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ideaForum

Warsaw, 28 June 2018

The Polish Law on the Supreme Court in light of rulings of the Court of Justice of the European Union

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There is an ongoing discussion on the question if the Court of Justice of the European Union has the competence to issue a judgment on provisions of the Law on the Supreme Court which decrease the retirement age of Supreme Court judges from 70 to 65 years and require judges older than 65 to request from the President of Poland a consent to continue their work.

We argue in ten short points that provisions of the Law on the Supreme Court might jeopardize the principle of irremovability of judges and thus violate Articles 2 and 19(1) of the Treaty on the European Union as well as Article 47 of the Charter of Fundamental Rights of the European Union.

On this basis we conclude that if the European Commission launched an infringement proceeding over the Law on the Supreme Court (regardless of the Article 7 procedure), the Court of Justice of the European Union would be competent to judge it.

1. In accordance with Article 258 of the Treaty on the Functioning of the European Union (TFEU), the Commission may file a complaint if a Member State fails to perform one of its treaty obligations. According to the judgement in Case C-64/16 Associação Sindical dos Juizes Portugueses, the second paragraph of Article 19(1) of the Treaty on European Union (TEU) imposes the obligation on Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. Therefore, the second paragraph of Article 19(1) refers to the principle of effective judicial protection, which is a general principle of EU law, confirmed in Article 47 of the Charter of Fundamental Rights of the European Union (EU CFR) and constituting an inherent feature of the principle of the rule of law (Article 2 TEU). Therefore, a breach of the principle of effective judicial protection in the fields covered by Union law is a breach of the second paragraph of Article 19(1), Article 47 EU CFR and a breach of Article 2 TEU.
2. Pursuant to the second paragraph of Article 19(1), if a given national authority can settle matters regarding the application or interpretation of EU law as a court, in the meaning of Article 267 TFEU, that Member State should ensure that that authority complies with the integral requirements of effective judicial protection in accordance with the second paragraph of Article 19(1) TEU.
3. The Polish Supreme Court (SC) undoubtedly settles matters regarding the application or interpretation of EU law. Furthermore, as it has already submitted enquiries to the Court of Justice for a preliminary ruling, it is a court in the meaning of Article 267 TFEU. Additionally, it is a court against whose decisions there is no judicial remedy under national law in the meaning of the third paragraph of Article 267 TFEU (see, in particular, judgement in case C-119/15, Biuro podróży "Partner"). Therefore, the Republic of Poland should give the Supreme Court guarantees arising from the principle of effective judicial protection under the second paragraph of Article 19(1) TEU and Article 47 EU CFR. One of the key elements of this principle is the independence of the judicial body.
4. In accordance with the second paragraph of Article 19(1) TEU and Article 47 EU CFR, the concept of independence has two aspects. The first – external – aspect assumes the protection of the authority against external interference and pressures that can jeopardize the independence of the

judgements of its members when considering disputes. The second – internal – aspect is related to the notion of “impartiality” and applies to an equal distance to the parties to the dispute and their respective interests regarding its subject matter. This aspect requires the observance of objectivity and a lack of any interest in settling a dispute beyond the strict application of the provisions of the law.

5. Such guarantees of independence and impartiality assume the existence of “statutory and procedural rules” – enabling what legal entities believe to be the elimination of all reasonable doubts as to this authority’s independence of external factors regarding neutrality with respect to conflicting interests. These should refer, in particular, to the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (C-222/13, TDC, paragraph 32).
6. According to the Court of Justice (CoJ), in order to accept that the conditions for independence are satisfied, dismissals of members of given authority should be determined by express legislative provisions (see judgement in case C-222/13, TDC, paragraph 32), while the mandate of the authority’s members should end “only for exceptional and well-defined reasons” (C-246/05, Armin Häupl). If both the term of office of the president of the authority assessed in the light of Article 267 TFEU, as well as the reasons for his possible dismissal by the government of a Member State are not specified in an act of law, such an authority cannot be considered independent (C-49/13, MF 7, paragraph 22). The Court similarly assessed the situation in which members of the Danish adjudicating body in telecommunications cases (appointed by the minister for a term of 4 years) may be removed from office in the absence of specific regulations in this respect (regarding judges) other than the general principles of administrative law and employment law (C-222/13, TDC, paragraphs 33–38). The lack of specific guarantees against dismissal results in the members of the adjudicating authority not being independent, although, according to the national regulations, they are “personally and occupationally independent and subject in their tasks exclusively to the law and their own conscience”. According to the CoJ,

such a system does not effectively protect against undue intervention or pressure from the executive (C-53/03, *Synetairismos Farmakopoiou Aitolias & Akarnanias (Syfait)*, paragraph 31).

7. In accordance with the case law, when filing a complaint with the CoJ, the Commission does not need to rely on a specific situation in which the independence of the given authority is actually undermined (judgement in Case C-530/16, *Commission v. Poland*, paragraph 32). This is because, in the light of the second paragraph of Article 19(1) TEU and Article 47 EU CFR, Member States are required to guarantee the independence of the judicial authority, including by issuing regulations that ensure that the authority is able to fulfill its tasks without being exposed to the risk of being subject to orders from or influence by the executive. At the same time, according to the CoJ, shortening the term of office of an independent authority outside the premises specified in an act of law is a breach of its independence and can cause "prior compliance" on the part of such authority" (C-288/12, *Commission v. Hungary*, paragraph 53).
8. **Articles 37 and 111 of the Act on the Supreme Court, according to which the Supreme Court judges retire at the age of 65 (lowering this age from 70), can breach the principle of irremovability of judges, which is a fundamental element of the independence of judges, and therefore may be incompatible with Article 2 and the second paragraph of Article 19(1) TEU as well as the second paragraph of Article 47 EU CFR. Furthermore, these provisions may be in conflict with the principles of legal certainty and the protection of legitimate expectations, which are general principles of EU law (judgement in Case C-286/12, *Commission v. Hungary*, paragraph 68). Article 111 applies to approximately 40% of the judges of the Supreme Court, including the First President of the Supreme Court and the President managing the Criminal Chamber.**
9. The Commission may file a complaint with the CoJ under Article 258 TFEU, regardless of the procedure provided for in Article 7 TEU. Firstly, the grounds by which the Commission can file the complaint need not only be Article 2 TEU, as referred to in Article 7 TEU, but also, and perhaps primarily, the second paragraph of Article 19(1) TEU and the second paragraph of Article 47 EU CFR. Secondly, if the Commission also wanted to refer in the complaint to Article 2 TEU, no provision explicitly rules out

the jurisdiction of the CoJ in adjudicating in the procedure of Article 258 TFEU as a result of a breach by a Member State of the values referred to in Article 2 TEU. In particular, Article 269 TFEU is not such a provision. Any derogations from the jurisdiction of the CoJ should be interpreted restrictively (C-658/11 Parliament v Council, paragraph 70). Thirdly, the acknowledgement that the Commission cannot file a complaint under Article 258 TFEU regarding a breach of Article 2 TEU would be in conflict with the Commission's general competence as a "guardian of Treaties" (in the situation where such a restriction of competence is not explicitly specified in the Treaty). Fourthly, in accordance with Article 49 TEU, it should be accepted that the obligation to respect a value, the breach of which can justify the initiation of proceedings under Article 258 TFEU, arises from Article 2 TEU. Fifthly, it is possible to raise the argument that Article 258 TFEU and Article 7 TEU have a different function.

10. As it does not seem possible to lodge a complaint before 3 July 2018, together with a motion for interim measures in the form of the suspension of the application of Article 111 of the Act on the Supreme Court until the matter is settled, the Commission may consider a motion to the CoJ to order Poland to temporarily regulate the status of judges who are to retire on 3 July 2018. According to the case law, Article 279 TFEU gives the CoJ the power to order any interim measure that the CoJ deems necessary to guarantee the full effectiveness of the final order (decision C-441/17 R, Commission v. Poland, paragraph 47).

A ruling of the CoJ finding provisions of the Law on the Supreme Court in violation of EU law will have to be implemented immediately by Polish authorities. The ruling will be final, and its potential insufficient implementation could trigger a second complaint of the European Commission to the CoJ, this time with a proposal to impose financial penalties.

Irrespective of the abovementioned charges regarding forced early retirement of Supreme Court judges, there are more provisions of the Law on the Supreme Court potentially violating EU law. This includes the requirement to gain permission from the President of Poland to continue judging, as well as the procedure of appointing new Supreme Court judges. An assessment of these charges was however beyond the scope of this analysis.

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This analysis was written for the ideaForum of the Stefan Batory Foundation. The views expressed here are those of the authors.

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