

**INTRODUCTORY NOTE TO JOINED CASES A. K. V. KRAJOWA RADA
SĄDOWNICTWA (C-585/18) AND CP (C-624/18), DO (C-625/18) V. SĄD NAJWYŻSZY
(C.J.E.U.)
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Introduction

Joined Cases C-585/18, C-624/18, and C-625/18¹ concerning the independence of the Disciplinary Chamber of the Sąd Najwyższy (Polish Supreme Court) is the latest in a series of European Union (EU) member states' requesting the Court of Justice of the EU (CJEU) to rule on the independence of their judicial systems. While the organization of justice systems within member states is a competence of member states (and so not for the EU to determine or decide), the CJEU has held that member states are nevertheless required to comply with obligations under EU law to ensure effective judicial protection, and as a necessary corollary, judicial independence. The significance of the current case lies in the formulation by the CJEU of a "European" standard of judicial independence, and its finding that national judges may set aside the jurisdiction of courts found not to be independent against that standard and to disapply any national measure (in accordance with the principle of the primacy of EU law over national law) which gives jurisdiction to a non-independent court.

Background

Beginning in 2015, the Polish parliament led by the *Prawo i Sprawiedliwość* (Law and Justice) government introduced a series of judicial reforms, as part of a larger legislative agenda of constitutional and legal reform. Reforms initially targeted the Constitutional Court, followed by the Supreme Court and National Council of the Judiciary (NCJ). The practical effect of these reforms was to increase the degree of political oversight and control of the judicial system in Poland. The NCJ, the body responsible for judicial appointments in Poland, was reformed in a manner which meant that appointments to the judiciary are primarily determined by the Parliament and under significant control of the ruling political party. These judicial reforms were found to have been both unconstitutional under the Polish constitution and, in an earlier judgment of the CJEU, also to have also violated the EU Treaties' guarantee of judicial independence.² A significant number of judges appointed to the Disciplinary Chamber, which itself was introduced through the reforms and responsible for disciplinary actions against Polish judges, were appointed by the NCJ, leading to the question and concern of whether the Disciplinary Chamber could sufficiently be considered "independent" from political influence.

In the present case, the CJEU was asked by two Supreme Court judges and a judge of the Supreme Administrative Court to consider the independence of the Disciplinary Chamber of the Supreme Court, and where it did not meet EU requirements for judicial independence, whether the referring courts should disapply a national law which precluded the referring court from assuming jurisdiction of the non-independent court. Advocate General Tanchev, in his Opinion, argued for the Court to rule that the Disciplinary Chamber failed to meet the standards required for judicial independence due to the degree of influence exerted by the National Council for the Judiciary.

Judgment of the Court

In reformulating the questions, the Court first considered the means by which the independence of the Disciplinary Chamber could be assessed, taking into account the procedures by which it is appointed, and in light of Articles 2 of the Treaty on European Union (TEU), Article 19(1)(2) of the Treaty on the Functioning of the European Union,³ and Article 47 of the EU Charter of Fundamental Rights. The second question was whether, in cases where the Disciplinary Chamber was found not to guarantee the independence of its members (and so unable to guarantee the right to effective judicial protection under

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EU law), the principle of the primacy of EU law requires the referring court to disapply the national law which removes its jurisdiction.

Despite this significant statement on the standard of judicial independence expected of national courts, the CJEU did not follow the Opinion of the Advocate General, and stopped short of giving a substantive assessment of the Disciplinary Chamber of the Polish Supreme Court, instead giving guidance for the interpretation and application of the standard by the referring judges. The Court held that Union law must be interpreted as precluding the application of EU law falling within the exclusive jurisdiction of a court which is not an “independent and impartial tribunal.” Such a determination of whether the court is independent must be made based on the objective circumstances in which the court is formed, the way and circumstances in which its members are appointed, as well as the features of the court which could give 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.⁴

The Court set a series of requirements for courts to be considered independent, consisting of two aspects. The first, an external aspect, requires that a court exercise its functions “wholly autonomously” and “without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever” in order to be protected from any “external intervention or pressure” liable to impair or influence their decisions.⁵ The second, internal, aspect linked with impartiality, requires “objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.”⁶ Based on this assessment, the CJEU held that a national court may find a body not to be a court within the meaning of EU law and should set aside any national measure which grants exclusive jurisdiction to a non-independent body to ensure that individuals are not deprived of their rights under EU law and the guarantee of effective judicial protection under Article 47 of the EU Charter of Fundamental Rights and Article 19(1) TEU.⁷

Conclusion

This judgment represents a significant statement on judicial independence within the larger context of reforms which have the effect of undermining the autonomy of judges and the separation of powers within EU member states. Within Poland, the judgment extends beyond the Disciplinary Court, to include any court which could be found to have fallen below the standard of judicial independence, but it does not have the automatic effect of invalidating or setting aside any ruling that had been made by judges appointed by the NCJ, though it could result in a right of appeal on this basis. In immediate response to the judgment, “Act of 20 December 2019 on Amendments to the Act-Law on the System of Ordinary Courts, the Act on the Supreme Court, and Certain Other Acts” was introduced which prohibits Polish courts from questioning the legitimacy of state institutions or the validity of judicial appointments, and includes disciplinary procedures against judges who make such assessments. This, in effect, is both to counteract and contravene the judgement.

¹ Joined Cases A. K. v Krajowa Rada Sądownictwa (C-585/18) and CP (C-624/18), DO (C-625/18) v Sąd Najwyższy (Nov. 19, 2019),

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=220770&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=328730> [hereinafter Joined Cases].

² Case C-619/18 Commission v. Poland (June 24, 2019) (on the independence of the Supreme Court),

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=215341&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=328430>; Case C-192/18 Commission v. Poland (Nov. 5, 2019) (on the independence of the ordinary courts),

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=219725&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=328576>.

³ Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010 O.J. (C83) 13 and 2012 O.J. (C326) 47.

⁴ Joined Cases, *supra* note 1 ¶ 153.

⁵ *Id.* ¶ 121.

⁶ *Id.* ¶ 122.

⁷ Charter of Fundamental Rights of the European Union, 2010 O.J. (C83) 389.