



Advocate General Tanchev: Polish law introduced in order to exclude the possibility for legal review of the National Council of the Judiciary's assessment of judicial candidates to the Supreme Court violates EU law

The second subparagraph of Article 19(1) TEU can be applied directly by the referring court in order to disapply those national provisions and to declare itself competent to rule on the cases in the legal framework which was applicable before the adoption of that law

In the context of legal proceedings between candidates for judicial office A.B., C.D., E.F., G.H. and I.J., on the one hand, and the Krajowa Rada Sądownictwa (National Council of the Judiciary; 'the KRS'), on the other, by which those candidates appealed against resolutions where: i) the KRS decided *not to propose* to the President of the Republic of Poland ('the President of the Republic') their appointment to the position of judge of the Sąd Najwyższy (Supreme Court, Poland); and at the same time, ii) the KRS proposed the appointment of other candidates to the President of the Republic, the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) has referred the matter to the Court of Justice.

The Polish law of 26 April 2019¹ changed a provision of the law on the KRS, which is now worded as follows: 'There shall be no right of appeal in individual cases regarding the appointment of Supreme Court Judges'. The same law also states that 'proceedings in cases concerning appeals against [KRS] resolutions in individual cases regarding the appointment of Supreme Court Judges, which have been initiated but not concluded before this law comes into force, shall be discontinued by operation of law'.

In today's Opinion, Advocate General Evgeni Tanchev first examines whether EU law precludes a provision which causes national proceedings to be discontinued by operation of law without any possibility to continue those proceedings or to bring them again before a different court and whether EU law precludes the consequence which is liable to flow from that national provision in terms of the Court of Justice declining jurisdiction in cases which have already given rise to a reference for a preliminary ruling which is still pending.

He recalls that the judicial system of the Union has as its keystone the preliminary ruling procedure, provided for in Article 267 TFEU, which, by setting up a dialogue between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties. It follows clearly from the Court's case-law that, in accordance with that provision, national courts must remain free to decide whether to refer preliminary questions to the Court or not.

The Advocate General considers therefore that EU law precludes a national law which decreed the discontinuation by operation of law of proceedings such as those before the referring court while at the same time excluding any transfer of the review of the appeals to another national court or the bringing again of the appeals before another national court. Moreover, such a national provision in a context where the national court originally having jurisdiction in those cases has referred

¹ Law of 26 April 2019 amending the Law on the National Council of the Judiciary and the Law on the System of Administrative Courts which entered into force on 23 May 2019.

questions to the Court of Justice for a preliminary ruling following the successful initiation of the procedure for reviewing the KRS resolutions, undermines the right of access to a court also in so far as, in the individual case pending before the court (originally) having jurisdiction to hear and determine it, it then denies that court both the possibility of successfully initiating preliminary ruling proceedings before the Court of Justice and the right to wait for a ruling from the Court, thereby undermining the EU principle of sincere cooperation.

The Advocate General finds that the removal of the (right to a) judicial remedy which was until then available and, in particular, taking it away from litigants who have already brought such an action constitutes a measure whose nature contributes to – indeed reinforces – the absence of the appearance of independence and impartiality on the part of the judges actually appointed to the court concerned, and on the part of the court itself. Such an absence of the appearance of independence and impartiality violates the second subparagraph of Article 19(1) TEU.

In the context of examining the primacy of EU law in the present case, Advocate General Tanchev addresses recent judgments from the Bundesverfassungsgericht (Federal Constitutional Court, Germany, ‘the BVerfG’) and from the Polish Supreme Court. The former ruled in *Weiss*² inter alia that a judgment of the Court of Justice was *ultra vires* and not applicable in Germany and the latter ruled³ subsequently that a Court of Justice judgment was not binding in the Polish legal order. In particular, the Advocate General explains that, rather than endangering the whole system of the EU community based on the rule of law and taking such an unprecedented approach, the BVerfG could have explained what, in its view, was open to criticism in the case-law of the Court of Justice and could have sent a new reference for a preliminary ruling to the Court. The Advocate General underlines the importance of judicial dialogue, which is integral to the functioning of the EU legal order. According to the Advocate General, the BVerfG’s *ultra vires* approach undermines the rule of law in the EU, which is a *conditio sine qua non* to integration. Indeed, the rule of law serves as a bridge to deal with conflicts of courts. The Advocate General concludes essentially that according to the Treaties, which are the Member States’ ‘contract’, the final instance in EU law is the Court of Justice and so it is simply not the BVerfG’s role or competence to rule the way it did in *Weiss*. No national court is allowed by the Treaties to overrule a Court of Justice judgment, otherwise EU law would not be applied equally and effectively across all 27 Member States and the entire legal basis of the EU would be called into question. In other words, if a national constitutional court deems that an EU act or a Court of Justice ruling clashes with its constitution, it cannot simply find that the act or ruling is inapplicable in its jurisdiction.

Furthermore, the Advocate General explains that the Court of Justice has already implicitly accepted that Article 19(1) TEU has direct effect and may be invoked by litigants before national courts as an autonomous legal basis (besides Article 47 of the Charter of Fundamental Rights of the EU) in order to appraise the conformity of a Member State’s actions with EU law. According to the Advocate General, the second subparagraph of Article 19(1) TEU can be applied by the referring court directly in the present case in order to disapply the national provisions at issue and to declare itself competent to rule on the cases in the legal framework which was applicable before the adoption of that law.

According to the Advocate General, due to the specific circumstances arising in Poland, judicial review of appointment procedures by a court whose independence is beyond doubt, is indispensable under Article 19(1) TEU in order to maintain the appearance of independence of the judges appointed in these procedures. This is notably because of the rapid changes in Polish legislative provisions governing judicial review of the KRS’s selection procedures and decisions. Those changes give rise to reasonable doubts as to whether the appointment procedure is currently oriented towards the selection of internally independent candidates, rather than politically convenient ones, for judicial office at such an important and systemic institution as the Supreme Court, the court of last instance.

² 2 BvR 859/15.

³ Order of the Disciplinary Chamber of the Polish Supreme Court (II DO 52/20).

It follows that the referring court can preserve its competence to rule on the actions in the main proceedings.

As regards the action which presents defects in terms of effectiveness such as the one originally applicable to the cases in the main proceedings, Advocate General Tanchev underlines that the remedy available to participants in the procedure who have not been proposed for appointment is completely ineffective as it does not change the legal situation of a candidate who lodges an appeal in the proceedings ending with the KRS resolution that has been set aside. Nor does it allow for a reassessment of that person's application for the vacant judicial position in the Supreme Court if that application was submitted in connection with the announcement of a competition for a specific judicial position. In order for an appeal framework to be effective, it would require that: (1) the lodging of an appeal by any unsuccessful candidate for a judicial position in the Supreme Court would halt the entire nomination procedure until that appeal has been examined by the referring court; (2) the upholding of the appeal against a KRS resolution concerning a decision not to submit a proposal for the appointment to the Supreme Court results in an obligation on the part of the competent body in the Member State (the KRS) to re-examine the individual case concerning the appointment to the position of Supreme Court judge; (3) the resolution becomes valid if the referring court has dismissed the appeals against it, and that only then can the resolution be submitted to the President of the Republic and the candidate named in the proposal be appointed as a Supreme Court judge.

The referring court should therefore disapply (i) provisions which would entail the total exclusion of the possibility to review any error of assessment of the judicial candidates in the light of the criteria which are imposed on them; and (ii) the partially definitive character of KRS resolutions regarding the candidates who were appointed. Otherwise, the judicial review of such a resolution would be illusory in relation to the appointed candidate.

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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