CJEU on provisional/protective measures requested against a public authority (potentially and/or allegedly enjoying some form of immunity) in the case TOTO, C-581/20

Back in September, AG Rantos presented his Opinion in the case TOTO, C-581/20. As reported previously, at the request of the Court, the Opinion confined itself solely to the second preliminary question on the interpretation of Article 35 of the Brussels I bis Regulation.

In its judgment delivered today, the Court addresses all three preliminary questions of the referring court. These questions concern the concept of "civil and commercial matters" in the sense of Article 1(1) of the Brussels I bis Regulation (first preliminary question), subsequent application for provision/protective measures lodged before a court not having jurisdiction as to the substance of the matter (second preliminary question) and EU law- or purely national law-dependent modalities for ordering such measures (third preliminary question).

Factual background and context of preliminary questions

The questions referred for a preliminary ruling are raised in the context of a contract concluded between two Italian companies and the Director of a Polish central authority for road management/construction, acting in the name and on the behalf of the Polish State Treasury (in essence, the State itself; hereinafter referred to as "the public authority"). Under the said contract, concluded following a public procurement procedure, the companies are supposed to

construct a public road in Poland.

The contract itself provides for some contractual penalties, in particular for its late performance by the companies. Guarantees are provided by a Bulgarian insurance company in order to cover the potential (non-)fulfillment of the obligations assumed by these companies.

Before a Polish court, the companies bring an action against the public authority for a negative declaration that, in substance, aims to oblige the defendant not to make use of the guarantees. The companies also request provisional/protective measures. Their request is rejected.

In parallel with the procedures pending before the Polish court, they apply for analogous measures before a Bulgarian court. The first instance court rejects the application. The second instance court orders the measures and the public authority brings an administrative appeal before the referring court, the Supreme Court of Cassation of Bulgaria.

In its administrative appeal, the public authority contests, in particular, the applicability of the Brussels I bis Regulation in the interim proceedings pending in Bulgaria. It argues that these proceedings do not fall within the scope of the concept of "civil and commercial matters" in the sense of Article 1(1) of the Regulation (first preliminary question). In its request for a preliminary ruling, the referring court also asks the Court to provide guidance as to the interpretation of Article 35 (second and third preliminary questions).

Concept of "civil and commercial matters" and its interplay with immunity from jurisdiction

Echoing the inquires of the public authority, by its first question the referring court seeks to establish whether the proceedings pending before the Bulgarian courts fall within the scope of the concept of "civil and commercial matters" and, as a consequence, within the scope of the Brussels I bis Regulation.

The Court answers this question in the affirmative: in particular, the Court reaffirms the finding made in its judgments in Rina, C-641/18 and Supreme Site, C-186/19, according to which a public purpose of certain activities (here, it

seems: the conclusion of the contract for a construction of a public road and potentially its performance) does not, in itself, suffice to exclude a case from the scope of application of the Brussels I bis Regulation (paragraphs 39 and 41).

In its answer to the first preliminary question, the Court also clarifies further the interplay between that concept of "civil and commercial matters" and the immunity from jurisdiction.

In fact, under Article 393 of the Bulgarian Code of Civil Procedure (BCCP), the interim measures for securing a pecuniary claim brought against, inter alia, the State and public bodies are not permissible. For the Court, that provision seems to establish an immunity from jurisdiction in favour of some defendants: States and public authorities. However, referring the judgment in Supreme Site, C-186/19 on the immunity from execution (more precisely, its point 62, which refers to point 72 of the Opinion in that case), the Court indicates, in essence, that the immunity from jurisdiction does not automatically exclude an action brought before a national court from the scope of the concept of "civil and commercial matters" (paragraph 44).

(on a side note: conversely, if this is not the case and the Bulgarian provision does not provide for an immunity from jurisdiction, the provision in question may be potentially read as providing for a material immunity, on the level of substantive law; see also the third preliminary question outlined below; other residual interpretation could view the Bulgarian provision as providing for an immunity from jurisdiction departing from what is required under public international law, nothing, however, supports that reading of the provision at hand).

Subsequent application for provisional/protective measures

By its second preliminary question, the referring court 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 his Opinion, AG Rantos argued 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 and must decline jurisdiction.

By contrast, for the Court, a court of a Member State not having jurisdiction as to the substance of the matter, seized with a subsequent application for provisional/protective measures, is not obliged to declare that it lacks jurisdiction to rule on the application for the measures in question (paragraph 60).

[Update October 7, 2021: in his contribution published on EAPIL Blog, Gilles Cuniberti provides a detailed analysis of the second preliminary question and does more justice to the contrast between the Opinion and the judgment; I am therefore happy to refer to his post].

Provisional/protective measures as a matter of procedural autonomy ?

By its third preliminary question the referring court seeks to establish whether the application for provisional/protective measures has to be examined in the light of EU law or purely in the light of the national law of the court seized with the application.

Interestingly, also this question is inspired by Article 393 of the BCCP, under which interim measures for securing a pecuniary claim brought against, inter alia, the State and public bodies are not permissible. Thus, applied in the proceedings before the Bulgarian courts, this provision has the potential of barring any application for interim measures against the public authority.

However, the referring court considers that examining the application for provisional/protective measures in the light of EU law would mandate it to benchmark the national provisions on such measures against the principle of effectiveness and, potentially, to disapply Article 393 of the BCCP (paragraph 25).

In other terms, the referring court seems to frame the question as one on the procedural autonomy and its limitations. If this assumption is correct, the

provisions of the BCCP would govern the exercise of the right provided for in Article 35 of the Brussels I bis Regulation. Logically, it seems that the assumption is based on a consideration that the role of Article 35 of the Regulation goes beyond providing for an alternative forum before which an application for provisional/protective measures can be made: it provides an alternative "effective" forum or, if one would wish to go even further, it provides a right to request (and obtain) some minimal provisional/protective measures before a court not having jurisdiction as to the substance of the matter.

For the Court, this does not seem to be the case. Under Article 35 of the Regulation a court of a Member State not having jurisdiction as to the substance of the matter may order measures "available under the law of that Member State". This provision ensures the availability of an alternative forum to the applicant, without guarantying that provisional/protective measures themselves will be also available to him/her (paragraph 64).

Before drawing a final conclusion on the merits of the aforementioned assumptions/consideration: while the issue pertaining to the principle of effectiveness ("principe d'effectivité") has been directly invoked by the referring court, it is true that in the present case the Court has not been expressly called to pronounce itself on the effectiveness ("effet utile") of Article 35 or on the right to effective judicial protection guaranteed under Article 47 of the Charter. Thus, at least for some it may be still a question of debate whether "effet utile" of Article 35 confines itself to the pure availability of an alternative forum. Either way, that debate could benefit from taking into account point 20 of the judgment in Bier, C-21/76 and point 49 of the judgment in AMS Neve e.a., where the Court considered that the effectiveness ("effet utile") of these provision calls for their interpretation under which they do provide the alternative fora, that do not coincide with those available for the claimants under general rules of jurisdiction.

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