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Advocate General's Opinion in
Joined Cases C-585/18, C-624/18 and C-625/18
Krajowa Rada Sądownictwa and Others

Advocate General Tanchev: the newly-created Disciplinary Chamber of the Polish Supreme Court does not satisfy the requirements of judicial independence established by EU law

In the view of Advocate General Tanchev, the Disciplinary Chamber of the Polish Supreme Court does not satisfy the requirements of judicial independence under EU law in light of the role of the legislative authorities in electing the 15 judicial members of the Krajowa Rada Sądownictwa (National Council of the Judiciary, 'NCJ') and the role of that body in selecting judges eligible for appointment by the President of the Republic of Poland to the Disciplinary Chamber of the Supreme Court.

In 2017, Poland introduced a comprehensive reform of its justice system. In particular, the retirement age for judges of the Sąd Najwyższy (Supreme Court, Poland) was lowered to 65, unless within the specified time period, they submit a declaration that they are willing to continue in their posts and a certificate of good health, and the President of the Republic consents to their continuing in their posts. Prior to granting his consent, the President of the Republic is required to consult the NCJ which provides him with an opinion. Those measures were held by the Court to be incompatible with EU law in its judgment of 24 June 2019, *Commission v Poland*.¹

In this context, judges affected by the Polish measures lowering the judicial retirement age² brought actions, based in part on EU law, before the Chamber of Labour Law and Social Security of the Supreme Court. Under Polish law, the newly created Disciplinary Chamber of the Supreme Court is designated to hear the actions. Yet, the Sąd Najwyższy queries whether the Disciplinary Chamber offers sufficient guarantees of independence under EU law to hear such claims. This is in view of the fact that the group of judges eligible for appointment by the President of the Republic to the Disciplinary Chamber are selected by the NCJ which is the body charged with safeguarding judicial independence in Poland. However, the independence of the NCJ has, in turn, been put in doubt by Polish legislation modifying the manner in which its judicial members are appointed. Its composition is now primarily determined by the legislative and executive authorities. The Sąd Najwyższy has therefore referred the matter to the Court of Justice.

By order of 26 November 2018, the President of the Court granted the Sąd Najwyższy's requests to deal with the present cases under the accelerated procedure.

In today's Opinion, Advocate General Tanchev first examines whether EU law vests the referring court with authority in the main proceedings when, at the time that the applicants sought to enforce their rights with respect to age discrimination, the court designated to enforce those rights had not yet been established in practice.

¹ Judgment of 24 June 2019, *Commission v Poland* (Independence of the Supreme Court) (Case [C-619/18](#)), see also Press Release No [81/19](#).

² Case [C-585/18](#) AK, a judge in the Supreme Administrative Court, case [C-624/18](#) CP and case [C-625/18](#) DO, judges of the Supreme Court.

The Advocate General recalls that the Member States are only obliged to create new legal remedies under national law for individuals to enforce EU law rights when none exist. This was the situation in the main proceedings, given that the Disciplinary Chamber was not functioning on account of the fact that judges had not yet been appointed to that chamber. Further, Article 47 of the Charter of Fundamental Rights of the European Union guarantees the right of access to a court. By hearing the actions brought by the applicants, the referring court is guaranteeing this access.

Moreover, the Advocate General considers that measures relating to the appointment of judges and the disciplinary regime governing judges are important aspects of the guarantees of judicial independence under EU law, and the existence of an independent body in the context of the disciplinary regime is part of those guarantees. Thus, even if a national body tasked with selecting judges, such as a judicial council, does not itself carry out the role of a court, the rules regarding, *inter alia*, its composition and functioning in so far as they bear on those aspects, may be taken into account for assessing whether a national court offers sufficient guarantees of independence under EU law.

The Advocate General observes that judicial councils and similar bodies play an essential role in guaranteeing the independence and autonomy of the judiciary in many, though not all, Member States. Although there is no uniform model for judicial councils, they are considered to have some common attributes relating to their mission to safeguard judicial independence and their operation within the judicial systems of their respective jurisdictions to maintain respect for the rule of law and fundamental rights:

- 1) the *mission* of judicial councils is to safeguard the independence of courts and judges, which means that they must be free from any influence from the legislative and executive authorities,
- 2) there is no single model that a jurisdiction is bound to follow in setting up a judicial council so long as its *composition* guarantees its independence and enables it to function effectively. In particular, judicial councils should in principle be composed of at least a majority of judges elected by their peers to prevent manipulation or undue pressure. The selection procedure should be carried out in an objective and transparent manner, in which a wide representation of the judiciary at all levels is guaranteed, and the involvement of legislative and executive authorities in the selection process is discouraged,
- 3) in order to guarantee the continuity of functions, the *mandates* of the members of judicial councils should not be replaced at the same time or renewed following parliamentary elections,
- 4) the selection, appointment and/or promotion of judges are among the most widely recognised *functions* of judicial councils, and the procedures must be carried out by judicial councils which are independent of the legislative and executive authorities.

According to the Advocate General, the Disciplinary Chamber of the Polish Supreme Court does not satisfy the requirements of judicial independence under EU law. In particular, the NCJ is a body whose mission is to safeguard the independence of courts and judges under the Polish constitution, and its functions include the selection of judges for appointment by the President of the Republic, it must be free of influence from the legislative and executive authorities in order to duly perform its tasks. Yet, **the manner of appointment of the members of the NCJ discloses deficiencies that appear likely to compromise its independence from the legislative and executive authorities.**

The Advocate General finds that the manner of appointment of the NCJ members entails influence of the legislative authorities over the NCJ, and it cannot be discounted that the Sejm may choose candidates with little or no support from judges, with the result that the judicial community's opinion may have insufficient weight in the process of the election of the NCJ members. Irrespective of the aims of enhancing the democratic legitimacy and the representativeness of the NCJ, this arrangement is apt to adversely affect the independence of the NCJ.

Moreover, the changes to the manner of appointment of the judicial members of the NCJ were accompanied by the early termination of the mandates of the members of the NCJ according to the amendments to the law on the NCJ. Notwithstanding the purported aim to unify the terms of office of the NCJ membership, the immediate replacement of the members of the NCJ in tandem with the new regime for appointment of the NCJ may be considered to further impair the NCJ's independence from the legislative and executive authorities.

On this basis, taking into account that judicial councils are crucial for guaranteeing the independence of the judiciary in the jurisdictions where they are established, and that they must themselves be independent and free from interference from the legislative and executive authorities in carrying out their tasks, there are **legitimate reasons to objectively doubt the independence of the Disciplinary Chamber** in light of the role of the legislative authorities in electing the 15 judicial members of the NCJ and the role of that body in selecting judges eligible for appointment by the President of the Republic.

The Advocate General further points out that there are **a number of considerations** relating to the selection of judges to the Disciplinary Chamber which should be taken into account. In particular, until the moment when all the posts in the Disciplinary Chamber have been filled for the first time, judges of that chamber are appointed by the President of the Republic; the Disciplinary Chamber is governed to a certain degree by provisions distinguishing it from the other chambers of the Supreme Court; the arrangements regarding the Disciplinary Chamber were introduced as part of the legislative package of measures on the reform of the Polish justice system; and the Disciplinary Chamber is tasked with deciding cases involving the retirement of Supreme Court judges and disciplinary proceedings against judges which are concerned by that package of measures.

In addition, Advocate General Tanchev considers that national provisions conferring jurisdiction to rule in a dispute involving EU law to a chamber of a national last instance court which does not meet the requirements of judicial independence under EU law must be disapplied. Therefore, for ensuring effective judicial protection for individuals under EU law, another chamber of a national last instance court must be able, of its own initiative, to disapply national provisions which are incompatible with that principle.

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.

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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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