

CJEU: Polish Retirement Rules at Ordinary Court Level Contrary to EU Law

Thomas Wahl

On 5 November 2019, the Grand Chamber of the CJEU declared that another issue of the Polish justice reform was not in line with EU law. After having ruled on 24 June 2019 that lowering the retirement age of the Supreme Court judges is contrary to EU law (see Case C-619/18 in [eu crim 2/2018](#), p. 80), the CJEU also affirmed non-compliance with regard to the new retirement scheme for Polish judges and public prosecutors ([Case C-192/18](#)).

A Polish law of 12 July 2017 lowered the retirement age of ordinary court judges and public prosecutors as well as the age for early retirement of Supreme Court judges to 60 years for women and 65 years for men (previously 67 for both sexes). The power of the Polish Minister of Justice to extend the active service period of judges at the ordinary courts above and beyond the new retirement age was also the subject of the case. Since the European Commission found these rules to be contrary to EU law, it brought an action for failure to fulfil obligations before the Luxembourg Court.

The CJEU first held that the differences in retirement age between female and male judges/prosecutors is a direct discrimination based on sex. The CJEU rejected the argument Polish government that the difference is an “authorised positive action” under Article 157(4) TFEU and Article 3 of Directive 2006/54, because early retirement for women would indirectly compensate them for difficulties experienced in receiving promotions throughout their professional careers. The CJEU held on the contrary that “(t)he setting, for retirement, of an age condition that differs according to sex does not offset the disadvantages to which the careers of female public servants are exposed by helping those women in their professional life and by providing a remedy for the problems which they may encounter in the course of their professional career.” As a result, the new legislation infringes Art. 157 TFEU (principle of equal pay for male and female workers for equal work) and Directive 2006/54 (implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation).

Second, the CJEU also held that the discretion given to the Minister of Justice to decide whether or not to authorise that ordinary court judges may continue to carry out their duties above and beyond the new (lower) retirement age is contrary to Union law. It found that the substantive conditions and detailed procedural rules governing that decision-making power are contrary to the criteria for independence of judges, which can be deduced from Art. 19 para. 1, subpara. 2 TEU and as set out in the first judgment on the Polish justice reform of 24 June 2019. The too vague and unverifiable conditions for extension and the potential length for the discretionary decision are not acceptable.

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ISSN: 1862-6947

<https://eu crim.eu>



Moreover, the judges in Luxembourg found that the necessary imperviousness of judges to all external intervention or pressure is not guaranteed. They mainly argue that the combination of lowering the normal retirement age of judges at the ordinary courts and of conferring discretion for extension to the Minister of Justice fails to comply with the principle of irremovability. In this context, the judges remarked that “the combination of the two measures ... is such as to create, in the minds of individuals, reasonable doubts regarding the fact that the new system might actually have been intended to enable the Minister for Justice, acting in his discretion, to remove, once the newly set normal retirement age was reached, certain groups of judges serving in the ordinary Polish courts while retaining others of those judges in post.”

In sum, the CJEU follows the conclusion of AG *Tranchev* of 20 June 2019 (see [eucrim 2/2019](#), pp. 80-81) and its judgment of 24 June 2019 on changes to the retirement age of Supreme Court judges (see above). It is the second of a serious of pending cases before the CJEU that attack the justice reform in Poland for exerting more political influence into the judiciary.

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).



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