



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-192/18
Commission v Poland

Advocate General Tanchev: the Court should rule that the new retirement rules for Polish judges are contrary to EU law

The contested measures violate the prohibition of discrimination on grounds of sex and the principles of irremovability of judges and of judicial independence

On the 12 July 2017¹ Poland introduced a law entailing new retirement rules for Polish judges. Under that law, the retirement age for judges of the common law courts, public prosecutors, and judges of the Supreme Court was lowered to 60 for women and 65 for men, when it was previously 67 for both sexes. Moreover, the Minister of Justice was vested with a discretion to prolong the period of active service of individual common law court judges beyond the new retirement ages, when that power was previously exercised by the National Council of the Judiciary. Being of the opinion that these rules were contrary to EU law², the Commission brought an action for failure to fulfil obligations before the Court of Justice.

The Commission underlined at the hearing that although the provisions of the law challenged in these proceedings were modified by the Law of 12 April 2018, these changes have not managed to solve all of the issues raised in its application and that there is an express and important interest in adjudicating on the case.

In today's Opinion, Advocate General Evgeni Tanchev considers that the complaints should be rejected as inadmissible in so far as they are based on Article 47 of the Charter of Fundamental rights of the European Union, 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.

With regards to the Commission's complaint concerning the discrimination based on sex, the Advocate General rejects Poland's argument to the effect that there was no direct link between length of services and pension benefits, so that the scheme in issue was governed by Directive 79/7³, and the latitude in Article 7 (1) (a) for Member States to set different retirement ages for men and women in public social security schemes. The Advocate General pointed out that Poland has not sought to explain how the scheme at issue differs from the rulings in which the requirement of pension benefits paid to be 'directly related' to length of service were held to be made out, so that the prohibition on discrimination on the basis of sex in Article 5 of Directive 2006/54 applied. In particular, the Court has held that the benefits paid under occupation pension schemes amounted to 'pay' under the provision of EU law pertinent to the case, after applying the directly related to length of service guideline; along with whether the scheme concerns a particular category of workers, and whether benefits are calculated by reference to the final salary; the latter two factors not being in issue in this case.

¹ Law of 12 July 2017 amending the Law on the System of Common Courts and Certain Other Laws (Ustawa z dnia 12 lipca 2017 r. o zmianie ustawy — Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw) as entered into force on 1 October 2017.

² Article 157 of the Treaty on the Functioning of the European Union, Articles 5(a) and 9(1)(f) of Directive 2006/54 of the European Parliament and of the Council of 5 July 2006 relative to the implementation of the principle of equal opportunities and equal treatment between men and women in matters of employment and work (OJ 2006 L 204, p. 23), Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union.

³ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979, L6, p.24)

Furthermore, with regard to Poland's arguments concerning positive discrimination, the Advocate General observes that it is embedded in the Court's case law that the purpose of positive discrimination measures is to 'give a specific advantage to women with a view to improving their ability to compete on the labour market and pursue a career on an equal footing with men'. Given that retired women judges are no longer competing on the labour market or pursuing a career, on no account can the measures challenged by the Commission amount to measures of positive discrimination. Moreover, rules that perpetuate the traditional division of roles into the future should not be viewed as measures to promote equality. Further, the challenged measure is not available to men who have missed career opportunities due to child rearing, or taken into account women who have never been involved in it. **The Advocate General therefore considers that the different retirement age for men and women judges of the common law courts, the Supreme Court, and public prosecutors violates EU law.**

The Advocate General recalls that EU law protects against removal from office of the members of courts. It is one of the guarantees essential to judicial independence. The concept of independence presupposes in particular that the body concerned exercises its judicial 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, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. **According to the Advocate General**, lowering the retirement age of judges must and of itself be accompanied by safeguards to ensure against *de facto* removal of a judge, while **the law of 2017 fails to meet the guarantee of the irremovability of judges and their independence**. The Advocate General finds that the arrangements here in issue entail the simultaneous transfer to a member of the executive, and here no less the Minister of Justice, to extend the period of a judges active service, and a legislative lowering of the retirement age of judges. This package is inconsistent with the objective element of impartiality as protected under the case law of the European Court of Human Rights, another long since recognised source for the elaboration of general principles of law beneath an umbrella of primary EU law. **Advocate General Tanchev concludes that by lowering the age of retirement of judges of the common law courts, and by vesting the Minister of Justice with the discretion to extend the active period of such judges, Poland has breached its obligations under 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: 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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