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Press and Information

Advocate General's Opinions in Cases C-487/19 W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court - Appointment) and C-508/19 Prokurator Generalny (Disciplinary Chamber of the Supreme Court - Appointment)

Advocate General Tanchev: two newly-created chambers of the Polish Supreme Court are liable to fail the requirements established by EU law in a situation where the judges concerned were appointed to those positions in flagrant breach of the national laws applicable to judicial appointments to that court

The national court must therefore assess the manifest and deliberate character of that breach as well as the gravity of the breach

Judge W.Ż. (Case C-487/19) was a member and spokesperson of the former Krajowa Rada Sądownictwa (National Council for the Judiciary, Poland; 'the KRS') and has publicly criticised the judicial reforms in Poland carried out by the ruling party. In 2018 he was transferred from the division of the Sąd Okręgowy (Regional Court) in K. (Poland), where he had sat until that date, to another division of that court. That transfer amounts de facto to a demotion, in so far as he is transferred from the second-instance division to a first-instance division of the court. W.Ż. brought an appeal against that decision before the KRS, which, by means of its resolution of 21 September 2018 ('the contested resolution'), discontinued the proceedings concerning his appeal. Then W.Ż. brought an appeal against the contested resolution before the Supreme Court (Poland).

After lodging that appeal, W.Ż. submitted a petition for all judges of the Supreme Court sitting in the Chamber of Extraordinary Control and Public Affairs ('CECPA') to be excluded from hearing his appeal. He argued that, given its systemic framework and the manner in which its members were elected by the KRS, which had been established contrary to the Constitution, the CECPA could not examine the appeal impartially and independently in any composition that included its members.

W.Ż. claims that the motion to appoint all the judges sitting in the CECPA who were included in the petition for exclusion was included in Resolution No 331/2018 of the KRS of 28 August 2018 ('KRS Resolution No 331/2018'). An appeal was brought against that resolution in its entirety before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland; 'the Supreme Administrative Court') by other parties to the appointment proceedings in respect of whom the KRS had not submitted a motion to the Prezydent Rzeczypospolitej Polskiej (President of the Republic of Poland; 'the President of the Republic') to appoint them as judges of the Supreme Court. Despite the ongoing proceedings, on 20 February 2019, the President of the Republic handed a letter of appointment as judge in the CECPA to A.S. (the judge in charge of examining W.Ż.'s appeal, sitting in a single judge formation). On 8 March 2019, shortly before the hearing in the Civil Chamber of the Supreme Court was scheduled to begin, the CECPA, composed of a single person (A.S.), without having at its disposal the case files, issued an order in the case, dismissing the appeal lodged by W.Ż. as inadmissible. Moreover, the CECPA found that W.Ż's appeal was inadmissible despite the fact that proceedings had already been brought before the Civil Chamber of the Supreme Court by W.Ż. for the exclusion of all the judges of the CECPA.

M.F. (Case C-508/19) is a judge of the Sąd Rejonowy (district court) in P. (Poland). On 17 January 2019, disciplinary proceedings were instituted against her. In those proceedings it was alleged that her conduct resulted in overly lengthy proceedings and that she failed to draw up written grounds for her judgments in a timely manner. On 28 January 2019, J.M., acting as a judge of the Supreme Court performing the duties of the President of the Supreme Court who directs the work of the

Disciplinary Chamber, issued an order appointing the disciplinary court competent to hear her case at first instance.

However, M.F. claims that the proceedings against her cannot be continued because J.M. is not a judge of the Supreme Court, as he was not appointed to the position of Supreme Court judge in the Disciplinary Chamber. His appointment on 20 September 2018 is ineffective because he was appointed: (i) after the selection procedure had been conducted by the KRS on the basis of an announcement of the Prezydent Rzeczypospolitej Polskiej (President of the Republic of Poland, 'the President of the Republic'), which was signed by the President of the Republic without the countersignature of the Prezes Rady Ministrów (Prime Minister); (ii) after the resolution of the KRS which contained the motion to appoint J.M. to the position of Supreme Court judge in the Disciplinary Chamber had been appealed to the Naczelny Sąd Administracyjny (Supreme Administrative Court) by one of the participants in the selection procedure, and before that court had ruled on the appeal.

Therefore, the Civil Chamber (Case C-487/18) and the Chamber of Labour and Social Security Law (Case C-508/18) of the Supreme Court have referred the matter to the Court of Justice.

In today's parallel Opinions, Advocate General Evgeni Tanchev first examines whether EU law precludes the appointment of A.S. and J.M. to the position of judge of the Supreme Court in the CECPA and in the Disciplinary Chamber respectively.

According to the Advocate General, given the key role played by the KRS in the judicial appointment process and the absence of legal review of the decisions of the President of the Republic appointing a judge, it is necessary that effective legal review exists for the judicial candidates. That is particularly the case where, as in this instance, the State, by way of its conduct, is interfering in the process of appointing judges in a manner which risks compromising the future independence of those judges. The required legal review should: a) happen before the appointment, as the judge is thus protected subsequently by the principle of irremovability; b) cover at least an ultra vires or improper exercise of authority, error of law or manifest error of assessment; and c) allow clarification of all the aspects of the appointment procedure, including the requirements under EU law, if appropriate, by submitting questions to the Court, in particular concerning the requirements stemming from the principle of effective judicial protection. Therefore, the act of appointment as judge of the Supreme Court adopted by the President of the Republic before the Supreme Administrative Court ruled definitively on the action brought against the KRS Resolution No 331/2018, constitutes a flagrant breach of national rules governing the procedure for the appointment of judges to the Supreme Court, when those rules are interpreted in conformity with applicable EU law (in particular, the second subparagraph of Article 19(1) TEU).

In Advocate General Tanchev's view, the manifest and deliberate character of the violation of the order of the Supreme Administrative Court staying the execution of the KRS Resolution No 331/2018, committed by such an important State authority as the President of the Republic, empowered to deliver the act of appointment to the post of judge of the Supreme Court, is indicative of a flagrant breach of the rules of national law governing the appointment procedure for judges. Moreover, the very fact that the President of the Republic paid no heed to the final decision of the Supreme Administrative Court – that is, the administrative court of final instance – ordering interim measures and staying the execution of KRS Resolution No 331/2018 until that court rules on the main action pending before it, indicates the gravity of the breach that was committed. He recalls that the respect by competent national authorities of a Member State of interim measures ordered by national courts constitutes 'an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded'.

The Advocate General examines the effects of the finding that A.S. may not constitute a tribunal established by law. He points out that when the single judge A.S. gave the order of inadmissibility in question, from which no appeal lies, then – supposing that that judge does not fulfil the requirements of a tribunal established previously by law – the legal effectiveness of that order must be limited. As a result, the referring court would be able to set aside that order and rule on the petition for exclusion of the CECPA judges, introduced by W.Ż., so that his action may be

examined by a court or tribunal which does fulfil the requirements of the second subparagraph of Article 19(1) TEU (that is, the referring court).

As regards the case C-508/19, the Advocate General finds that the connecting factors between the action in the main proceedings and the EU law provisions relate to the fact that a national judge (M.F.) who may rule on the application or interpretation of EU law is asking that she is afforded, in the context of a disciplinary action levelled against her, the benefit of the effective judicial protection guaranteed by Article 19(1) TEU in the light of Article 47 of the Charter of Fundamental Rights of the European Union. Such protection implies an obligation for the Member States to provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions, which means that M.F. has a right to be judged by an independent and impartial court established by law. That also means that the tribunal called upon to rule on her disciplinary procedure cannot be appointed by a judge whose own appointment breached the very same provision of EU law even though he himself gives rulings relating to the application or interpretation of EU law.

Advocate General Tanchev underlines that there were numerous potentially flagrant breaches of the law applicable to judicial appointments in the appointment procedure in respect of J.M.: (i) the procedure was opened without the ministerial countersignature required under the Constitution, which it is claimed renders the procedure void ab initio; (ii) it involved the new KRS whose members were appointed under a new legislative process, which is unconstitutional and does not guarantee independence; (iii) there were diverse deliberate impediments to the preliminary judicial review of the act of appointment, as: (a) the KRS deliberately failed to forward the action brought against its resolution to the Supreme Administrative Court, at the same time as it sent it to the President of the Republic, before the deadline to do so before that court expired; (b) the President of the Republic appointed the judges proposed in that resolution before the judicial review of that resolution was closed and without waiting for the answer of the Court of Justice to the questions referred to it in case C-824/18, concerning the conformity of the modalities of that control with EU law. Therefore, the President of the Republic committed a potentially flagrant breach of fundamental norms of national law.

The Advocate General concludes that a court chamber does not constitute an independent and impartial tribunal, within the meaning of EU law, when the objective conditions in which it was created, its characteristics as well as the manner of appointment of its members are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that chamber to external factors, and, in particular, to the direct or indirect influence of the legislature and the executive, and as to its neutrality with respect to the interests before it and, thus, whether they may lead to that chamber not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber of the Supreme Court.

In such a situation, the principle of the primacy of EU law requires the referring court to disapply national law provisions which reserve jurisdiction to rule on actions, such as the one in the main proceedings, to such a chamber, so that those actions may be examined by a court which fulfils the requirements of independence and impartiality referred to above and which would have jurisdiction were it not for those provisions.

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