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Case study

Litigating European Union Law

ADVANCED TRAINING FOR LAWYERS IN PRIVATE PRACTICE

By
Daniel Sarmiento

M. Krústai is a landowner who has been running a farm for the past twenty years in the region of Marvahy, in the Member State of Falstaffia. In the last five years he has been the recipient of EU aid through several CAP programmes, as well as European Investment Bank projects. His crops include carrots, cucumbers and peppers, among other agricultural products. The farm has thrived in the recent past thanks to EU support targeted at the modernization of farming infrastructures, including the digitalization of most of the harvesting process. Aid has been received through grants as well as loans. The latter are due in a repayment schedule ranging from ten and twelve years, depending on the loan, since 2019.

In 2021 the government of Falstaffia introduced a legislative proposal, the Independent Media Investment Bill, which would allow undertakings investing in the country's media sector a sum of at least 5 million EUR to enjoy a right of purchase of land in the region of Marvahy. This right of purchase sets the price of the square meter at the value set in the land registry, which is well known not to reflect real market prices. However, and according to the Minister in charge of the file, the measure is intended to promote investment in the region of Marvahy to boost the modernization of its farming industry and to stop the urban exodus that has severely affected rural areas in the country, particularly in the region of Marvahy. According to the government, although EU aid has contributed to improve the industrial profile of the region, there is a considerable lack of participation of institutional and large investors, which will contribute to dynamize the region and attract young talent from urban areas. The government considers that the media sector attracts sophisticated investors, and adding a right of purchase of land to these investors would promote and incentivize a more high-level property structure in the region of Marvahy.

The region of Marvahy is known for its cultural distinctness from the rest of the country, including its regional language of unknown origins, famous traditional dances and a

strong popular support for independence from Falstaffia. The local parties, which have been supporting independence with varying degrees of enthusiasm, are highly concerned by the Independent Media Investment Bill. They believe that the government is attempting to control the media in the entire country, including Marvahy, and impose very restrictive economic measures among the farmers of the region, which is where the highest support to independence can be found, as a means of suffocating through economically coercive measures any attempts to promote independence in the region.

In April 2021 the Independent Media Investment Bill was approved with the support of the governing party, which holds a large majority in the Falstaffian parliament. Immediately after its entry into force on 1 May 2021, the Varietas group, controlled by a local magnate with close ties to the government party, made a take-over bid of the two leading TV and newspaper outlets of the country. The acquisition was immediately approved by the competition authorities of Falstaffia without any referral to the European Commission. Although the minority party lodged an action of unconstitutionality before the Constitutional Court, the remedy was declared inadmissible within twenty-four hours. This decision is in line with the most recent case-law of the Constitutional Court, which, after being entirely renewed in its composition with former government Ministers, it interprets its statute very strictly and has rejected lately all actions of unconstitutionality on the grounds that they have "no material relevance from a substantial constitutional parameter".

Once the acquisition materialized and the Varietas group assumed control of the outlets, it immediately referred to the Ministry of Agriculture a purchase request, pursuant to the Independent Media Investment Act, of 100.000 acres of land in the region of Marvahy. One of the provisions of the Act states that land whose former proprietors were subject to guaranteed loans, shall not transfer any liabilities to the purchaser, if the purchaser so requests. This provision was justified by the government on the grounds that such loans were for the benefit of the former proprietor, and the know-how and immaterial assets that such financial support provided were and will be mostly enjoyed by the former proprietor. The measure is also intended to make the investment more attractive and consolidate the modernization of the farming industry in the region of Marvahy.

On 1 September 2021, the Varietas group purchased 100.000 acres of land, at the proposal of the Ministry of Agriculture, and exercising its right not to assume any liabilities attached to the purchased land and derived from loans for the benefit of the previous proprietors.

M. Krústai's farm is part of the 100.000 acres purchased by the Varietas group. Its fifty-five acres are now the property of the Varietas group, but the loans that amount to 150.000 EUR, of which 120.000 EUR remain pending repayment, have not been transferred to the group. As a result, M. Krústai has received in concept of payment for the sale a total of 95.000 EUR (in contrast with the market value of 350.000 EUR at which his farm was valued recently by an independent consultant) and is now left with a liability of 120.000 EUR, plus interests, which he must face. Of the 120.000 EUR pending

repayment, 60.000 EUR are loans guaranteed by an EU fund and the European Investment Bank.

M. Krústai has brought an action against the decision of the Ministry of Agriculture enacting the sale of his property in favor of the Varietas group. According to M. Krústai, the sale breaches EU Law as well as the European Convention of Human Rights. M. Krústai's lawyers are optimistic about the chances of success, particularly after the European Commission announced that it was immediately launching infringement procedures against Falstaffia. M. Krústai's counsel has requested in his written submissions before the regional court of Marvahy that the chamber makes a preliminary reference to the Court of Justice. However, although the Marvahy regional court has been very proactive in the past in making references to the Luxembourg court, particularly when questioning national laws that affected Marvahy's cultural singularities, the President of the regional court has made use of an exceptional power granted by the recent Judiciary Act, which allows the President of a regional court to seize the competence of a case pending in a chamber of the court. The Judiciary Act provides that the Presidents of regional courts are appointed by the Ministry of Justice, and they can use their right to seize a case at any time in the procedures before the chamber of the regional court. This has been the case of M. Krústai's claim, which has been transferred to the President, appointed only three weeks ago by the Ministry of Justice, and rejected on all grounds by an Order of 20 September 2021. This decision is not subject to review by the Supreme Court and is therefore final.

In desperation, M. Krústai's counsel has decided to bring another action, this time before a first instance court, challenging the land registrar's decision to formally register the transfer of property. These decisions can only be challenged on the grounds of manifest procedural irregularities. Although the Civil Code does not specify that such irregularities should only take place within the registration procedure, it has been traditionally assumed that these claims can only be brought when the irregularity alleged has taken place in the course of the registration procedure. However, M. Krústai's lawyer purports a novel interpretation, arguing that the prior judicial proceedings before the regional court were stained by manifest procedural irregularities that breached EU law, including Article 19 TEU and Article 267 TFEU.

The case is now before the first instance court and the defendant government, as well as the prosecutor, have requested the court to dismiss the case, due to a manifest fraud and abuse of procedure. According to the defendant and the prosecutor, the procedural irregularities that can be invoked in this context can only refer to irregularities taking place within the registration procedure, and not in prior judicial proceedings that are irrelevant for the purposes of the land registrar's duties.

However, the first instance court has doubts and it has decided to refer the case to the Court of Justice. In its order for reference, the instance court raises several questions worded in the following terms:

"*1. Should EU law be interpreted in the sense that it imposes a duty on a national court to make a conform interpretation of national law that refers, in general terms, to*

"manifest procedural irregularities", as including breaches of Articles 19 TEU and Articles 267 TFEU?

2. Is the decision of a land registrar to register an acquisition of land in accordance with the Independent Media Investment Act, an implementation of EU law? If the answer to this question is in the negative, could such a decision come under the notion of "fields of European Union Law" as prescribed by Article 19 TEU?

3. If one or both of the queries in Question 2 are to be replied in the positive, is EU Law, and in particular Article 17 of the Charter of Fundamental Rights of the European Union, to be interpreted in the sense that it precludes a Member State from introducing a legislative act that imposes a forced sale in favor of an undertaking, at a price that does not reflect market value, on the sole grounds that the undertaking has made an investment of at least 5 million EUR in a national media outlet?

4. If one or both of the queries in Question 2 are to be replied in the positive, is EU Law, and in particular Article 19 TEU, interpreted in light of Article 47 of the Charter of Fundamental Rights of the European Union, to be interpreted in the sense that it precludes a Member State from conferring on Presidents of regional courts the right to seize a pending case from a chamber within the regional court and decide on the merits, irrespective of the stage of the procedures? Does the fact that the Presidents of regional courts are appointed directly by the Ministry of Justice have any relevance in the interpretation of Article 19 TEU, in light of Article 47 of the Charter of Fundamental Rights of the European Union?"

Questions

1. Can the Court of Justice rule on all the questions raised by the referring court, particularly questions 3 and 4, which refer to a legal matter that is not under direct consideration in the main proceedings?

2. To what extent can the Court of Justice rule on the legality of a provision of national law in the course of a preliminary reference procedure?

3. In this specific case, can the national court make a conform interpretation of the Civil Code in light of EU law?

4. Can Article 19 TEU be invoked in these proceedings and, if so, what impact would it have on the situation of M. Krústai?

Answers

1. Can the Court of Justice rule on all the questions raised by the referring court, particularly questions 3 and 4, which refer to a legal matter that is not under direct consideration in the main proceedings?

This question points out to a problem of admissibility which the defendant party in the main proceedings should focus on: are the questions on the substance of relevance for the main proceedings? It should be noted that the main proceedings concern the review of a registration in a land registry, not the legality of the property transfer as such nor the legality of the Independent Media Investment Act. Therefore, it could be argued that questions 3 and 4 are inadmissible, because they have no direct link with the main proceedings and are therefore hypothetical. According to settled case-law, questions in preliminary references relating to EU law "enjoy a presumption of relevance, which means that the Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it".[1]

The case-law of the Court of Justice on the hypothetical nature of preliminary references is very flexible and, as a rule, it declares the inadmissibility of a reference only when it is "obvious" that the ruling of the Court of Justice is *not* of direct relevance for the case at hand. In this case, however, there is a link between the main proceedings and the substantive questions being raised: this is a forced transfer of property, the legality of which depends on the validity of the Independent Media Investment Act. Therefore, although the link between both issues is not immediate and the Land registrar is not reviewing the Independent Media Investment Act, it is clear that the registration can only take place if the transfer of property is in conformity with the law. The applicants in the main proceedings can argue that questions 3 and 4 are essential for the Land registrar to make a determination on the registration of the transfer.

It should also be taken into account that national courts have a wide margin of discretion in determining what is of relevance to resolve the main proceedings. As a result, the Court of Justice will usually defer to the national court's view as to the convenience of the questions raised. In this case, it is unquestionable that the Land registrar must apply the law, including EU law. In fact, if the Land registrar is under a duty to apply a statutory Act, it also has a duty to set it aside if it is in breach of EU Law. The case-law of the Court of Justice since the case in Costanzo[2] imposes on all national authorities, including administrative authorities, the duties to set aside any provision of national law contrary

[1] See, inter alia, judgments of 5 December 2006, Cipolla and Others (C-94/04 and C-202/04, EU:C:2006:758) and of 11 May 2017, Archus and Gama (C-131/16, EU:C:2017:358).

[2] Judgment of 22 June 1989, Costanzo (103/88, EU:C:1989:256). In the same vein, see judgments of 9 September 2003, CIF (C-198/01, EU:C:2003:430, paragraph 49), and, in relation to the application of regulations, judgments of 14 June 2012, Association nationale d'assistance aux frontières pour les étrangers (C-606/10, EU:C:2012:348, paragraph 75), and of 5 March 2019, Eesti Pagar (C-349/17, EU:C:2019:172, paragraphs 90 and 91).

to EU Law. Therefore, if Questions 3 and 4 were to be replied in the positive, it is possible that the Land registrar would be precluded from registering the transfer of property, inasmuch the transfer is a forced sale based on a national law that breaches EU Law.

2. To what extent can the Court of Justice rule on the legality of a provision of national law in the course of a preliminary reference procedure?

It is frequent for national court to ask the Court of Justice about the legality of national law in light of EU Law. However, the preliminary reference procedure is not a procedural tool of judicial review, but a cooperation mechanism to provide a dialogue among courts on points of interpretation and validity of EU law. Therefore, if a national court raises a question on a specific point of national law by way of a preliminary reference, the Court of Justice does not have jurisdiction to rule on such a query.[3]

However, in this case the national court has been careful to frame the questions in terms of *interpretation* of EU Law. The questions do not refer to the legality of national laws, but to whether EU law "can be interpreted in the sense that…", thus eluding the issue of legality of national law. This will allow the Court of Justice to reply to the national court with a response based on the interpretation of EU Law, and not ruling directly on the compatibility of national law with EU Law.

There is a fine line between the Court of Justice's assistance in providing useful interpretations of EU law and its involvement in the judicial review of national legislation. For example, if the national court refers a question to the Court of Justice asking whether EU Law should be interpreted in the sense that "it is opposed to a rule of national law that states z", the reply will be undertaking a judicial review of national law, albeit under the dressing of a question of interpretation.

3. In this specific case, can the national court make a conform interpretation of the Civil Code in light of EU law?

The principle of conform interpretation of national law in light of Union law is a standard doctrine, well established in the case-law of the Court of Justice. The requirement that national law be interpreted in conformity with EU law is, according to the case-law, "inherent in the system of the FEU Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them".[4]

In applying national law, "the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order

[3] See, in particular, the judgments of 22 October 1998, IN. CO. GE.'90 and Others(C-10/97 to C-22/97, EU:C:1998:498, paragraph 21). See also Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases IN. CO. GE.'90 and Others, C-10/97 to C-22/97, EU:C:1998:228, points 16 to 44.

[4] Judgment of 23 April 2009, Angelidaki and Others(C-378/07 to C-380/07, EU:C:2009:250), paragraph 198.

to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 288 TFEU".[5]

In the case at hand, it is clear that the national laws are subject to interpretation, inasmuch they do not limit the scope of the appeal to issues of procedure in the course of the registration. There has been a practice and a common understanding that the scope was limited to issues raised during the procedure, but nothing in national law precludes an applicant from challenging the registration of a property forced sale on the grounds of a breach of Union law. Thus, the applicants can argue that, in light of the case-law of the Court of Justice on the principle of conform interpretation, the purpose of which is to ensure the full effectiveness of Union law, the appeal must allow the chamber to hear all arguments of procedure and substance that condition the Registrar's decision to register the sale.

The defendant could argue that there is a practice that settles the matter, although that will be a weak argument that will probably not prosper. The defendant could also highlight that the case-law on conform interpretation has mostly been addressed to directives, and in this particular case the issue raises points of interpretation of the Treaties. However, this line of argument will not be successful, since the Court has applied the principle of conform interpretation to all kinds of Union law acts.

4. Can Article 19 TEU be invoked in these proceedings and, if so, what impact would it have on the situation of M. Krústai?

The question on whether Article 19 TEU has direct effect has been recently settled by the Court of Justice, in the case of Repubblika,[6] confirming a strand of case-law developed in the saga of the Polish reforms of the judiciary. This line of case-law argues that Article 19 TEU has a broader scope of application than the fundamental rights enshrined in the Charter, which are only implemented in Member States under the conditions of Article 51(1) of the Charter. In contrast, Article 19 TEU refers to "the fields covered by Union Law" and therefore it alludes to a broader range of situations. Also, the fact that Article 19 TEU introduces the guarantee of access to an effective judicial protection, it requires being interpreted in light of Article 47 of the Charter, which includes minimum standards of procedural fairness, including the principle of independence of the judiciary.

However, in the present case the applicant is not challenging the independence of the Court that is hearing the present case. In contrast, the applicant is challenging a prior decision, the result of which has provoked a series of effects that ensued in the loss of property rights of the applicant.

[5] Judgment of 13 November 1990, Marleasing (C-106/89, EU:C:1990:395, paragraph 8)
[6] Judgment of 20 April 2021, Repubblika (C-896/19, EU:C:2021:311).

In this context, the relevant case-law that should be taken into account is provided in the case of Simpson,[7] in which the Court of Justice explored the consequences that a lack of judicial independence, or an undue appointment or selection procedure that vitiates a judge from sitting in chambers, will have in subsequent judicial proceedings. This case-law should also be interpreted taking into account the recent case-law of the European Court of Human Rights in the Astradsson v. Iceland case,[8] which covers the same question.

In light of the mentioned case-law of both European courts, both parties can make convincing argument in their respective support. The applicant can rely on the case law, that highlights the importance of the "gravity" of the breach of procedural fairness, in which case it is obvious that there are serious doubts as to the composition of the court, basically reduced to a discretional power in the hands of the President of the regional court. On the other hand, the defendant can argue that the case-law refers to cases in which the breach of procedural fairness has taken place in the same court, or in the same procedure. In the case at hand the applicant is making the argument in different procedures which have no direct connection with the President of the regional court's prior ruling (although the connection exists, but not in a direct way).

[7] Judgment of 26 March 2020, Review Simpson and HG v Council and Commission (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232).

[8] Judgment of the ECtHR of 1 December 2020, Guðmundur Andri Ástráðsson v. Iceland (CE:ECHR:2020:1201JUD002637418).