.