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Press and Information

Advocate General's Opinion in Case C-791/19
Commission/Poland (Disciplinary regime for judges)

Advocate General Tanchev: the Court should rule that the Polish legislation concerning the disciplinary regime for judges is contrary to EU law

In 2017, Poland adopted the new disciplinary regime for judges of the Sąd Najwyższy (Supreme Court, Poland) and the ordinary courts. Specifically, under that legislative reform, a new Chamber, the Izba Dyscyplinarna (the Disciplinary Chamber) was created within the Sąd Najwyższy. The jurisdiction of the Disciplinary Chamber thus covers, inter alia, disciplinary cases concerning judges of the Sąd Najwyższy and, on appeal, those concerning judges of the ordinary courts. (PR 47/20)

Taking the view that, by adopting the new disciplinary regime for judges, Poland had failed to fulfil its obligations under EU law, [1] on 25 October 2019, the Commission brought an action before the Court of Justice. The Commission claims, inter alia, [2] that the new disciplinary regime does not guarantee the independence and impartiality of the Disciplinary Chamber, composed exclusively of judges selected by the Krajowa Rada Sądownictwa (the National Council of the Judiciary; 'the KRS'), the fifteen judges who are members of which were elected by the Sejm (the lower chamber of the Polish Parliament). (PR 47/20)

By its judgment of 19 November 2019, [3] the Court, on the basis of a question referred by the Sąd Najwyższy – Izba Pracy i Ubezpieczeń Społecznych (Supreme Court – Labour Law and Social Security Chamber), found, inter alia, that EU law precluded cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal. [4] Subsequently, the Sąd Najwyższy – Izba Pracy i Ubezpieczeń Społecznych, ruling on the cases which gave rise to its order for reference, in its judgment of 5 December 2019 and its orders of 15 January 2020, held specifically that, having regard to the circumstances in which it was formed, the extent of its powers, its composition and the involvement of the KRS in its constitution, the Disciplinary Chamber cannot be regarded as a tribunal for the purposes of either

[1] The second subparagraph of Article 19(1) TEU and the second and third subparagraphs of Article 267 TFEU.
[2] In addition, according to the Commission, the new disciplinary regime: (1) allows the content of judicial decisions to be treated as a disciplinary offence so far as concerns judges of the ordinary courts, (2) fails to guarantee that disciplinary cases are examined by a court 'established by law' inasmuch as it confers on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary court competent at first instance in cases concerning judges of the ordinary courts, (3) fails to guarantee that disciplinary cases against judges of the ordinary courts are heard within a reasonable period inasmuch as it confers on the Minister for Justice the power to appoint a Disciplinary Officer of the Minister for Justice and fails to guarantee the rights of the defence of judges of the ordinary courts who are accused since it provides that acts connected with the designation of counsel and that counsel's conduct of the defence do not have a suspensive effect on the course of the disciplinary proceedings and that the disciplinary court is to conduct the proceedings despite the justified absence of the notified accused judge or his or her counsel, (4) allows the right of courts to refer questions for a preliminary ruling to the Court of Justice to be limited by the possibility of the initiation of disciplinary proceedings.
[3] Cases C-585/18, C-624/18 and C-625/18, A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court) ('A.K and Others'); see Press Release No 145/19.
[4] According to the Court, that is the case where the objective circumstances in which the court concerned was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court 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.

EU law or Polish law. After those judgments, the Disciplinary Chamber continued to perform its judicial functions. (PR 47/20)

In those circumstances, on 23 January 2020, the Commission [5] requested the Court of Justice, in proceedings seeking interim relief, to order Poland to adopt the following measures: (1) to suspend, pending the judgment of the Court of Justice on the action for failure to fulfil obligations ('the final judgment'), the application of the provisions constituting the basis of the jurisdiction of the Disciplinary Chamber to rule, both at first instance and on appeal, in disciplinary cases concerning judges; (2) to refrain from referring the cases pending before the Disciplinary Chamber before a panel whose composition does not meet the requirements of independence defined, in particular, in A.K and Others, and (3) to communicate to the Commission, at the latest one month after notification of the order of the Court of Justice imposing the requested interim measures, all the measures that it has adopted in order comply in full with that order. (PR 47/20)

By order of 8 April 2020, the Court granted all those requests until delivery of the final judgment in the present case [6].

In today's Opinion, Advocate General Evgeni Tanchev first rejects Poland's objections that the right to a court established by law, the right to have a case examined within a reasonable time and the rights of the defence do not derive from the second subparagraph of Article 19(1) TEU [7] and that those rights do not apply to disciplinary cases conducted on the basis of the contested measures, as they are of an internal nature and the disciplinary court in such cases does not apply Union law (38, 72). He recalls that that provision is applicable in relation to any national court whenever it may rule on questions concerning the application or interpretation of Union law and thus falling within the fields covered by Union law. (64) In the present case, it is common ground that the Supreme Court and the ordinary courts in Poland rule on questions concerning the application or interpretation of Union law and thus falling within the fields covered by Union law. The fact that disciplinary cases conducted on the basis of the contested measures do not involve the implementation of Union law is irrelevant, as is the fact that the Union has no general competence concerning the disciplinary liability of judges. (65)

The Advocate General next examines the Commission's allegation that the contested provisions infringe the principle of judicial independence because they allow the content of judicial decisions to be treated as a disciplinary offence. (73) He observes that disciplinary action should be instituted against a judge for the most serious forms of professional misconduct, and not on account of the content of judicial decisions generally involving the assessment of facts, the evaluation of evidence and the interpretation of the law. (76) In the Advocate General's view, a definition of disciplinary offences, consisting of obvious and gross violations of the law and breach of the dignity of the office, can indeed be used to cover the content of judicial decisions and does not contain sufficient guarantees to protect judges. Moreover, the mere possibility that disciplinary proceedings or measures could be taken against judges on account of the content of their judicial decisions undoubtedly creates a 'chilling effect' not only on those judges, but also on other judges in the future, which is incompatible with judicial independence. (84)

Advocate General Tanchev further considers that the Commission has sufficiently demonstrated that the disputed provisions do not guarantee the independence and impartiality of the Disciplinary Chamber and are therefore contrary to the second subparagraph of Article 19(1) TEU. (94) He recalls that any lack of appearance of independence or impartiality of the court prejudicing the trust which justice in a democratic society inspires in subjects of the law must not be allowed. (88)

The Advocate General also observes that, by conferring discretionary power on the President of the Disciplinary Chamber to designate the competent disciplinary court of first instance in cases concerning ordinary court judges, the national provisions infringe the requirement that such a court must be established by law, whose observance is necessary to meet the requirements of effective

[5] Supported by: Belgium, Denmark, Finland, the Netherlands and Sweden.
[6] See Press Release No 47/20.
[7] 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

judicial protection under the second subparagraph of Article 19(1) TEU. (101, 106) Indeed, the absence of indications in the disputed provisions of the criteria according to which the President of the Disciplinary Chamber is entitled to designate the competent disciplinary court, aside from the court in which the accused judge sits, gives rise to the risk that this discretionary power may be exercised in such a way as to undermine the status of the disciplinary courts as courts established by law. (107) Moreover, the lack of independence of the Disciplinary Chamber may be considered to contribute to legitimate doubts as to the independence of the President of that chamber. (108)

Advocate General Tanchev then finds that, by granting the Minister for Justice the possibility of permanently maintaining charges against ordinary court judges through the appointment of a Disciplinary Officer of the Minister for Justice, the contested provisions infringe the right to have a case examined within a reasonable time. Furthermore, by providing that activities relating to the appointment of ex officio defence counsel do not interrupt the proceedings and that those proceedings can be conducted in the absence of the judge or his or her defence counsel, the national provisions infringe the rights of the defence. Those rights are requirements of effective judicial protection under the second subparagraph of Article 19(1) TEU. (110, 118)

Lastly, the Advocate General takes the view that, by allowing the right of national courts to make a reference for a preliminary ruling to be limited by the possible initiation of disciplinary proceedings, the contested measures infringe the second and third paragraphs of Article 267 TFEU, which regulate the discretion or obligation of national courts to make a reference for a preliminary ruling. (126) In that regard, he recalls that national measures which expose national judges to disciplinary proceedings because they made a reference cannot be permitted. (128) Indeed, such measures not only undermine the functioning of the preliminary ruling procedure, but also are likely to influence the decisions of other national judges in the future as to whether to make a reference, thus giving rise to a ‘chilling effect’. To the Advocate General’s mind, the mere prospect that a national judge may be subject to disciplinary proceedings or measures for making a reference strikes at the heart of the procedure governed by Article 267 TFEU and with it, the very foundations of the Union itself. (132)

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