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**Advocate General Bobek: the circumstances referred by the Polish Supreme Court are not such as to cast doubts on the independence and impartiality of potentially all Polish judges appointed before 2018**

In the context of an appeal on a point of law pending before it, the Sąd Najwyższy (Supreme Court, Poland) referred a set of questions to the Court of Justice. In particular, the national court takes the view that some of the judges of the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław, Poland) who participated in the delivery of the judgment of 28 February 2019 dismissing the applicants' appeals (contested judgment) may, because of the procedure by which they were first appointed to a judicial office, fail to meet the requirement of independence resulting from EU law.

In particular, that court wonders whether circumstances pertaining to the first judicial appointment of a judge in a Member State, at a time when that State was still governed by an undemocratic regime and prior to that State's accession to the European Union, and the ongoing retention of such a judge within the judiciary of that State after the fall of the Communist regime, is capable of casting doubts on the independence and impartiality of that judge for the purposes of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') today.

In today's Opinion, Advocate General Michal Bobek first examines the arguments, raised by the Rzecznik Praw Obywatelskich (Ombudsman, Poland), concerning the alleged inadmissibility of the request for a preliminary ruling. The Ombudsman argues that the order for reference was submitted by a judge whose own recent appointment to judicial office has been made under such circumstances as to cast doubts on his independence. For that reason, the Ombudsman is of the view that the referring judge himself and, hence, the referring court, does not constitute an independent court established by law for the purposes of Article 267 TFEU and, consequently, that court was not entitled to seize the Court. In this regard, the Advocate General points out that, within Article 267 TFEU, the concept of 'court or tribunal' has a functional nature: it serves to identify the national bodies which – in so far as they exercise judicial functions – can become the interlocutors of the Court in the context of a preliminary ruling procedure. The preliminary ruling procedure established judicial cooperation between courts, not between individual persons. Accordingly, the legal analysis of its actors must necessarily be focused on structural, institutional issues. What is crucial, in that respect, is the nature, position and functioning of that body within the Member States' institutional framework. Conversely, that analysis is not meant to verify whether specific individuals who belong to that institution and sit in the formation of the court which made the reference fulfil, each of them individually, the criteria set out in Article 267 TFEU. In his view, the possible flaws in the appointment procedure of the judge who made the reference in the present case, and/or his alleged personal and professional ties to the Minister for Justice/General Prosecutor, may very well lead to statement finding that Article 19(1) TEU and/or Article 47 of the Charter were infringed. However, provided that the entire judicial institution has not been 'hijacked' and can therefore no longer be considered a court, they should not automatically result in the inadmissibility of the order for reference made by a supreme court of a Member State.

The Advocate General next clarifies the manner in which the assessment of compliance with the principle of judicial independence, enshrined in Article 19(1) TEU and in Article 47 of the Charter, is

to be carried out. He recalls that, regardless of the constitutional model chosen for the appointment, it is 'still necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges. Therefore, in order to assess compliance with the principle of independence of the judiciary, a national court must consider all relevant elements and take into account, where appropriate, the reasons and specific objectives of the national measures that may be applicable to the situation. In that context, both formal and institutional elements and case-specific elements may be relevant, depending on the characteristics of the case in question and the EU provision(s) that is/are applicable. The significance of those elements should not be evaluated per se or in isolation, but assessed together in the light of the broader legal and institutional landscape.

Advocate General Bobek further examines whether the circumstances pertaining to the first appointment to judicial office of one of the judges of the court that delivered the contested judgment (Judge FO), whose appointment took place under the Communist regime of the then Polish People's Republic ('the PRL'), has an impact on his independence in the current exercise of his judicial duties. He finds that the order for reference is scarce in providing any specific explanations as to the identity of who could be the person, institution or body which would be currently capable of exerting undue pressure over Judge FO, and as to the reasons why Judge FO could be inclined to yield to that pressure. More generally, he expressed perplexity as to how rules and standards flowing from Article 19(1) TEU and/or Article 47 of the Charter could be applied to judicial appointments in Poland prior to 1989. Indeed, nothing indicates why the national rules which the referring court made reference to would, in spite of no longer being in force for several decades, be still capable of producing some effect today. As a matter of fact, any judicial intervention that would invalidate decisions taken by a national judge, such as Judge FO, simply for having been first appointed to judicial office in the PRL, would be akin to a newly adopted measure of 'lustration'. Yet, the Advocate General doubts that the adoption of a measure such as that envisaged by the referring court would, to date, be considered compatible with EU law. He sees several potential issues arising, especially in respect of Article 2 TEU (rule of law) and Articles 47 and 48 of the Charter (due process). In addition, the Advocate General stresses that adopting such a measure several decades after the fall of the Communist regime does not appear to be objectively necessary in a democratic society. Therefore, the Advocate General takes the view that the mere fact that some judges were appointed to judicial office for the first time during the PRL era is not an element capable, in and of itself, of calling into question their independence today. Accordingly, the circumstances referred to by the national court are not such as to cast doubts on the independence and impartiality of a national judge, such as Judge FO, for the purposes of Article 19(1) TEU and Article 47 of the Charter.

Similarly, the fact that some members of the composition of the court which delivered the contested judgment were appointed to that court on the basis of resolutions adopted by the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland, 'the KRS') in a composition resulting from legislation subsequently declared unconstitutional by the Trybunał Konstytucyjny (Constitutional Court), is also not such as to cast doubts on the independence and impartiality of any national judges for the purposes of Articles 19(1) TEU and Article 47 of the Charter. In fact, in the Advocate General's view, no 'motive, means and opportunity' can be detected with regard to a potential lack of independence of the judges in question. More specifically, he has doubts as to whether anybody would be, at present, able to exert undue pressure over these judges as a consequence or in view of the circumstances of their appointment, and as to why those judges may be induced to bow to that pressure.

Lastly, according to the Advocate General, the ongoing retention of judges that are subject to political, personal, or other forms of pressure strikes at the heart of a legal system based on the rule of law and of a democracy predicated on the separation of powers. Therefore, Article 47 of the Charter of Fundamental Rights, which enshrines the rights to an effective remedy before an independent and impartial tribunal previously established by law and to a fair trial, requires national courts to verify whether an irregularity vitiating a procedure for the appointment of a judge could

lead to an infringement of rights conferred by EU law. Where a genuine and serious doubt arises on that point, that issue must be raised of the court's own motion. The principle of irremovability of judges does not preclude national courts from carrying out that verification.

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**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.

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

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