THEMIS 2021 GRAND FINAL

REPORT ON THE LEGAL PRACTICAL QUESTION

TEAM PORTUGAL

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As regards the first question relating to the procedure to be followed by the Court of Justice of the European Union, the following should be said.

1. Admissibility of the preliminary ruling

Judge Arno, single-judge formation in the Regional Court of Themisburg, to whom the appeal procedure in the case of Franz K. was assigned, after examination of the case, raised a doubt as to the compatibility of the domestic law of the Kingdom of H. and practice thereof as to whether the national court could continue the criminal proceedings in absentia. This led Judge Arno to decide to refer the preliminary question to the Court of Justice of the European Union to hear the case. Judge Arno also raised the issue of incompliance of domestic law with the European standards of the fair trial regarding the police incitement. Finally, Judge Arno alluded to the fact that by referring the matter to the High Court, the question would be heard by a newly created extraordinary chamber, which is composed of 9 judges, who were selected by the Judicial Council, which is also composed of judges, but who were elected by Parliament, and therefore Judge Arno believes that the extraordinary chamber does not fulfil the requirements to be considered as a Court under article 47 of the Charter of Fundamental Rights of the European Union.

According to article 267 of the Treaty of the Functioning of the European Union, the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

The request for a preliminary reference was referred by the Regional Court in Themisburg to the Court of Justice of the European Union on 10 May 2020 and the criminal proceedings were suspended.

Taking into consideration the elements provided in the practical case, it is presumed that the request for preliminary ruling complied with all the legal formalities provided for in s 93 et seq. of the Rules of Procedure of The Court of Justice and art. 23 of Protocol (no. 3) on the Statute of the Court of Justice of the European Union.

2. Admissibility of the request for withdrawal of the preliminary ruling

As regards the request for withdrawal of the preliminary ruling, in accordance with art. 100 of the Rules of Procedure of The Court of Justice, the request for a preliminary ruling may

be withdrawn by the referring court or tribunal, but such a request will be taken into account only if the time limit referred to in art. 23 of Protocol (No. 3) on the Statute of the Court of Justice of the European Union has not yet been exceeded. This means only if the decision suspending its proceedings and referring a case to the Court of Justice has not yet been notified to the parties, the Member States, the Commission, and the institution, body, office or agency of the Union which adopted the act, the validity or interpretation of which is in dispute.

Taking into consideration the above, and that it does not appear from the practical case that the notification of Article 23 has been complied with, it was concluded that, in procedural terms, it is still possible for the court which submitted the request to withdraw it.

A different question is whether Judge Jana G. had standing to decide to request the return of the request for a preliminary ruling issued by Judge Arno without any examination of the merits.

In this regard, on May 25, 2020, Mr. Lichttrager, who is both Prosecutor General and Minister os Justice of Kingdom of H, dismissed the President of the Court in Themisburg before the expiration of his 4-year term, which was only ending in December 2022, a decision which is not appealable, and which was not reasoned. Without prejudice, Mr. Lichttrager said that he was disappointed with the Regional Court in Themisburg for having proved ineffective in preventing the actions of certain judges, which he called rebellious, and as undermining the fundamental principles of the country's internal legal system.

On the same day, the Minister of Justice seconded Judge Jana G., who was serving in the Themisburg District Court, to the Themisburg Regional Court, which is a higher court, for a 4-year term. In that same decision, Jana G. was appointed President of the Themisburg Regional Court. Under Themisburg domestic law the Minister of Justice can second a judge to a higher court for up to two years or indefinitely, and such secondment can be terminated at any time without cause and such a decision is not subject to appeal.

Independence is the fundamental element of judicial authority in a state under the rule of law (Article 6 (1) ECHR)[1] - so that they can properly perform their specific function, exclusively through the principle of separation of powers. As a servant of society, the Court has

[1] In the past years, the ECtHR issued decisions highlighting that for an "institution" - such as a prosecutor's office - to be considered as a "tribunal" under article 6 (1) the ECHR, must fulfill some requirements. For example, in the Case of Vasilescu vs Romania, 22.05.1998, the ECHR concluded that "*The Court reiterates that only an institution that has full jurisdiction and satisfies several requirements, such as independence of the executive and also of the parties, merits the description "tribunal" within the meaning of Article 6 § 1*" (paragraph 41), and in Case of Ringeisen v Austria, 16.07.1971, the ECtHR concluded that"*… the Court observes that the Regional Commission is a "tribunal" within the meaning of Article 6, paragraph (1) (art. 6-1), of the Convention as it is independent of the executive and also of the parties, its members are appointed for a term of five years and the proceedings before it afford the necessary guarantees*…" (§ 95)

a central role in upholding human rights and must perform its duties with respect for the presumption of innocence and the right to a fair trial and equality of arms. It is therefore essential to guarantee their independence and effective autonomy so that they can act with complete fairness, impartiality and objectivity in a decision that will make a difference in the decision to be made here.[2]

The case law of the CJEU, has stressed that "independence requires that there must be statutory rules and an institutional framework capable of ensuring that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction from the executive in a particular case" (Process C-509/18, no 52).

The concept of "judicial authority" includes not only judges or judicial bodies, but also all the authorities that participate in the administration of criminal justice and whose "*action is taking place with a judicial review that tends to be immediate*" (Case C-508/19, paragraph 93 and C- 509/18, paragraph 29)[3]. Moreover "[t]*he independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267.º TFEU, in that, in accordance with the settled case-law referred to in paragraph 38 above, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence"* (Case C-64/16, paragraph 43; also, Case C-216/18, paragraph 54).

Furthermore, the CJEU jurisprudence has stated that for a national authority to be considered a "judicial authority" it must exercise its functions with total autonomy, *"without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever and that it is thus protected against*

[2] As stated by ECtHR in several cases, the ECHR also applies to the pre-trial stage, such as the inquiry or the investigation. See the case of Imbrioscia v. Switzerland, 24.11.1993, § 36, case of Dvorski v. Croatia, 20.10.2015, § 76, and the case of Ibrahim and others v. The United Kingdom, 13.09.2016, § 253. Also, Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial, in https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

[3] The paradigm of understanding if the Public Prosecutor is considered a judicial authority is changing. Although there is still little jurisprudence, the CJEU in cases C - 324/17 and Case C-584/19 has decided that "Article 1(1) and Article 2(c) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters must be interpreted as meaning that the concepts of 'judicial authority' and 'issuing authority', within the meaning of those provisions, include the public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order" (Case C- 584/19). It is a fact that there is a difference between the EAW and the EIO, that is, the EIO is less intrusive in essence therefore its more likely to not violate the guarantees enshrined in Article 6 of the Charter.

external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions" (Joined Cases c-508/18 and C-82/19 PPU paragraph 87; see, also, Case C-64/16, paragraph 44 and Case C-216/18 paragraph 63).

With regard to the assessment of the legality of the actions of the Prosecutor General, namely with regard to the filing of the extraordinary appeal to the High Court on the request for referral and removal from office of the President of the Court in Themisburg, we must say that the same considerations made above with regard to compliance with the requirements of independence and impartiality also apply here.

Since we are dealing with a Prosecutor General who is also the Minister of Justice of the Kingdom of H., it is clear and evident that there is no neutrality or external pressure on him.

See the CJEU, C-363/11, Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v. Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou, of 19 December 2012, paragraphs 19-31, is in this sense.

The administrative organization and hierarchical systems of any Member State that do not meet these requirements will not guarantee all the guarantees necessary to be considered a "judicial authority", particularly all those related to independence[4].

In conclusion:

Given the facts of the case and the ECtHR and CDEJ jurisprudence, it must be concluded that Judge Jana G. does not have legitimacy to request the withdrawal of the request for a preliminary ruling, nor can she even be considered a judicial authority.

3. Incitement or entrapment

Drug trafficking is a crime that presupposes the investigation of the various actors involved in the act of trafficking (i.e., producer, distributor, and seller). Organized crime – like the ones that involve drug trafficking- require a more complex investigation methods such as undercover investigations. Without prejudice to the special attention that the fight against organized crime must have, its investigation cannot mean the violation or restriction of the fundamental rights of suspects or defendants.

[4] Given the disparity in understanding concepts and internal systems in the various Member States that call into question the general principles and the rights, freedoms, and guarantees of a fair and independent judicial system, the Consultative Council of European Prosecutors, in 2018, through the Opinion number 13, sought, in the light of the various instruments already referred, to standardize global norms and principles of independence, responsibility and ethics of prosecutors, work advisors and the attitude with which they should act. See, Consultative Council of European Prosecutors (CCPE), Opinion No. 13(2018) of the CCPE, «Independence, accountability, and ethics of prosecutors», Strasbourg, of 23 November 2018, available in https://rm.coe.int/opinion-13-ccpe-2018-2e-independence-accountability-and-ethics-of-pros/1680907e9d.

This said, although covert actions are not prohibited by law, for them to be carried out in compliance with the fundamental principles and rights inherent in criminal proceedings - namely, the fundamental right to a fair trial (article 6.º of European Convention of Human Rights, henceforce, ECHC, and article 47.º of Charter of Fundamental Rights European Union, henceforce, CFREU) - such operations must be carried out according to procedures predetermined by law and in compliance with case law.

Let us open a small parenthesis to point out that although Themisburg is a member state of the European Union, since the European Union has acceded to the European Convention on Human Rights, the jurisprudence of the ECtHR applies to Themisburg. Additionally, since article 6 ECHR and article 47 CFREU have the same scope, the case law of the ECHR is an additional tool for the judges of the EU Court of Justice to decide whether a certain situation violates fundamental rights, such as the fundamental right to a fair trial.

According to ECtHR case law, the judgment as to whether a particular covert action violates the right to a fair trial presupposes knowing:

- Whether the reasons that led to the covert action were objective and well-founded suspicions that the suspect has been involved in or has committed or is about to commit a crime[5].
- Whether the criminal's actions were so influenced by the undercover police officers that but for their actions the suspect would not have committed the crime or would not have been willing to commit it[6].
- Whether the undercover action was duly authorized and supervised by the competent authority, which must be a judicial authority[7].

Also, as was argued in *Bannikova v. Russia* (no. 18757/06, § 58, 59, 60 and 61) to analyze an *agent provocateur* claim, it is essential to conclude if the principle of adversarial proceedings and equality of arms was respected, specially, if the defendant was able to access information held by authorities. As the ECtHR concluded "… *it is a common feature of many agent provocateur cases that the applicant is precluded from raising a plea of incitement* ***because the relevant evidence has been withheld from the defense, often by a formal decision on grounds of public-interest immunity granted to particular categories of evidence***.". For all intents and purposes, evidence is considered to fall under the category of "public interest" if its

[5] *Furcht v. Germany*, no. 54648/09, § 51
[6] *Ramanauskas v. Lithuania*, *no. 74420/01*, *§55* and *Morari v. the Republic of Moldova*, no. 65311/09, § 31.
[7] *Matanović v. Croatia*, no. 2742/12, §126 and *Teixeira de Castro v. Portugal*, judgement 09.06.1998, §35, §36, and §38

disclosure might jeopardize national security, the fundamental rights of others involved in the case, or the need to keep certain investigative methods secret[8].

Reverting to the specific case of Franz K., the criminal proceedings started on information - as far as is known anonymous - obtained by the Themisburg authorities, that Franz K. was trafficking cocaine via his company's trucks. As a result of this, the Themisburg police authorities contacted Miss G. - a police informant - to approach Franz K., with a view to obtaining evidence. Miss G. received EUR 100,00 for her work. It is unknown who informed the Themisburg authorities and whether they presented evidence to support their suspicions. Furthermore, although the prosecutor's office authorized the police authority to carry out a covert action, it was to be carried out by a police officer and not by a paid informant.

In January 2018 Miss G. told Franz K. that she could introduce him to a dock worker at the port of Themisburg, who could help him smuggle marihuana. The said worker was an undercover police officer, who also received EUR 100.00 for his services. It should be noted that between January and August 2018, Franz K. showed no interest in meeting the dock worker, and only did so in August 2018 after much insistence by Miss G.. The events between January and August 2018 show that Franz K. was, on several occasions, impelled by Miss G. to develop a drug trafficking scheme through the port of Themisburg. It being foreseeable that Franz K. would not have trafficked marihuana had it not been for Miss G.'s influence. This was because (i) the initial accusation was that Franz K. was dealing cocaine, when in fact he was not - a fact that he told Miss G. from the start -, (ii) Franz K. had told Miss G. that he had some interest in marihuana, but never stated or demonstrated that he dealt in marihuana, and (iii) Franz K. only agreed to meet the dock worker after months of insistence by Miss G.

After meeting the port worker, Franz K. told Miss G. that he would arrange a shipment of marihuana through a contact he had in Southern Europe, without having such a contact. The non-existence of contacts and/or an organized trafficking network eventually came to the attention of the police during the covert action. However, Miss G., with the knowledge of the police authorities, continued to exert pressure on Franz K. to make a shipment of marihuana. The pressure exerted by Miss G. against Franz K. and the knowledge by the police authority that the latter did not have the necessary contacts to smuggle marihuana via the port of Themisburg, shows that the initial suspicions about Franz K. were not based on objective

[8] *Jasper v. the United Kingdom*, no. 27052/95, §§ 51-53 and *S.N. v. Sweden*, no. 34209/96, § 47.

evidence and that even though the police knew that there was no such evidence, they decided to continue the covert action against him.

Finally, when in September 2019 Franz K. was arrested for trafficking marihuana, with the assistance of Joseph K. and Marc de W. (known to the latter), we have no doubt that he did so because he had been pressured for months by Miss G. This circumstances, coupled with the fact that the initial suspicions were not supported by objective evidence, leads us the conclusion that the covert action was not legitimate and, consequently, that it violated Franz K.'s right to a fair trial (as this fundamental right is foreseen in article 47 CFREU and article 6 ECHR).

The police incitement seems is so obvious, that any Franz K.'s lawyer would be able to argue for the nullity of the criminal proceedings, founded on police incitement. However, as it appears from the case, Franz K.'s lawyer was unable to attend the questioning and, nevertheless, the officer in charge of the case continued with the questioning.

4. Right to a lawyer and to be presence at trial

Article 47 §2 CFREU provides for the defendant's right to be advised, defended, and represented in court by a lawyer. Article 47 §3 CFREU reinforces the right to legal assistance by providing that if the defendant does not have sufficient resources to be assisted by a lawyer, the member states must create lawyer assignment mechanisms for defendants. The key idea is that the defendant is advised and represented in court by someone qualified, otherwise he will not be able to exercise his right of defense. In certain situations, the defendant may waive the presence of a lawyer, but must do so expressly and provided he or she is informed in advance of the significance of the waiver[9].

Franz K. requested the presence of his lawyer and, when informed that counsel could not attend, remained silent for not being accompanied by his lawyer. Franz K.'s right because representation by a lawyer is one of the pillars of the right to a fair trial. Otherwise, Franz K. could make statements that were incriminating and prejudicial to the preparation of his defense.

Article 8 § 1 of Directive (EU) 2016/343, foresees the right of defendants to be present at their trial, and §2 of the said article establishes that Member States may issue a decision on the guilt or innocence of a accused that were absent from trial, if "the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or the

[9] *Case of Dvorski v. Croatia, no. 25703/11*, § 100.

suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State."

As already mentioned, Franz K.'s lawyer was not present at the interrogation, and to the best of our knowledge, the state of Thesmiburg has not appointed a lawyer for Franz K, remaining unknown whether Franz K.'s interpreter explained to Franz K. the consequences of not attending the trial. The absence of information on these specific points and the fact that Frank K. did not waive his right to be assisted by a lawyer, lead us to conclude that article 47 2 and 3 and article 6 were violated.

5. Right to interpretation

In addition to the absence of the lawyer, Franz K. does not speak the language of H. There was no information as how to the interpreter was selected and how that interpreter´s competence was verified. That does not meet the standards of the EU law, the ECHR as the case-law of the ECtHR.

According with the Directive 2016/64/EU, the person suspected or accused who do not speak or understand the language of the criminal proceedings concerned should be provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings – Article 2 (1).The interpretation provided shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence – Article 2 (8). Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) – Article 5 (1). Member States should ensure that control can be exercised over the adequacy of the interpretation and translation provided when the competent authorities have been put on notice in a given case – Recital 24. The translators and interpreters must be independent and appropriately qualified – Article 5 (2).

The Article 6 § 3 (e) of the ECHR statues that "Everyone charged with a criminal offence has the following minimum rights: ... (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.". The ultimate guardians of the fairness of the proceedings – encompassing, among other aspects, the possible absence of translation or interpretation for a non-national defendant – **are the domestic courts** (ECtHR: Cuscani v. the United Kingdom, § 39; Hermi v. Italy [GC], § 72; Katritsch v. France, § 44), what did not happen with the present case. In view of the need for the right guaranteed by Article 6 § 3(e) to be practical and effective, **the obligation of the competent authorities (the**

investigative body, the Public Prosecutor and the Court) is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided (ECtHR: Kamasinski v. Austria, § 74; Hermi v. Italy [GC], § 70; Protopapa v. Turkey, § 80).

The right to a quality interpretation is indispensable to an effective defence. Defects in interpretation can create repercussions for other rights and may undermine the fairness of the proceedings as a whole (ECtHR: Baytar v. Turkey, §§ 50, 54-55).

Also, the letter of notification sent to Franz K. was not translated to the language of A. Even if he the notification, he could never understand it. Article 6 § 3 (e) ofício the ECHR guarantees the right to the free assistance of an interpreter for translation or interpretation of all documents or statements in the proceedings which it is necessary for the accused to understand or to have rendered into the court's language in order to have the benefit of a fair trial (ECtHR: Luedicke, Belkacem and Koç v. Germany, § 48; Ucak v. the United Kingdom (dec.); Hermi v. Italy [GC], § 69; Lagerblom v. Sweden, § 61).

The proceedings in the Kingdom of H. violated the Franz K. rights to a proper interpretation a defence in the whole case, and so, the right to a fair proceeding, guaranteed by Article 47 of the Charter of Fundamental Rights of The European Union.

The right to a fair trial takes many forms, including the right to have access to the evidence available in the case file and to have it obtained in accordance with legal requirements, the right to be assisted by counsel, to have an interpreter and not to be tried in absentia if the legal requirements for such a trial are not met.

In light of the above, it is clear that the criminal proceedings against Frank K. did not respect the fundamental right to a fair and just trial.