



## PRESS RELEASE No 40/23

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Advocate General's Opinion in Case C-718/21 | Krajowa Rada Sądownictwa (Continued holding of a judicial office)

### **Advocate General Athanasios Rantos doubts whether the mechanism whereby the KRS authorises Polish judges to continue to hold judicial office beyond retirement age offers sufficient guarantees of independence**

*The decision whether or not to authorise a judge to continue to hold judicial office cannot be based on criteria that are too vague and difficult to verify*

In Poland, the Law on the system of ordinary courts provides that judges who wish to continue to work as judges after reaching the retirement age are required to declare their intention to that effect to the National Council of the Judiciary (Poland, 'the KRS'). That declaration must be made within a statutory time limit, which if exceeded, would render the application inadmissible. The KRS may authorise a judge to continue in his or her post, if, inter alia, there is a legitimate interest for the administration of justice or an important social interest in that judge continuing in that role.

The Chamber of Extraordinary Control and Public Affairs of the Supreme Court of Poland ('the Chamber of Extraordinary Control') is seised of an appeal brought by a judge against the resolution of the KRS not to grant his application for his term of office to be extended, on the ground that that application was submitted beyond the deadline laid down by law. The Chamber of Extraordinary Control has asked the Court of Justice whether the national legislation infringes the principle of the irremovability of judges and judicial independence, enshrined in the Treaty on European Union, inasmuch as, first, that legislation makes the performance of the duties of a judge after retirement age subject to authorisation from another body and, second, establishes that an application to exercise the duties of a judge after retirement age cannot be considered if the statutory time limit for submission of that application has expired.

In today's Opinion, Advocate General Athanasios Rantos observes, at the outset, that the request for a preliminary ruling raises the issue of whether the Chamber of Extraordinary Control can be classified as a 'court or tribunal', within the meaning of the Treaty on the Functioning of the European Union, entitled to submit questions for a preliminary ruling to the Court of Justice. The doubts in relation to the independence of that chamber concern, in particular, the appointment of the judges thereof on the basis of a resolution — subsequently annulled — of the KRS whose independence has been questioned in several judgments of the Court of Justice.<sup>1</sup> In addition, the European Court of Human Rights ('the ECtHR')<sup>2</sup> has held that two panels of the Chamber of Extraordinary Control composed of three judges did not constitute 'tribunal[s] established by law' within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').

<sup>1</sup> Judgments of 19 November 2019, *Joined Cases, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, [C-585/18, C-624/18 and C-625/18](#), paragraphs 136 to 145 (see also [Press Release No 145/19](#)), and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court - Actions)*, [C-824/18](#), paragraphs 130 and 131 (see also [Press Release No 31/21](#)).

<sup>2</sup> Judgment of the ECtHR of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland* (CE:ECHR:2021:1108JUD004986819).

On that point, the Advocate General considers that the interpretation of the principle of independence in the context of the entitlement to refer questions to the Court of Justice for a preliminary ruling calls for a different examination separate from that required, respectively, in the context of the principle of the irremovability of judges and judicial independence, enshrined in the Treaty on European Union, and of the right to an effective remedy enshrined in the Charter of Fundamental Rights of the European Union, having regard to the different functions and objectives of those texts.

According to the Advocate General, **the concept of a 'court or tribunal' entitled to submit questions to the Court of Justice for a preliminary ruling has a 'functional' nature**, which refers primarily to the absence of hierarchical control, by the administration, of the body which submitted the question, and not to the individuals who sit in the body. It follows that **any irregularities in the appointment of the members of a judicial formation can deprive a body of the status of 'court or tribunal' to that effect only if they affect the very ability of such a body to judge independently**. The divergent position of the ECtHR does not change this, because its interpretation is more concerned with respect for the right to effective judicial protection. Consequently, it might play a role in the application of the Charter of Fundamental Rights, but not necessarily as regards the entitlement to submit questions to the Court of Justice for a preliminary ruling. **Thus, in the view of the Advocate General, the Court is validly seised by the Chamber of Extraordinary Control and, therefore, has jurisdiction to answer the questions referred for a preliminary ruling.**

Next, as regards those questions referred, the Advocate General recalls that, in its case-law, the Court accepts that Member States may invest a body outside the judiciary (either independent or under the authority of the legislature or the executive) with the power to take decisions relating, in particular, to the appointment of judges or their continued holding of a judicial office.<sup>3</sup> For that reason, he concludes that, even if, following the reforms of the Polish judicial system, the KRS is said to have become a 'captive institution', controlled by the executive branch, **the fact that it is vested with the power to decide whether or not to grant a possible extension of the exercise of judicial functions is not in itself sufficient to conclude that the principle of judicial independence has been infringed.**

**However**, as regards the substantive conditions and procedural rules, the Advocate General observes **that the criteria on which the KRS decision relating to the continued holding of judicial office is based are too vague and unverifiable**.<sup>4</sup> There is also uncertainty given that the Polish legislation does not lay down a time limit within which the KRS is required to adopt its resolution.

Taking into account all the relevant factors, both factual and legal, relating to the nature of the KRS itself and also to the way in which that body fulfils its role, the Advocate General concludes that the principle of the irremovability of judges and judicial independence, enshrined in the Treaty on European Union, **precludes national legislation that makes the effectiveness of a judge's declaration of intention to continue to hold a judicial office after reaching retirement age subject to authorisation from a body that has been shown to be lacking in independence from the legislative or executive branches and that adopts its decisions on the basis of criteria that are vague and difficult to verify.**

As regards the time-barring of a belated declaration of a judge's intention to continue to hold a judicial office, the Advocate General states that **clear and foreseeable deadlines for that declaration constitute objective procedural requirements that are likely to contribute to the legal certainty and objectivity of the entire procedure in question**. Fixed in relation to the date of the judge's birthday, the six-month time limit provided for in Polish law is, according to Advocate General Rantos, sufficiently generous to give that judge the opportunity to take a reasoned decision as to whether or not to declare his or her intention to continue in office. Similarly, **given the**

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<sup>3</sup> Judgments of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, [C-619/18](#), paragraphs 108 and 110 (see also [Press Release No 81/19](#)), and of 5 November 2019, *Commission v Poland (Independence of ordinary courts)*, [C-192/18](#), paragraph 119 (see also [Press Release No 134/19](#)).

<sup>4</sup> Like the situation that was the subject of the judgment in [C-192/18](#), paragraphs 119 and 122.

**fact that there is no possibility of an exemption from that time limit being granted, judges are not subjected to any external pressure or influence and, moreover, the KRS is deprived of the possibility of exercising any discretionary power.** Notwithstanding that assessment, the Advocate General leaves to the Chamber of Extraordinary Control the task of determining whether that time limit is proportionate.

**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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