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Advocate General's Opinion in Joined Cases C-748/19 to C-754/19  
Prokuratura Rejonowa w Mińsku Mazowieckim/WB and others

## **Advocate General Bobek: EU law precludes the Polish practice of secondment of judges to higher courts that may be terminated at any moment at the discretion of the Minister of Justice, who is simultaneously the General Prosecutor**

In the context of seven criminal cases pending before it, the Sąd Okręgowy w Warszawie (Regional Court of Warsaw, Poland) decided to seek the guidance of the Court of Justice on the compatibility with EU law of certain provisions of national law which grant the Minister for Justice/General Prosecutor the power to second judges to higher courts for an indeterminate period of time and, at any moment, may terminate that secondment at his own discretion. In particular, the referring court takes the view that those provisions may infringe the requirement of independence of the national judiciary that follows from Article 19(1) TEU<sup>1</sup>, read in conjunction with Article 2 TEU.<sup>2</sup>

Specifically, that court points out that each of the judicial panels destined to hear the respective case at issue in the main proceedings is composed of the referring judge as President, and two other judges. In each of the cases, one of the 'other' judges is a judge seconded from a lower court by decision of the Minister for Justice/General Prosecutor ('the seconded judges'). Furthermore, some of the seconded judges also hold the position of 'disciplinary agent' attached to the Rzecznik Dyscyplinarny Sędziów Sądów Powszechnych (Disciplinary Officer for Ordinary Court Judges).

In today's Opinion, Advocate General Michal Bobek first rejects arguments that the requests for preliminary rulings are inadmissible, as they have been submitted by a single judge – the President of the judicial panel hearing the criminal cases at issue – and not by the panel itself. He points out that, if the body making the request is a national body acting in a judicial capacity, it is not for the Court to verify compliance with all procedural rules of national law. Therefore, the referring court is a 'court or tribunal' for the purposes of Article 267 TFEU.

The Advocate General next examines whether EU law<sup>3</sup> precludes national provisions according to which the Minister for Justice/General Prosecutor may, on the basis of criteria that are not made public, second judges to higher courts. He observes that the concept of judicial independence has two aspects to it: external and internal. The *external* aspect (or independence *stricto sensu*) requires the court to be protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. The *internal* aspect is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests as regards the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. In his view, in the present cases the national measures at issue appear highly problematic in view of both aspects of independence.

<sup>1</sup> 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

<sup>2</sup> That provision provides, inter alia, that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

<sup>3</sup> Second subparagraph of Article 19(1) TEU, in conjunction with Article 2 TEU and the principle of the rule of law enshrined therein.

Advocate General Bobek further considers that there is nothing in EU law that precludes Member States from having recourse to a system according to which judges may, in the interest of service, be temporarily seconded from a court to another. In systems where the Ministry of Justice is in charge of organisational and staff matters concerning the judiciary, decisions on secondment of individual judges may fall within the competence of the Minister. Provided that the statutory procedures are followed, all the appropriate consents required under national law have been given, and the *ordinary rules* on appointments, tenure and removal of judges *continue to apply during secondment*, that aspect too is in itself not problematic. However, that clearly does not appear to be the case under the national rules at issue. The seconded judges are, in his view, not subject to the ordinary rules, but to a rather special – and very troubling – legal regime.

The Advocate General takes the view that in a rule of law-compliant system, there should be at least some transparency and accountability with regard to the decisions on the secondment of judges. In particular, any decision relating to a secondment of a judge (initiation or termination) should be made on the basis of some *ex ante* known criteria and be duly motivated. Moreover, they must be capable of offering a minimum degree of clarity as to why and how a given decision was taken, in order to ensure some form of oversight. However, no such feature can be found in the national measures at issue. Indeed, the criteria used by the Minister of Justice/General Prosecutor to second judges and to terminate their secondment, if they exist, are in any event not made public.

Furthermore, the fact that the secondment is for an indeterminate period of time and may be terminated at any moment at the discretion of the Minister of Justice/General Prosecutor is a source of major concern. Advocate General Bobek finds that a (judicial) secondment should normally be for a fixed period of time, determined in terms of a given duration, or until another objectively ascertainable event occurs. Therefore, the exercise of unfettered, unreviewable and non-transparent discretion permitted to the Minister of Justice/General Prosecutor to second judges and *to remove them* at any moment as he sees fit appears to go way beyond what could be considered reasonable and necessary to ensure the smooth functioning of, and workflow within, the national judicial structure.

The Advocate General finds that, not only is the power to exercise that unfettered discretion assigned to a member of the government, but that member of the government is also wearing ‘a double hat’. Indeed, in his capacity of (Public) General Prosecutor, the Minister of Justice is the chief prosecutorial body within the Member State and has authority over the entire body of public prosecution services. He possesses extensive powers over the subordinate prosecutors. Among other things, national law grants him the power to adopt orders ‘concerning the content of an act in court’ by a subordinate prosecutor, who is required to act in accordance with such orders. This produces an ‘unholy’ alliance between two institutional bodies that should normally function separately. As regards, in particular, the issue of secondment of judges, it effectively allows the hierarchical superior of one party to each criminal proceedings (the prosecutor) to compose (part of) the panel that will hear the cases brought by his subordinate prosecutors. The consequence is that some judges may have an incentive to rule in favour of the prosecutor or, more generally, to the liking of the Minister of Justice/General Prosecutor. Indeed, judges of lower courts may feel enticed by the possibility of being rewarded with a secondment to a higher court, which may offer them improved career prospects and a higher salary. In turn, delegated judges may be discouraged to act independently, to avoid the risk that their secondment may be terminated by the Minister of Justice/General Prosecutor.

Lastly, according to the Advocate General, the situation described above is further aggravated by the fact that the delegated judges may also hold the position of disciplinary agents attached to the Disciplinary Officer for Ordinary Court Judges. It is certainly not far-fetched to believe that judges may be reluctant to disagree with colleagues who, one day, may bring disciplinary proceedings against them. Moreover, in structural terms, such persons may be perceived as exercising a ‘diffuse control and supervision’ within the judicial panels and the courts to which they have been seconded due to the context and the parameters of their secondment. Therefore, the national provisions at issue give rise, on the one hand, to a rather worrisome network of connections between the seconded judges, the prosecutors and (one member of) the government; and, on the

other hand, to an unhealthy confusion of roles between judges, normal prosecutors and disciplinary agents. The Advocate General finally emphasises that there is no issue, from the point of view of EU law, with the secondment of judges *per se*, provided that during their secondment those judges enjoy the same types of guarantees in terms of irremovability and independence as any other judges within that court. Nonetheless, that is clearly not the case in the present cases.

The Advocate General concludes that, in circumstances such as those in the main proceedings, the minimum guarantees necessary to ensure the indispensable separation of powers between the executive and the judiciary are no longer present. The national rules at issue do not offer safeguards sufficient to inspire in the individuals, especially those subject to criminal proceedings, reasonable confidence that the judges sitting on the panel are not subject to external pressure and political influence, and have no vested interest in the outcome of the case. He suggests that the Court should find that those national rules are therefore incompatible with the second subparagraph of Article 19(1) TEU.<sup>4</sup>

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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.*

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*Pictures of the delivery of the Opinion are available from "[Europe by Satellite](#)" ☎ (+32) 2 2964106*

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<sup>4</sup> The Advocate General considers unnecessary to dwell on the reasons as to why the national provisions at issue also infringe the provisions of Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1). In his view, in the context of such a serious infringement of Article 19(1) TEU, it is of little added value to engage in further discussions on whether the burden of proof for establishing the guilt of suspects and accused persons is still on the prosecution, or whether the benefit of doubt is in fact given to suspects or accused persons. The very core of the principle of the presumption of innocence is undermined when one and the same person – the Minister of Justice/General Prosecutor – may, in criminal cases, exert influence on both the prosecutors and certain judges on the bench. Consequently, a simultaneous infringement of the provisions of Directive 2016/343 appears to him to be inevitable.