

# AG: Poland's New Disciplinary Chamber of the Supreme Court Incompatible with EU Law



## News

Thomas Wahl

On 27 June 2019, Advocate General *Tanchev* delivered his opinion on a reference for a preliminary ruling brought by the Polish Supreme Court ([Joined Cases C-585/18, C-624/18 and C-625/18](#)). The referring court casts doubt as to whether the newly created Disciplinary Chamber of the Supreme Court meets the requirements of independence under EU law. The Polish Supreme Court has had to deal with several complaints by Supreme Court judges against their retirement following the new Polish legislation lowering the retirement age of judges.

The case concerns another aspect of the judicial reform in Poland, the Polish legislator having newly created the Disciplinary Chamber of the Supreme Court designated to hear such actions, which were heard prior to the reform before the Chamber of Labour Law and Social Security of the Supreme Court. The Supreme Court questions, however, whether the Disciplinary Chamber offers sufficient guarantees of independence under EU law to hear such claims and whether it can eventually disapply national legislation that transferred jurisdiction to the Disciplinary Chamber. As it stands, the group of judges eligible for appointment by the President of the Republic to the Disciplinary Chamber are selected by the *Krajowa Rada Sądownictwa* (National Council of the Judiciary, 'NCJ') which is the body charged with safeguarding judicial independence in Poland. The independence of the NCJ has been rendered doubtful, however, by Polish legislation modifying the manner in which its judicial members are appointed. Its composition is now primarily determined by the legislative and executive authorities.

In its opinion, AG *Tanchev* first argues that disciplinary regimes governing judges are important aspects of the guarantees of judicial independence under EU law, thus the composition and functioning of a judicial council that itself is not a court must also be assessed in view of the guarantee of judicial independence. The AG admits that there is no uniform model for judicial councils; however, there are common attributes in relation to mission, composition, mandate, and functions that safeguard judicial independence, and the requirements of these attributes must be met under EU law.

After examining the various aspects of the NCJ, the AG concludes that the newly created Disciplinary Chamber does not satisfy the requirement of judicial independence established by EU law. In particular, the manner of appointment of the members of the NCJ compromise its independence from the legislative and executive authorities.

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Ultimately, the AG considers that another chamber of a national last-instance court is entitled – of its own initiative – to disapply national provisions that are incompatible with the principle of judicial independence, i.e., in the present case, the law conferring powers to the new disciplinary chamber.

The case is closely connected to other procedures before the CJEU that concern the comprehensive justice reform initiated by the Polish government in 2017. This reform triggered much international criticism and led the Commission to open several infringement procedures against Poland as well as to carry out the so-called Art. 7 TEU procedure by which Poland is put under rule-of-law monitoring. On 24 June 2019, the CJEU held that lowering the retirement age of Supreme Court judges is incompatible with EU law (Case C-619/18). On 20 June 2019, AG Tanchev concluded that the reform of altering the retirement age of judges in lower courts and of prosecutors is in breach of EU law (Case C-192/18). The Commission is conducting further infringement procedures against Poland.

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