



## PRESS RELEASE No 202/22

Luxembourg, 15 December 2022

Advocate General's Opinion in Joined Cases C-181/21 and C-269/21 | G. and Others (Appointment of judges to the ordinary courts in Poland)

### Advocate General Collins: the requirement of prior establishment by law applies to all Member State courts and tribunals

*That principle applies irrespective of the level at which those courts and tribunals exercise jurisdiction in a national legal order*

In separate references for preliminary ruling, Regional Courts in Katowice and Kraków (Poland) asked the Court to rule upon the compatibility with EU law of procedures to appoint judges to the ordinary courts in Poland.

In Case C-181/21, Judge A.Z., who had been appointed to the Regional Court in Katowice notwithstanding that the assembly of representatives of judges had withheld its opinion on his candidature due to concerns about the status of the Krajowa Rada Sądownictwa (National Council of the Judiciary; KRS) and the manner in which KRS operated, was assigned to sit in a formation of three judges.

In Case C-269/21, Judge A.T. had been appointed as a judge of the Regional Court in Kraków at a time when the opinion of the relevant assembly of judges was no longer required. The College of that Regional Court, half of whose members had been appointed by the Minister for Justice, assessed her candidature. Judge A.T. participated in a formation of three judges that had dismissed an application for interim measures and referred the main proceedings back to the referring court.

Questions for preliminary ruling from these two courts ask the Court to interpret the principle of prior establishment by law of a court or tribunal recognised by the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union. The referring courts are uncertain as to whether a court formation complies with that principle where certain of its members were appointed (i) under a procedure that excluded the participation of judicial self-governing bodies; (ii) on foot of a resolution of the KRS, which consists, for the most part, of members chosen by the legislature; and (iii) where unsuccessful candidates in the respective appointment procedures had no right of appeal to a court that fulfilled the requirement that it be previously established by law.

In his Opinion, delivered today, Advocate General Anthony Michael Collins finds that **the requirement of prior establishment by law applies without distinction to all Member State courts and tribunals**, irrespective of the level at which they exercise jurisdiction in a national legal order.

Invoking the Court's case-law<sup>1</sup>, Advocate General Collins confirms that, in order to find a violation of that requirement, **it is necessary to make an overall assessment of a number of factors which, taken together, give rise to reasonable doubts, in the minds of individuals, as to the independence and impartiality of the**

<sup>1</sup> Judgment of 29 March 2022, *Getin Noble Bank*, [C-132/20](#) (see Press release No [52/22](#)), paras 123-123 and the case-law cited therein.

## **judges sitting on that tribunal.**

Advocate General Collins also examines the three factors that the referring courts put in issue.

First, **the lack of participation of a judicial self-governing body in the appointment procedure will not, on its own, suffice to undermine the legality of judicial appointments.** Notwithstanding the diminished role of judges' assemblies and the enhanced role of the KRS in the appointment procedure since 2018, the Advocate General observes that, pursuant to the Constitution of the Republic of Poland, the KRS is the guardian of the independence of courts and judges and not any assembly of judges or court college. In line with the Court's case-law<sup>2</sup>, the fact that the Minister for Justice had selected half of a court college does not *per se* fail to comply with the standard set out in the second subparagraph of Article 19(1) TEU.

Second, as for the KRS's role, Advocate General Collins relies on Court case-law<sup>3</sup> according to which **the involvement of a body such as the KRS in the appointment procedure does not, in itself, give rise to doubts as to the independence of the judges under that procedure.** That conclusion may be different where the participation of such a body, combined with other relevant factors and the conditions under which the judges were selected, are capable of giving rise to such doubts.

Third, as for the possibility to challenge the procedure for the appointment of judges to the ordinary courts, in the Advocate General's view, **the jurisdiction conferred upon the Extraordinary Review and Public Affairs Chamber of the Supreme Court<sup>4</sup>, to review KRS resolutions in that respect has been extensively and unlawfully restricted.** Following the Court's reasoning in Case C-824/19<sup>5</sup>, Advocate General Collins considers that effective judicial review is necessary where all of the relevant factors characterising the appointment procedure give rise to systemic doubts, in the minds of individuals, as to the independence and impartiality of the judges appointed thereunder. In the Advocate General's view, **the referring courts have not put forward any specific evidence, either of a systemic or of an individual nature, to substantiate the existence of legitimate and serious doubts in that regard.**

Subject to verification by the referring courts, the Advocate General concludes that those three factors are **by themselves insufficient to reach the conclusion that the procedures that led to appointment of judges to the ordinary courts, such as Judges A.Z. and A.T., are incompatible with the requirements of EU law.**

**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

<sup>2</sup> Judgment of 9 July 2020, *Land Hesse*, [C-272/19](#) (see Press release No [85/20](#)), paras 55, 56.

<sup>3</sup> Judgment of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, [C-562/21 PPU](#) and [C-563/21 PPU](#) (see Press release No [32/22](#)), para 75 and the case-law cited therein.

<sup>4</sup> See in that respect points 93 to 110 of the Opinion of Advocate General Collins delivered on 15 December 2022 in Case [C-204/21](#) (see also Press Release No 201/22), *Commission v Poland (Independence and private life of judges)*.

<sup>5</sup> Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, [C-824/18](#) (see Press release No [31/21](#)), paras 128-136.

Unofficial document for media use, not binding on the Court of Justice.

The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355

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