



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-619/18
Commission v Poland

Advocate General Tanchev: the Court should rule that the provisions of Polish legislation relating to the lowering of the retirement age for Supreme Court judges are contrary to EU law

The contested measures violate the principles of irremovability of judges and of judicial independence

On 3 April 2018, the new Polish Law on the Supreme Court ('the Law on the Supreme Court') entered into force. Under that law, the retirement age for Supreme Court judges has been lowered to 65. The new age limit applies as from the date of entry into force of that law, and includes judges of that court appointed before that date. It is possible for Supreme Court judges to continue in active judicial service beyond the age of 65 but this is subject to the submission of a statement indicating the desire of the judge concerned to continue to perform his duties and a certificate stating that his state of health allows him to serve, and must be consented to by the President of the Republic of Poland.

Thus, according to that law, serving Supreme Court judges who reached the age of 65 before that law entered into force or, at the latest, on 3 July 2018, were required to retire on 4 July 2018, unless they had submitted such a statement and certificate by 3 May 2018 inclusive and the President of the Republic of Poland had granted them permission to continue in active service at the Supreme Court¹

On 2 October 2018, the Commission brought an action for failure to fulfil obligations before the Court of Justice. The Commission considers that by, first, lowering the retirement age and applying that new retirement age to judges appointed to the Supreme Court up until 3 April 2018 and, second, by granting the President of the Republic of Poland the discretion to extend the active judicial service of Supreme Court judges, Poland has infringed EU law²

By order of 15 November 2018, the President of the Court granted the Commission's request to decide this action under an expedited procedure

Moreover, pending judgment by the Court, the Commission requested the Court, in the context of interim proceedings, to order Poland³ to adopt the following interim measures: (1) suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges; (2) take all necessary measures to ensure that the Supreme Court judges concerned by the provisions at issue may continue to perform their duties in the same post, while continuing to enjoy the same status and the same rights and working conditions as they did before the Law on the Supreme Court entered into force; (3) refrain from adopting any measure concerning the appointment of judges to the Supreme Court to replace the Supreme Court judges

¹As regards Supreme Court judges who will reach the age of 65 between 4 July 2018 and 3 April 2019, they are to retire on 3 April 2019, unless they file the necessary statement and certificate before 3 April 2019 and the President of the Republic of Poland grants them permission to continue in active service at the Supreme Court. As regards Supreme Court judges appointed to the Supreme Court before 3 April 2018 who will reach the age of 65 after 3 April 2019, their continuing in active service beyond the age of 65 is subject to the general rules, namely the submission of a statement and a certificate and the consent of the President of the Republic of Poland.

²Second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union.

³Supported by Hungary.

concerned by those provisions, or any measure concerning the appointment of a new First President of the Supreme Court or indicating the person tasked with leading the Supreme Court in its First President's stead pending the appointment of a new First President; inform the Commission, one month after being notified of the order of the Court at the latest, and every month thereafter, of all the measures it has adopted or plans to adopt in order to fully comply with that order.

By order of 17 December 2018, the Court granted all those requests until delivery of final judgment in the present case⁴

The Commission underlined at the hearing that although the provisions of the Law on the Supreme Court challenged in these proceedings were modified by the Law of 21 November 2018, it is not certain whether that law eliminates the alleged violations of EU law, and in any event, there remains an interest in deciding this case in view of the importance of judicial independence in the EU legal order.

In today's Opinion, Advocate General Evgeni Tanchev considers that a separate assessment of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter is required. In consequence, the complaints should be rejected as inadmissible in so far as they are based on Article 47 of the Charter, given that the Commission furnished no arguments to illustrate that implementation of EU law by Poland has occurred, as required by Article 51(1) of the Charter. In his view, the complaints are well founded in so far as they are based on the second subparagraph of Article 19(1) TEU, and this action is not barred by the initiation of the Article 7(1) TEU mechanism.

The Advocate General notes, in the first place, that protection against removal from office of the members of the body concerned is one of the guarantees essential to judicial independence. Indeed, protection against removal from office (irremovability) 'is the basis and the reflection of judicial independence and means that judges cannot be dismissed, suspended, moved or retired except on grounds, and subject to the safeguards, provided by law'. In particular, according to guidelines issued by European and international bodies relating to judicial independence, judges should have a guaranteed tenure until a mandatory retirement age or the expiry of their term of office, and can be subject to suspension or removal from office in individual cases only for reasons of incapacity or behaviour rendering them unfit for office. Early retirement should be possible only at the request of the judge concerned or on medical grounds, and any changes to the obligatory retirement age must not have retroactive effect.

The Advocate General points out that the Commission has shown that the contested measures, first, have a considerable impact on the composition of the Supreme Court because they affect 27 out of 72 judges; second, constitute specific legislation adopted in respect of members of the Supreme Court; and third, are not envisaged to be temporary. In addition to this, a sudden and unforeseen removal of a large number of judges inevitably creates difficulties in terms of public confidence. Moreover, in the view of the Advocate General, while the Member States have competence to adjust the retirement ages of judges in view of societal and economic changes, they must do so without compromising the independence and irremovability of judges in violation of their obligations under EU law. **The Advocate General therefore considers that the contested measures violate the principle of irremovability of judges**, whose observance is necessary to meet the requirements of effective judicial protection under the second subparagraph of Article 19(1) TEU.

In the second place, the Advocate General recalls that, according to the requirements of judicial independence which the Member States must meet under that provision, the concept of independence presupposes, in particular, that the body concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members

⁴See Press Release No. [204/18](#).

and to influence their decisions. In the present case, Poland has acknowledged that the absence of authorisation by the President of the Republic to extend the term of office of a Supreme Court judge beyond the retirement age is not subject to judicial review.

According to the Advocate General, Poland's arguments as to the prerogatives of the President of the Republic under the Polish constitution, the system of guarantees of judicial independence enshrined in Polish law and the criteria taken into account by the National Council of the Judiciary ('NCJ') in formulating its opinion are not sufficient to dispel the impression of the lack of objective independence of the Supreme Court resulting from the contested measures. In particular, with regard to the role of the NCJ, the Advocate General observes that its opinion is not binding, and irrespective of the composition of the NCJ, its role in no way dispels the impression of the inordinate breadth of power of the President of the Republic. Moreover, Poland's arguments based on the laws of the other Member States and the Court of Justice of the EU fail to convince. Indeed, the regimes of other Member States are not comparable to the situation in Poland, as they operate in a different legal, political and social context, and in any event, this has no bearing on Poland's failure to fulfil obligations. The reference to the Court of Justice of the EU is also irrelevant, there being no question of alteration of rules on the retirement ages of judges of this Court and, moreover, is inapposite, as it is situated at the supranational level entailing a different regime than the classic tripartite separation of powers in the Member States. **The Advocate General concludes that the contested measures violate the requirements of judicial independence**, since they are liable to expose the Supreme Court and its judges to external intervention and pressure from the President of the Republic in the initial extension and renewal of their mandate which impairs the objective independence of that court and influences the judges' independent judgment and decisions, especially given that the requirement to apply to the President of the Republic for the extension of retirement age is accompanied by a reduction in the retirement age.

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: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay. Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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

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