AG Rantos on subsequent application for provisional/protective measures lodged before a court not having jurisdiction as to the substance of the matter in the case TOTO, C-581/20

At least from the perspective of private international law, this Thursday can easily go down in history as one of the busiest days in the Court of Justice agenda. Its complete outline can be found here, due to courtesy of Marta Requejo Isidro. Stay tuned also for our next updates on the cases of this morning.

The present post concerns the Opinion presented by AG Rantos in the case TOTO, C-581/20. At the request of the Court, the analysis provided for in the Opinion is limited to the second preliminary question on the interpretation of Article 35 of the Brussels I bis Regulation. The second question reads as follows:

> *After the right to make an application for provisional/protective measures has been exercised and the court having jurisdiction as to the substance of the matter has already ruled on that application, is the court seised of an application for interim relief on the same basis and under Article 35 of [the Brussels I bis Regulation] to be regarded as not having jurisdiction from the point at which evidence is produced that the court having jurisdiction as to the substance of the matter has given a ruling on that application?*

In essence, the question seeks to establish whether a Bulgarian court not having jurisdiction as to the substance of the matter is precluded from pronouncing provisional/protective measures under Article 35 of the Brussels I bis Regulation in a situation where a Polish court having jurisdiction as to the substance of the matter has already given a ruling on an application for identical

provisional/protective measures and rejected the application.

In brief, AG Rantos argues that in a situation described in the preliminary question the court not having jurisdiction as to the substance of the matter should not pronounce the provisional/protective measures.

In general terms, the Opinion contends that the rules on litispendence provided for in Article 29 of the Brussels I bis Regulation do apply in the context of proceedings for provisional/protective measures. Such finding of a general nature seems to suggest that the court subsequently seized under Article 35 of the Regulation with an identical application for provisional/protective measures should not give a ruling on that application (point 50).

The Opinion then goes on to elaborate on the more specific elements of the case at hand which seemed to inspire the second preliminary question: firstly, the impact of the choice of court clause in favour of the Polish courts on the applicability of Article 35 of the Regulation (in other terms: whether the Polish courts have exclusive jurisdiction also as to the provisional/protective measures); secondly, the actual connection between the measures sought and the territory of Bulgaria (the question being left open for the referring court to asses, point 74); thirdly, the relevance, before the Bulgarian court, of the Polish court decision refusing the provisional/protective measures (point 54).

Concerning the last element, AG Rantos observes that it is not clear whether the ruling of a Polish court refusing to grant provisional/protective measures is final or not (point 76). Thus, he elaborates on these two different hypothesis. **In essence, according to the Opinion, the court subsequently seized should not give ruling on the application for provisional/protective measures [either because in a mutual trust oriented manner it should refrain from doing so because such ruling would be irreconcilable with a previous definitive ruling handed down by a Polish court (point 79) or – in the absence of such definitive ruling – because the rules on litispendence require the court subsequently seized to decline jurisdiction in favour of court previously seized (point 88)].**

The Opinion is available here (no English version so far).