TESTING THE COMPETENCE DIVIDE: A SHORT STORY HOW THE CJEU ANNULLED A NATIONAL MEASURE OF A MEMBER STATE

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1. INTRODUCTION

The issue of division of competences in ‘laying down the law of the land’ in a dynamic multi-level government system such as the EU, has always been of a perennial nature to the functioning of this system. In a situation where the Member States have voluntarily entered a uniquely structured sovereignty sharing arrangement, the limits of this sharing exercise, due to its power balance, are likely to never be clearly defined and are undergoing a continuous change. This power struggle between the EU and its Member States is as old as the EU and its founding Treaties, themselves, however the intensity of it does not seem to subside.

The current structure of the Treaties embodies a dual approach of limiting both the exercise and the existence of EU competence to legislate. In a very general terms the exercise of competences is limited mainly through three principles. The first one is the principle of subsidiarity, which demands that all EU-level action be necessary in the sense that the policy goals in question can-

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not be achieved as effectively and efficiently on the national level. The second is the proportionality principle, which requires EU action to be rational, in that it should be appropriate and necessary to achieve its aims, and that it should not limit individual (or Member State) autonomy too gravely (proportionality *stricto sensu*). The third limitation is found in Article 4(2) TEU, which follows an unprecise idea that the EU should respect national diversity and core areas of constitutional identity. All three principles are subject to a judicial review of EU legislation by the CJEU.

On the other hand, the limit on the existence of EU competence to legislate follows from the simple idea of the conferral principle and that is that supranational organisations only possess powers which are attributed to them by nations forming part of those organisations. The current Article 5 (2) TEU embodies this principle by providing that the EU can only act within the limits of the competences conferred upon it by the Member States in the Treaties. Competences which are not conferred upon the EU in the Treaties remain with the Member States (a proverbial embodiment of an old legal formula of *non est in acta non est in mundo*).

This central principle has been roughly translated in a nomotechnique way of structuring the Treaties that entails a specific and detailed attribution of competences in separate provisions scattered throughout the legal text. This dispersity of attribution brings us to the new chapter in the ongoing competence division saga, to the case where the CJEU for the first time annulled a national measure.

2. BACKGROUND OF THE CASE

The case of *Ilmārs Rimšēvičs* is a peculiar case in the competence saga and it demonstrates that the battles to provide clarity in the division of the disputed areas come in all shape and sizes and are fought on all legislative fronts. This

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6 Joined Cases C-202/18 and C-238/18, *Ilmārs Rimšēvičs and European Central Bank (ECB) v Republic of Latvia* ECLI:EU:C:2019:139.
particular one was fought in the area of central bank law, where the anomaly of blending the EU law and national law in substantial and procedural matters has been introduced in Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank (‘ESCB Statute’) in 1993. The Article reads as follows:

14.2. The statutes of the national central banks shall, in particular, provide that the term of office of a Governor of a national central bank shall be no less than five years. A Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. 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. Such proceedings shall be instituted within two months of the publication of the decision or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

In this judgement, the CJEU confirmed that review of a national legal act affecting the independence of the monetary authority lies within the competence of the CJEU, as drafted in the ESCB Statute. To have a better understanding of this anomaly that blends ‘both worlds’ of the competence divide, one must take a step back in understanding the general rule. The general rule in Article 263 TFEU stipulates that only legal acts of EU institutions, bodies, offices and agencies can be challenged before the CJEU. National legal acts that have an EU dimension (for example if they are a transposing or implementing measure of EU legislation) in line with Article 267 may come before the CJEU through a reference for a preliminary ruling or in infringement proceedings under Article 258 TFEU.

However, this anomaly embodied in Article 14.2 of the ESCB Statute concerns a review of a Member State measure by which a Governor of a National Central Bank (‘NCB’) is relieved from office, or in other terms an act by which he or she is stripped of its duties and no longer serves as a Governor. For clarification purposes NCB Governors in the Eurosystem, which is the term used in Article 282 (1) TFEU for the European Central Bank (‘ECB’) and NCBs of the Member States which have adopted the single currency euro, together with the Executive Board of the ECB, form the ECB’s Governing Council. The ECB’s Governing Council, in accordance with Articles 8 and 12.1 of the ESCB Statute is the ultimate decision-making power for the policy in the Euro Area. Coupled with the fact that the monetary policy is a conferred exclusive competence of the EU (as stipulated in Article 3(1)(c) TFEU), at least for the current 19 Member States of the EU that have adopted the single currency, it

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7 See: Articles 127(2) TFEU and 3.1 ESCB Statute.
comes as no surprise that the CJEU sized the opportunity to declare that it has jurisdiction and competence to assess the legality of measure that has a potential to interfere with the independence of a EU institution (the ECB) and its exclusive competence in shaping the monetary policy. The CJEU assessment was based on the fact that the Latvian national measure interfered with the 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 (which inter alia involves him being a part of the ECB’s Governing Council).

The duality of the role of the NCBs Governors and the need to adhere to the independence of their post was elegantly phrased by the AG Kokott in stating that although Governors are appointed and relived of their duties by the Member States, the fact that their post makes them a part of a main-decision body of the EU institution mandates a special protection. This special protection of independence safeguards an essential condition of price stability, the main objective of the economic and monetary policy of the EU, the importance of which is underlined by the reference to it in Article 3 of the TFEU on exclusive competences.

However, the story that prompted this case is far from perfect and comes with the backdrop of a scandal.

3. FACTS OF THE CASE

The facts of the case revolve around alleged corruption and money laundering in Latvia, as well as alleged misinformation from outside the EU, and they start by the fact that on 31 October 2013, Mr Rimšēvičs was re-appointed to the post of Governor of the Bank of Latvia by a decision of the Parliament for a new six-year term from 21 December 2013 until 21 December 2019.

However, just before his term had come to an end, on 17 February 2018, Mr Rimšēvičs was arrested following the opening on 15 February 2018 of a preliminary investigation carried out by the Korupcijas novēršanas un apkarošanas birojs (Anti-Corruption Office, Latvia) (‘KNAB’) on suspicion of having, in his capacity as Governor of the Bank of Latvia, committed the offence of soliciting

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11 Joined Cases C-202/18 and C-238/18, Ilmārs Rimšēvičs and European Central Bank (ECB) v Republic of Latvia, AG Opinion ECLI:EU:C:2018:1030 paras 4–5.
and accepting a bribe. In the events that followed Mr Rimšēvičs had become a subject of a decision imposing a number of restrictive measures on him, notably, prohibition on carrying out certain official activities, in particular the duties of Governor of the Bank of Latvia, the prohibition on approaching certain persons and the prohibition on leaving the country without prior authorisation. Both Mr Rimšēvičs and the ECB contested the Latvian measure in court on the basis of Article 14.2 ESCB Statute.

However, the emphasis here is not to go into the wider background of the money laundering allegations, nor the issue of presumption of innocence and the requirements that need to be met for relieving a Governor from his post. What is interesting here is the appeal made by Mr Rimšēvičs and the ECB to the CJEU against a Member State measure.

4. REMEDIAL INTERPRETATION OF THE CJEU

Although the ECB in its request asked the CJEU to declare that Latvia infringed Article 14.2 ESCB Statute by adopting the measure, the CJEU in its findings went further then that. The CJEU found that this article has a stronger remedial effect. It stated that both the literal and the systematic and teleological interpretations of Article 14.2 ESCB Statute entail that the action provided should be classified as an action for annulment.

It continued by stating that the provision that expressly entrust the CJEU with the 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, such as the second subparagraph of Article 14.2 ESCB Statute, derogates from the general distribution of powers between the national courts and the courts of the EU. In the view of the CJEU such derogation can be explained by the particular institutional context of the European System of Central Banks (‘ESCB’) within which it operates. It also added that 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.

The CJEU emphasised that Article 14.2 ESCB Statute 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.

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central bank of a Member State whose currency is the euro, on the main decision-making body of the ECB.\textsuperscript{16}

Since this is a specific dual professional role, this makes the nature of the remedial action under Article 14.2 ESCB Statute specific, unique and exceptional.\textsuperscript{17} This means that the application of the remedial action is narrow in its scope and is applicable to situations that fall under Article 14.2 ESCB Statute, thus preventing an ‘open door’ scenario of analogues national proceedings by going directly to the CJEU. This was also shown in the judgement where the CJEU set aside the discussion on the jurisdiction to give a ruling on the criminal liability of the governor involved, or even to interfere with the preliminary criminal investigation being conducted in respect of that person by the competent administrative or judicial authorities under the Latvian law. Its role is purely secluded to verify if a temporary prohibition on performing the duties of a governor is justified by serious misconduct. The CJEU found that Latvia provided insufficient indications to the CJEU to make such an assessment, therefore it deemed the KNAB’s decision as unjustified.\textsuperscript{18}

The driving legal argument of the CJEU for shaping Article 14.2 ESCB Statute in a remedial form of a direct appeal against a measure which, even though not outright dismissal,\textsuperscript{19} has an equal effect on relieving the Governor from office, was based on the independence of the ESCB. The CJEU stressed that the Treaty is intended to shield the ESCB from all political pressure\textsuperscript{20} and it finds that also temporary prohibiting an NCB Governor from performing her or his duties is likely a form of pressure.\textsuperscript{21} Prohibiting a Governor from performing his or her duties must be reviewable under Article 14.2 ESCB Statute because, if this were not so, a series of temporary measures could be adopted evading judicial review.\textsuperscript{22}

Furthermore, the CJEU comments that the framing of the article demonstrates that by directly conferring jurisdiction on the CJEU to determine the lawfulness of the decision to relieve the Governor of NCB from office, the Member States have demonstrated the importance which they attach to the independence of the holders of such positions.\textsuperscript{23} Moreover, unjustified measures to relieve an NCG Governor from office would severely undermine the independence of the ECB’s Governing Council.\textsuperscript{24}

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\textsuperscript{17} Ibid [6] para 71.
\textsuperscript{20} Ibid [6] para 47.
\textsuperscript{22} Ibid [6] para 53.
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5. CONCLUSION

With this judgement the CJEU shaped a direct form of remedial action of appeal against a national measure of a Member State under which it is competent to annul the national measure in question.

However, this remedial action is very narrow in its scope of application and there are three caveats to it. The first caveat is that this is a direct appeal to the CJEU against a national measure. The nature of this national measure is stipulated in Article 14.2 ESCB Statute as decision whose effect is to relieve a Governor of NCB of a Member State that adopted the single currency from office if he or she a) no longer fulfils the conditions required for the performance of his or her duties or if b) he or she has been guilty of serious misconduct. If this decision infringes the Treaty or of any rule of law relating to its application a direct appeal can be brought.

The second caveat are the addressees of this remedial action. These are Governors of NCB of a Member State that adopted the single currency against whom such a decision has been made and the ECB’s Governing Council. In effect this means that currently this remedial action can only be applied in 19 cases, since only 19 Member States have adopted the single currency.

And lastly, the third caveat is that there is a time limit in application of this remedial action, and that two months of the publication of the decision or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.