Case C-55/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

31 January 2020

Referring court:

Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Court of the Bar Association in Warsaw, Poland)

Date of the decision to refer:

24 January 2020

Appellant:

Ministerstwo Sprawiedliwości (Ministry of Justice, Poland)

Other party to the proceedings:

R.G.

Subject matter of the proceedings before the referring court

Appeal by the Minister Sprawiedliwości (Minister for Justice) against the decision of 8 August 2019 to discontinue disciplinary proceedings against the adwokat (advocate) R.G.

Subject matter and legal basis of the questions referred

– The application of Chapter III of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, including Article 10(6) thereof, to disciplinary proceedings against Polish advocates and foreign lawyers registered with a Bar Association;

– An appeal on a point of law being heard by a court which has been found not to be an independent and impartial tribunal for the purposes of Article 47 of the Charter [of Fundamental Rights of the European Union];

– The right of the Prokurator Generalny (Polish Public Prosecutor General) and the Rzecznik Praw Obywatelskich (Polish Ombudsman) to lodge an appeal on a point of law against the rulings of a Bar Association disciplinary court.

WORKING DOCUMENT

Questions referred

(1) Are the provisions of Chapter III of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (‘**the Services Directive**’), including Article 10(6) of the Services Directive, applicable to proceedings concerning the disciplinary liability of Polish advocates and foreign lawyers registered with a Bar Association, in connection with which liability an advocate may, inter alia, be fined, suspended, or expelled from the bar, and a foreign lawyer may, inter alia, be fined, have his right to provide legal assistance in the Republic of Poland suspended, or be prohibited from providing legal assistance in the Republic of Poland? If the answer to the above question is in the affirmative, do the provisions of the Charter of Fundamental Rights of the European Union (‘**the Charter**’), including Article 47 thereof, apply to the above proceedings before Bar Association courts in cases where there is no right of appeal against the rulings of those courts to national courts or where such rulings are subject only to an extraordinary appeal, such as an appeal on a point of law to the Sąd Najwyższy (Supreme Court), also in cases where all the essential elements are present within a single Member State?

(2) In a case where, in the proceedings referred to in Question 1, under the national legislation in force the body competent to hear an appeal on a point of law against a ruling or decision of a Bar Association disciplinary court or an objection to an order refusing such an appeal on a point of law is a body that, in the view of that court, which is consistent with the view expressed by the Sąd Najwyższy (Supreme Court) in its judgment of 5 December 2019, case reference III PO 7/18, is not an independent and impartial tribunal for the purposes of Article 47 of the Charter, is it necessary to disregard the national provisions establishing the jurisdiction of that body and is it the duty of the Bar Association disciplinary court to refer such an appeal on a point of law or objection to a judicial body which would have jurisdiction if those national provisions had not precluded it?

(3) In a case where — in the proceedings referred to in Question 1 — no appeal on a point of law can be lodged against a ruling or decision of a Bar Association disciplinary court, according to the position of that court, either by the Public Prosecutor General or the Ombudsman, and that position is:

(a) contrary to the position expressed in the resolution of 27 November 2019, case reference II DSI 67/18, adopted by a seven-judge panel of the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), that is, the body which, under the national legislation in force, is competent to

WORKING DOCUMENT

hear an objection to an order refusing an appeal on a point of law, but which, in the view of the Bar Association disciplinary court, which is consistent with the view expressed by the Sąd Najwyższy (Supreme Court) in its judgment of 5 December 2019, case reference III PO 7/18, is not an independent and impartial tribunal for the purposes of Article 47 of the Charter;

(b) consistent with the position previously expressed by the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court), that is, the judicial body that would have jurisdiction to hear such an objection if those national provisions had not precluded it;

may (or should) the Bar Association disciplinary court disregard the position expressed by the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court)?

(4) If in the case referred to in Question 3, an appeal by the Minister for Justice has been lodged with a Bar Association disciplinary court, and:

(a) one of the factors which in the view of the Sąd Najwyższy (Supreme Court) as expressed in its judgment of 5 December 2019, case reference III PO 7/18, as well as in the view of the Bar Association disciplinary court, justify the assumption that the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), that is, the body referred to in Question 3(a), is not an independent and impartial tribunal for the purposes of Article 47 of the Charter, is the influence of the executive, including the Minister for Justice, on its composition;

(b) the function of Public Prosecutor General, who — according to the position expressed by the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), that is, the body referred to in Question 3(a), would be entitled to lodge an appeal on a point of law against the decision made on appeal, and according to the position of the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court), that is, the judicial body referred to in Question 3(b), and also according to the position of the Bar Association disciplinary court, is not entitled to lodge such an appeal, is by operation of law actually performed by the Minister for Justice,

should the Bar Association disciplinary court ignore that appeal if it is the only way in which it can ensure that the proceedings are compatible with Article 47 of the Charter and, in particular, prevent interference in those proceedings by a body which is not an independent and impartial tribunal for the purposes of that provision?

WORKING DOCUMENT

Provisions of EU law relied on

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Article 10(6)

Charter of Fundamental Rights [of the European Union], Article 47

Provisions of national law relied on

Ustawa z dnia 26 maja 1982 r. — Prawo o adwokaturze (Law on Advocates of 26 May 1982) ('the LA'): Article 11(2), Article 39(1), Article 40(1) and (2), Article 51, Article 54(1), Article 56(1) and (3), Article 63, Article 80, Article 81(1), Article 82(2), Article 86, Article 88a(1) and (4), Article 89, Article 91, Article 91a(1), Article 91b, Article 91c, Article 95n;

Ustawa z dnia 5 lipca 2002 r. o świadczeniu przez prawników zagranicznych pomocy prawnej w Rzeczypospolitej Polskiej (Law of 5 July 2002 on the Provision of Legal Assistance by Foreign Lawyers in the Republic of Poland) …: Article 4(1), Article 10(1) and (2);

Kodeks postępowania karnego (Code of Criminal Procedure) ('the CCP'): Article 100 § 8, Article 521;

Ustawa z dnia 28 stycznia 2016 r. — Prawo o prokuraturze (Law of 28 January 2016 on the Public Prosecutor's Office) ('the LPPO'): Article 1 § 2;

Ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym (Law of 8 December 2017 on the Sąd Najwyższy (Supreme Court)) ('the LSC'): Article 24, first indent of Article 27 § 1(1)(b).

Brief outline of the facts and procedure

1 On 8 August 2017, the Rzecznik Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Spokesperson of the Bar Association in Warsaw) received a letter from the Prokurator Krajowy — Pierwszy Zastępca Prokuratora Generalnego (National Public Prosecutor — First Deputy of the Public Prosecutor General) ('the National Public Prosecutor') dated 20 July 2017, requesting that disciplinary proceedings be instituted against the advocate R.G. In the opinion of the National Public Prosecutor, statements by R.G. issued on 10 and 11 October 2016, in which he commented on the hypothetical possibility of his client, D.T., President of the European Council, being charged with a criminal offence, went beyond the limits of an advocate's freedom of expression, could be construed as unlawful threats, that is, as a criminal offence, and constituted disciplinary misconduct.

2 In his decision of 7 November 2017, the Disciplinary Spokesperson of the Bar Association in Warsaw refused to launch a disciplinary inquiry. That decision, following an appeal by the National Public Prosecutor, was overturned on 23 May

WORKING DOCUMENT

2018 by a decision of the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Court of the Bar Association in Warsaw) ('the Disciplinary Court') and the case was referred to the Disciplinary Spokesperson. In his decision of 18 June 2018, the Disciplinary Spokesperson launched a disciplinary inquiry in regard to the advocate R.G. having exceeded the limits of freedom of speech on 10 and 11 October 2016. In his decision of 28 November 2018, the Disciplinary Spokesperson discontinued the inquiry when he found that R.G.'s actions did not amount to disciplinary misconduct. As a result of an appeal by the National Public Prosecutor and an appeal by the Minister for Justice, that decision was overturned by the Disciplinary Court on 13 June 2019 and the case was referred to the Disciplinary Spokesperson for reconsideration. In his decision of 8 August 2019, the Disciplinary Spokesperson once again discontinued the disciplinary inquiry into R.G. Both the National Public Prosecutor and the Minister for Justice appealed against that decision.

3 Currently, the subject of the Disciplinary Court's consideration is (potentially) the appeal by the Minister for Justice; as regards the appeal by the National Public Prosecutor, the Disciplinary Spokesperson refused to accept it by order of 30 August 2019, but that order was repealed on 10 December 2019 by the Disciplinary Court; to date, the [Disciplinary] Spokesperson has not referred the appeal to the Disciplinary Court.

Succinct presentation of the reasons for the reference

4 In its view, the Disciplinary Court ruling in the present case is entitled to refer [questions] to the Court of Justice of the European Union for a preliminary ruling. Since (i) it is a body established by law, (ii) it is permanent in nature and independent in its judgments (Article 89(1) of the LA), (iii) it resolves disputes, ruling on motions by the Disciplinary Spokesperson concerning punishments for advocates and on appeals against the Disciplinary Spokesperson's decisions refusing to launch, or discontinuing, a disciplinary inquiry, (iv) it applies the procedural provisions of the Law on Advocates and of the Code of Criminal Procedure, (v) its decisions are binding and enforceable by coercion, (vi) it acts at the request of the parties rather than *ex officio* and (vii) it is obliged to apply the law, it is, as such, a court or tribunal for the purposes of Article 267 TFEU. Furthermore, as a court or tribunal of last instance for the purposes of Article 267 TFEU, it is in fact obliged to make a reference for a preliminary ruling.

Question 1 — Services Directive

5 The Disciplinary Court has doubts as to the interpretation of the provisions of the Services Directive — more specifically, whether the provisions of Chapter III of that directive apply to proceedings concerning the disciplinary liability of Polish advocates and foreign lawyers registered with a Bar Association, even if all the essential elements are present within only one State. This question is crucial for the outcome of the present case. If the provisions of Chapter III of the Services

WORKING DOCUMENT

Directive apply to proceedings concerning the disciplinary liability of Polish advocates and foreign lawyers registered with a Bar Association, those proceedings fall within EU law and are subject to the application of the Charter, in particular Article 47 thereof, both in so far as they are pending before Bar Association disciplinary courts and in so far as they are pending or may be pending before national courts or other national bodies as a result of appeals against the rulings of Bar Association disciplinary courts. In that case, the Disciplinary Court will have an obligation under EU law to ensure that the proceedings pending before it meet the standard of a fair trial laid down in that provision.

6 The Disciplinary Court inclines towards the view that that question should be answered in the affirmative. The provision of legal assistance by lawyers established in the European Union undoubtedly falls within the scope of Article 2(1) of the Services Directive, since such assistance constitutes a service supplied by a provider established in a Member State, particularly as under Polish law advocates are entrepreneurs and engage in business activity. Furthermore, legal assistance provided by lawyers is not covered by any of the exclusions listed in Article 2(2)(a) to (l) of that directive. In the view of the Disciplinary Court, the Bar Association registration and deregistration scheme amounts to an 'authorisation scheme' within the meaning of Article 4(6) of the Services Directive. Bar disciplinary proceedings are also part of that scheme, since as a result of such proceedings Bar Association disciplinary courts can in fact suspend a decision authorising a lawyer to pursue advocacy work (by suspending his right to engage in professional activity or by suspending his right to provide legal assistance in the territory of the Republic of Poland) or revoke such a decision, with effect for at least 10 years (by expelling him from the Bar or by prohibiting him from providing legal assistance in the territory of the Republic of Poland). Once the disciplinary court's ruling becomes final, a Polish advocate or a foreign lawyer loses, temporarily or permanently, the right to provide services. In fact, this constitutes a withdrawal of authorisation for the purposes of Article 10(6) of the [Services] Directive.

7 In the view of the Disciplinary Court, Article 3(1) of the Services Directive also does not preclude the application of the provisions of Chapter III thereof to the disciplinary proceedings at issue, since the provisions of other directives governing specific aspects of the taking up and pursuit of activity consisting in the provision of legal services under the freedom to provide services or the freedom of establishment do not conflict with the provisions of that chapter. In any event, such a conflict, even if it were to occur with regard to an aspect covered by Chapter III of the [Services] Directive, would not affect that directive as a whole. Those separate directives govern the provision of legal assistance services only in so far as those services include a foreign element and as such are covered by the freedom to provide services or the freedom of establishment enshrined in the Treaty. Meanwhile, the scope of Chapter III of the Services Directive is broader, because it also covers purely internal situations (judgment of the Court of Justice of 30 January 2018, *College van Burgemeester en Wethouders van de gemeente*

WORKING DOCUMENT

Amersfoort and Visser Vastgoed Beleggingen BV, C-360/15 and C-31/16). Thus, at least with respect to purely internal situations, the application of the provisions of Chapter III of the Services Directive should not be affected by Article 3(1) thereof.

8 Nor does Article 1(5) of the Services Directive preclude the application of the provisions of Chapter III thereof to proceedings before Bar Association disciplinary courts. Pursuant to Article 86 of the LA, disciplinary proceedings are conducted independently of criminal proceedings. Furthermore, the purpose of disciplinary proceedings is different to that of criminal proceedings. In a way, disciplinary proceedings serve to ensure the effectiveness of the system of controlling access to the provision of legal services. In that sense, they are part of the 'authorisation scheme' without which such proceedings would lose their *raison d'être*.

Question 2 — jurisdiction to hear an appeal on a point of law or an objection to a refusal to accept an appeal on a point of law

9 Question 2 concerns the body competent to hear an appeal on a point of law against a ruling of a Bar Association disciplinary court or an objection to a refusal to accept such an appeal on a point of law. Pursuant to the first indent of Article 27 § 1(1)(b) of the LSC, cases heard by the Sąd Najwyższy (Supreme Court) in connection with disciplinary proceedings conducted under the Law on Advocates fall within the jurisdiction of the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court) ('the SC Disciplinary Chamber'). The question whether the SC Disciplinary Chamber is an independent and impartial tribunal for the purposes of Article 47 of the Charter has already been considered by the Court of Justice and by the Sąd Najwyższy (Supreme Court). Further to the judgment of the Court of Justice of 19 November 2019, *A.K.*, C-585/18, C-624/18 and C-625/18 (independence of the SC Disciplinary Chamber), the Sąd Najwyższy (Supreme Court), in its judgment of 5 December 2019, case reference III PO 7/18, ruled that the SC Disciplinary Chamber is not an independent and impartial tribunal for the purposes of Article 47 of the Charter. One of the factors that led the Sąd Najwyższy (Supreme Court) to that conclusion was the influence of the executive, and especially the Minister for Justice, on the composition of that body.

10 In this situation, it appears that it is possible and even necessary to disregard the national provisions establishing the jurisdiction of the [SC] Disciplinary Chamber, that is, the first indent of Article 27 § 1(1)(b) of the LSC. In this instance, pursuant to Article 24 of the LSC, the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court) ('the SC Criminal Chamber') would be competent to hear the appeals on points of law and objections in question, since the provisions of the CCP apply to disciplinary cases against advocates. However, clarification by the Court of Justice is needed as regards whether the above conclusion is also valid in so far as the decision to disregard those provisions would not be made by the Sąd Najwyższy (Supreme Court), but by a Bar Association disciplinary court.

WORKING DOCUMENT

11 Since, under national law, after pronouncing or delivering its ruling a Bar Association disciplinary court is obliged to instruct the parties to the proceedings (and in some cases also the Minister for Justice) regarding the time limit for, and manner of, lodging an appeal or that there is no right of appeal, the Disciplinary Court seeks to determine whether in formulating that instruction it should, taking into account the judgment of the Sąd Najwyższy (Supreme Court) of 5 December 2019, disregard the first indent of Article 27 § 1(1)(b) of the LSC and instruct the parties that appeals — if the Disciplinary Court finds that such appeals may be lodged against its ruling — should be brought before the SC Criminal Chamber.

12 Question 2 is formulated under the assumption that the proceedings referred to in Question 1, including the proceedings at issue, fall within the scope of the Charter, in particular Article 47 thereof. That assumption, which determines the admissibility of this question, will be met, first of all, if the answer to Question 1 is in the affirmative. Secondly, in the view of the Disciplinary Court, there may be doubts as to the purely internal nature of the present case, given that it concerns the actions of the advocate R.G. who is acting as attorney for D.T., the President of the European Council. Thirdly, where a case or the laws applicable to it are even potentially of a cross-border nature, the Court will find an EU element that determines its jurisdiction, since it is sufficient for entrepreneurs from one Member State to be interested in carrying out regulated activities in another Member State (see judgments of: 11 June 2015, *Berlington*, C-98/14, and the case-law cited; 1 June 2010, *Blanco Pérez and Chao Gómez*, C-570/07 and C-571/07; 19 July 2012, *Garkalns*, C-470/11; 15 November 2016, *Ullens de Schooten*, C-268/15, paragraph 50). In addition, where the recipients of regulated services may potentially include persons from other Member States, that is sufficient for a finding that there is an EU element and the Court has jurisdiction (judgments of 11 June 2015, *Berlington*, C-98/14, and of 15 November 2016, *Ullens de Schooten*, C-268/15, paragraph 51). Undoubtedly, clients of lawyers registered with the Bar Association in Warsaw, and even clients of R.G., may include — and probably do include — persons from other Member States. Fourthly, the Court's jurisdiction to answer a question referred for a preliminary ruling in a case confined in all respects within a single Member State may be justified by the fact that national law requires the referring court to grant the same rights to a national of its own Member State as those which a national of another Member State in the same situation would derive from EU law (judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, paragraph 52 and the case-law cited). An assumption that other (higher) standards would have to be applied in hearing disciplinary cases of foreign lawyers from Member States of the European Union who are registered with the Bar as well as advocates who are citizens of such Member States or advocates who are involved in the provision of services to persons from other Member States, while other (lower) standards would be applied to the remaining advocates, namely those with Polish citizenship and providing services to Polish clients, would be difficult to accept under Polish law. Such reverse discrimination would not be acceptable under Polish law.

WORKING DOCUMENT

Question 3 — how to decide whether an appeal on a point of law is admissible

13 For the reasons already set out in the grounds for Question 2, it is necessary to clarify not only which body will have jurisdiction to hear a potential appeal on a point of law against a ruling of the Disciplinary Court or an objection to a refusal to accept such an appeal on a point of law, but also whether such an appeal on a point of law is admissible at all. This is important both because of the contents of the instruction which a disciplinary court is obliged to give when pronouncing or delivering its ruling, but also because of its further obligations in the event of an appeal on a point of law being lodged and also the possible need to ensure that the standard arising from Article 47 of the Charter is otherwise met in that respect. For the reasons set out in paragraph 12 above, this issue falls within EU law and its clarification falls within the jurisdiction of the Court of Justice.

14 The Disciplinary Court's uncertainty stems from the fact that, in accordance with the position presented to date by the SC Criminal Chamber, and the position presented in legal doctrine and by Bar Association disciplinary courts, in cases such as the one at issue not only do the parties to the proceedings not have the right to lodge an appeal on a point of law but also neither the Public Prosecutor General nor the Ombudsman has that right. In particular, in such cases those bodies may not avail themselves of the extraordinary appeal on a point of law provided for in Article 521 of the CCP. The Disciplinary Court shares that position. However, in its resolution of 27 November 2019, case reference II DSI 67/18 (which, incidentally, also concerned the advocate R.G.), a 7-judge panel of the SC Disciplinary Chamber found that an appeal on a point of law under Article 521 of the CCP is admissible in such cases. This would mean that in such cases, an appeal on a point of law could be brought by the Public Prosecutor General and by the Ombudsman. The Disciplinary Court therefore has doubts as to whether the above position of the [SC] Disciplinary Chamber — which, moreover, is not formally binding on the Disciplinary Court — should be taken into account or whether it is devoid of legal significance, since, as has already been stated above, according to the judgment of the Sąd Najwyższy (Supreme Court) of 5 December 2019, case reference III PO 7/18, the SC Disciplinary Chamber is not an independent and impartial tribunal for the purposes of Article 47 of the Charter.

Question 4 — how to ensure that the case is heard by an independent and impartial tribunal for the purposes of Article 47 of the Charter

15 In the present case, the Disciplinary Court is to hear the appeal of the Minister for Justice lodged by him not as a party to the proceedings but as a special body under Article 88a(4) of the LA, which status entitles him to lodge an appeal in any case. In accordance with the position presented to date by the SC Criminal Chamber, and the position presented in legal doctrine and by Bar Association disciplinary courts, in cases such as the one at issue an appeal on a point of law against a decision by the Disciplinary Court to uphold a decision to discontinue an inquiry contested before that court is inadmissible. However, a different position was

WORKING DOCUMENT

presented in the resolution of 27 November 2019, case reference II DSI 67/18, of a 7-judge panel of the SC Disciplinary Chamber, which indicated that the Public Prosecutor General — who is also the Minister for Justice pursuant to Article 1 § 2 of the LPPO — has the right to lodge an appeal on a point of law against such a decision. An important consideration here is that one of the factors which prompted the Sąd Najwyższy (Supreme Court) to find that the SC Disciplinary Chamber is not an independent and impartial tribunal for the purposes of Article 47 of the Charter was its dependence on the executive, and in particular the influence of the Minister for Justice (who is at the same time the Public Prosecutor General) on its composition.

16 In the light of the above circumstances as well as the fact that both the present case and Case II DSI 67/18 concerned the same advocate, the present case was initiated at the request of the First Deputy of the Public Prosecutor General and the charges against the defendant concern his statements regarding the actions of the public prosecutor's office, the Disciplinary Court sees a risk that even if the measures referred to in Questions 2 and 3 are applied, that is, even if the Disciplinary Court accepts that an appeal on a point of law is inadmissible in the present case and any objections to a refusal to hear such an appeal on a point of law should be referred to the SC Criminal Chamber, the appeal on a point of law brought by the Public Prosecutor General (Minister for Justice) will still be heard by the SC Disciplinary Chamber. That possibility raises the question of how the Disciplinary Court, if it deems that risk to be real, may (or should) proceed to prevent such a situation and thus ensure that the standard arising from Article 47 of the Charter is maintained in the present case.

17 The fact that the Minister for Justice acts as a special body justifies consideration of whether, in the event of the above risk becoming real, the Disciplinary Court should ignore the appeal on a point of law even though it is prima facie admissible under the applicable provisions of national legislation. Otherwise, we may be faced with a situation in which de facto the same body — acting firstly as the Minister for Justice, secondly as the Public Prosecutor General and thirdly as the body which actually determines the composition of the SC Disciplinary Chamber, which Chamber subsequently grants him the power to lodge an appeal on a point of law which is inadmissible under the relevant statute, and will ultimately hear his appeal on a point of law — will prevent the case in question from being heard by an independent and impartial tribunal as required by Article 47 of the Charter.

WORKING DOCUMENT