



EXCEPTIONAL POWERS, OFFENCES AND IMMUNITIES IN CENTRAL BANKING

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I.- ORIGINAL LEGAL CONSTRUCTIONS

The criminal actions of the Governor of the Bank of Latvia have given rise to two very important rulings of the Court of Justice of the European Union in recent years. The first, of 26 February 2019, cases C-202/18 and C-238/18, admits that State acts can be challenged before the Court of Justice, which is no mean feat. The second, much more recent, of 30 November 2021, case C-3/20, deals with immunity from jurisdiction in the European System of Central Banks and the European Central Bank. It recognises this immunity only for official actions.

These two judgments are noteworthy for other technical details and are undoubtedly good examples of the interpretation and creation of EU law by the courts. Case law as a source of law, whatever one may say, is a constant in Western legal systems. Here we have two good references for an original legal construction such as the European Banking Union. Let us move on from there.

II.- EXCEPTION TO THE JUDICIAL DIVISION OF JURISDICTION: COURT REVIEW OF STATE ACTS

The Governor of the Bank of Latvia was arrested in February 2018 for allegedly committing criminal offences and a criminal investigation was opened. He was released two days after the arrest but was suspended from his duties as Governor on the same day. In June 2018, he was charged with passive bribery and bribery by a Latvian bank.

Both the interested party and the ECB appealed to the Court of Justice against the suspension of the Governor's tasks on the basis of Article 14.2 of the Statute of the ESCB and of the ECB. The Court of Justice, Grand Chamber, on 26 February 2019, in cases C-202/18 and C-238/18, ruled on the challenge to this State act ordering the temporary suspension of the Governor of the Central Bank of Latvia.

The Court of Justice, it will have been noted by now, reviewed the legality of an act of state law and not of the European Union, and ultimately annulled the (suspension of office) decision insofar as it prevented the Governor from exercising his functions.

The action for annulment, which is provided for in Article 14.2 of the Statute of the ESCB and of the ECB, as the Court of Justice has already said, is an exception to the general division of jurisdiction between the judges of the Member States and the judge of the European Union. It should be understood as the product of an original legal construction such as today's European Banking Union.

The Court recognises the exceptional nature of this direct appeal against a State act, which is also justified by the hybrid status of the Governor of a central bank, who is a State authority but at the same time part of a management body of the ECB. This specific direct appeal under Article 14.2, which is one of the main guarantees of the Governor's independence from political pressure, must be added to the system of appeals established by the Treaties.

Latvia, it appears from a reading of the Judgment, shielded by the secrecy of the criminal investigation, failed to provide information and evidence or did so late and poorly, which may explain the content and tone of some parts of the Judgment. This ruling reportedly meant that in practice the Governor of the Bank of Latvia remained in office until 21 December 2019.

III.- IMMUNITY FROM JURISDICTION

Investigations into the Governor's actions continued in Latvia (with evidence of a payment by a bank for a leisure trip to the Governor of not much more than EUR 7,000, and a charge for advice to the same bank of some EUR 500,000, of which he allegedly received half). The Lithuanian court, in the context of the criminal proceedings, referred certain questions for a preliminary ruling. On 30 November 2021, the Court of Justice of the European Union (Grand Chamber) ruled in Case C-3/20. In connection with the criminal conduct of the Governor of the Bank of Latvia, it referred questions to the Court for a preliminary ruling on the immunity of central bank Governors as members of the ECB.

The Court of Justice, as it had already stated in the previous judgment, insists on the functional duality of the Governor of a central bank, who is also a member of an organ of a Union institution such as the ECB. It points out that the staff of the ECB enjoys the same immunity from jurisdiction as the staff of the other institutions of the Union (Protocol on the Privileges and Immunities of the European Union). This immunity covers acts performed in an official capacity and does not lapse after the termination of their duties, logically in those cases.

The Court recognises that privileges, immunities and facilities are granted to employees or agents of the Union exclusively in the interests of the Union. The Union institution concerned, in this case the ECB, must waive the immunity if it is not contrary to the interests of the Union. It is for the European Union Institution concerned, never for the State authority, to assess whether the waiver of immunity is contrary to those Union interests.

There is a shared competence between the EU institution and the State authorities to assess whether the action being investigated or judged, in this case of the Governor of the Bank of Latvia, has been carried out in an official capacity on behalf of the Union. Such official capacity presupposes the participation of the person claiming immunity in the exercise of the functions of the institution to which he belongs.

Passive bribery and money laundering, which were among the offences with which the Governor was charged, "fall necessarily outside the bounds of the duties of an official or other servant of the European Union (...) and cannot be considered acts carried out by those persons in their official capacity". In this type of case, where it is easy to establish that the offence was not manifestly committed by the official or servant of the Union in the performance of his or her duties, the State authority can assess "only a cursory assessment of the truth of that criterion" and continue the proceedings against the offender, since immunity from jurisdiction does not apply.

If the State authority has doubts as to the official character, it must consult the EU institution and, if necessary, apply to that institution for a waiver of immunity. The waiver of immunity, the Court insists, must be granted unless it is shown that the interests of the Union preclude it. The refusal could be challenged by the State in accordance with Article 263 TFEU.

The Court points out that, in practice, infringement proceedings could also be brought under Article 258 TFEU if the State does not consult the EU institution if it has reasonable doubts as to the official or unofficial nature of the conduct of the person concerned.

The scope of that immunity is determined by the Court of Justice itself, since it is for the Court to give a uniform interpretation of the legal order of the European Union. It considers that it is not opposed to its beneficiaries being tried and sentenced by the courts and that an excessively broad interpretation of immunity from jurisdiction would be a quasi exemption from criminal liability which would unduly impede the exercise of criminal justice. It stresses, however, that the waiver of immunity must be requested from the EU institution concerned as soon as the State authority becomes aware that offences have been committed in the course of official acts, if they are acts carried out in an official capacity.

Immunity from jurisdiction, he insists, is not applicable in the context of criminal proceedings in respect of acts that have nothing to do with the exercise of official duties. The protection of this immunity is functional and relative in scope.

In conclusion, the Court of Justice, after going into the distribution of competences, while being quite respectful of state competences, is not very clear about when official action is taken or when immunity does not apply. It does make it clear, however, that the interpretation of this immunity must be extremely restrictive for these purposes.