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Court of Justice of the European Union

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Advocate General's Opinion in Case C-55/20
Ministerstwo Sprawiedliwości

Advocate General Bobek: the Services Directive applies to disciplinary proceedings initiated against lawyers, the result of which may affect the ongoing ability of those lawyers to provide legal services

A national court must, if necessary, disregard the national legislation on the attribution of jurisdiction as well as the rulings of a higher court if it considers that they are incompatible with EU law, in particular with the principle of judicial independence

In July 2017, the Prokurator Krajowy – Pierwszy Zastępca Prokuratora Generalnego (Public Prosecutor – First Deputy of the General Prosecutor) ('the National Prosecutor') requested the Rzecznik Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Agent of the Bar Association in Warsaw) ('the Disciplinary Agent') to initiate disciplinary proceedings against R.G., the lawyer of the former President of the European Council, Donald Tusk. In the view of the National Prosecutor, the statements made by that lawyer when publicly commenting on the possibility of his client being charged with a criminal offence amounted to unlawful threats and disciplinary misconduct. Twice, the Disciplinary Agent either refused to initiate such proceedings or decided to discontinue them. Twice, the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Court of the Bar Association in Warsaw) following an appeal lodged by the National Prosecutor or the Minister of Justice, overturned those decisions and remitted the case back to the Disciplinary Agent.

In the context of a third 'round' of those proceedings, within which the Disciplinary Court of the Bar Association in Warsaw ('the Disciplinary Court') is examining the decision of the Disciplinary Agent to again discontinue the disciplinary inquiry against that lawyer, following an appeal lodged again by the National Prosecutor and the Minister of Justice, that court seeks to know whether Directive 2006/123/EC ('the Services Directive')¹ and Article 47² of the Charter of Fundamental Rights of the European Union ('the Charter') are applicable to disciplinary proceedings pending before it.

In today's Opinion, Advocate General Michal Bobek first examines whether the Disciplinary Court is a 'court or tribunal' within the meaning of Article 267 TFEU. He recalls that, in order to assess whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, the Court will take into account the following factors: whether the body is established by law; whether it is permanent; whether its jurisdiction is compulsory; whether its procedure is inter partes; whether it applies rules of law; and whether it is independent. The Advocate General underlines that the Disciplinary Court was established by the Polish Law on the Bar; it is permanent; it applies procedural rules laid down in the Law on the Bar and in the Code of Criminal Procedure; its decisions are binding and enforceable. In addition, the Disciplinary Court appears to have compulsory jurisdiction over the disciplinary disputes entrusted to it by national law. Moreover, there is no doubt that an inter partes dispute is present in the main proceedings. Similarly, it does not appear that the Disciplinary Court lacks independence (external or internal) so that it would be unable to seise the Court by way of request for a preliminary ruling. Therefore, the referring court is a 'court or tribunal' for the purposes of Article 267 TFEU.

¹ Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

² Establishing the right to an effective remedy and to a fair trial.

The Advocate General next examines whether the Services Directive is applicable to proceedings concerning the disciplinary liability of a lawyer and he concludes that it is applicable. Just as the registration with the bar association in order to be allowed to practice constitutes an authorisation scheme within the meaning of that directive, disciplinary proceedings also constitute part of such a scheme. He underlines that the provisions of legal counsel fall within the scope of the directive. Indeed, legal representation is undoubtedly a specific type of service that, because of its importance for the sound administration of justice, is provided by a closely regulated profession subject to specific deontological rules. The fact remains that, although subject to specific rules, legal representation is a service under the Services Directive. Therefore, disciplinary proceedings against a registered lawyer are also part of the scheme since, as a result of such proceedings, lawyers may be suspended, or expelled, and prevented from re-registering for ten years. Such measures constitute a withdrawal of authorisation for the purposes of Article 10(6) of the Services Directive. Furthermore, as long as the Services Directive is applicable, the Charter, including Article 47, is in principle also applicable to the case. This means that the referring court is to apply Article 47 of the Charter in the proceedings pending before it.

Advocate General Bobek further examines the powers of national courts in securing compliance with EU law and observes that, following a departure from the previous line of case-law, the Disciplinary Chamber of the Supreme Court effectively recognised the right to introduce an appeal on a point of law to the General Prosecutor/Minister for Justice and, indirectly, its own competence to hear such appeals against decisions of the Disciplinary Agent to discontinue disciplinary proceedings. In the Advocate General's view, by systematically or repeatedly appealing the decisions not to launch disciplinary proceedings, the Minister for Justice/General Prosecutor (or a national prosecutor acting under his instructions) might effectively be able to push for disciplinary proceedings being instigated, or for them to be (possibly endlessly) continued against certain members of the Bar. Such appeals would ultimately be brought before a body that was previously found to be lacking independence precisely because the executive, and in particular the Minister for Justice, was exercising undue influence on its composition.

The Advocate General recalls that any national legal provision and any legislative, administrative or judicial practice which might impair the effectiveness of EU law are incompatible with the latter. The Disciplinary Court may either interpret national rules in conformity with EU law or, where necessary, disapply the national provisions which prevent it from ensuring compliance. Similarly, as far as legal opinions or judgments of higher courts are concerned, national courts must, if necessary, disregard the rulings of a higher court if it considers that they are not consistent with EU law. However, the Disciplinary Court of the Bar Association in Warsaw cannot itself refrain from examining the case currently pending before it in order to block the potential subsequent appeal on a point of law to the Disciplinary Chamber of the Supreme Court. Even if the 'next level' within a judicial hierarchy no longer lives up to the standard of an effective legal remedy, Article 47 of the Charter can hardly be interpreted as having a knock on effect at the lower level, preventing it from making a decision at all.

Lastly, the Advocate General acknowledges that references for a preliminary ruling might not be ideal for dealing with what essentially are pathological situations in a Member State, within which normal rules of legal engagement and fair play appear to be breaking down. Infringement actions remain a more appropriate remedy to settle institutional stand-offs in a context where one or more actors refuse to follow the Court's judgments.

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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