

COMMON POSITION

on the Judgment of the Court of Justice of the European Union
delivered on 19 November 2019 in Joined Cases
A.K. (C-585/18), CP (C-624/18) and DO (C-625/18)

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CALL FOR ACTION

Following the delivery of the judgment of the Court of Justice of the European Union in Luxembourg on the National Council of the Judiciary and the Disciplinary Chamber, we emphasise that all authorities of the Republic of Poland are obliged to fully execute the said judgment. We would like to point out that any EU Member State that does not respect the standards of independence of national courts cannot participate in transnational European integration. This is because the Court considers judicial independence to be part of the value of the rule of law within the meaning of Article 2 TEU, which is essential for the functioning of the European Union's legal system, and for other Member States and EU institutions to have confidence in Polish courts and the Polish judicial system.

A failure to implement the judgment of the CJEU promptly and in accordance with European standards, the principle of legal certainty and respect for the rights of citizens who placed their trust in the Polish judicial system will inevitably cause unprecedented chaos in the legal system, which will manifest itself primarily in decisions of Polish courts being deprived of the benefits stemming from the principle of mutual trust and their recognition in other EU Member States.

It is court presidents, judges, as well as the legislator, the NCJ and other state authorities who have a huge responsibility to implement the CJEU judgment as soon as possible in order to ensure the legal security of all EU citizens.

I. INTRODUCTION

- 1 The CJEU judgment directly concerns the interpretation of Art. 19(1) and Art. 2 of the Treaty on European Union (“TEU”), as well as Article 47 of the Charter of Fundamental Rights of the European Union (“CFR”), which express the principle of effective judicial protection.
- 2 In terms of the judgment's impact on the Polish legal system, the key issue is whether a newly-created chamber of a court of last instance of a Member State (such as the Disciplinary Chamber (“DC”) of the Polish Supreme Court) – which has jurisdiction to hear an appeal lodged by a judge and is composed exclusively of judges selected by a body tasked with safeguarding the independence of the courts (the National Council of the Judiciary, “NCJ”), which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities – is an independent court or tribunal within the meaning of European Union law.

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3 The CJEU has also decided whether a national court has the right to disregard the provisions conferring exclusive jurisdiction on such a body to adjudicate on a given category of cases.

4 The CJEU expressed its views on the standards for the appointment of DC judges, including the status of the NCJ in light of the principle of effective judicial protection. The impact of the discussed judgment extends far beyond the mere question of the status of the DC. The judgment affects the situation of the NCJ, and thus also the legal status of the Chamber of Extraordinary Control and Public Affairs (“CECPA”) of the Polish Supreme Court, the judges of the Supreme Court's Civil Chamber appointed by the sitting NCJ, and over 600 judges appointed or promoted with the participation of this body. The CJEU judgment may also have an impact on the judgments delivered by the judges appointed by the NCJ in its current composition.

II. JUDGMENT – KEY POINTS

5 The CJUE determined that the structure and composition of the National Council of the Judiciary may be scrutinised under EU law (in particular, Art. 19 TEU and Art. 47 CFR). This means that the judicial appointments process involving the NCJ must satisfy the requirements of effective judicial protection. All Polish courts must, therefore, meet the standards set out in today's judgment, as all Polish courts are EU courts, applying EU law as part of their jurisdiction.

6 The CJEU noted that the mere fact that judges were appointed by the President did not result in the absence of judicial independence impartiality, provided that the legal rules on the appointment of judges do not give rise to reasonable doubts as to their independence. Accordingly, the Court pointed out that the Supreme Court, in its assessment of the independence of the Disciplinary Chamber, should have regard to the criteria set out in the judgment in relation to the composition and functioning of the NCJ and DC.

7 Referring to the NCJ, the CJEU noted the premature termination of the mandates of 15 judges who sat on the former NCJ, an increase in the number of NCJ members elected by a political authority, the potential for irregularities which could adversely affect the process for the appointment of new NCJ members, the manner in which the NCJ performs its constitutional role (in particular, that of a guardian of independence of the judiciary), as well as the existence of an effective judicial review of NCJ decisions. The Court emphasised that although any of those factors, taken separately, might not justify the argument that the NCJ lost its independence, when taken together,

these factual and legal circumstances may reasonably lead to such a conclusion.

- 8 The CJEU also pointed to other criteria relevant for the assessment of the independence of the Supreme Court's Disciplinary Chamber. The Court recalled, among other things, that the DC had been granted exclusive competence to hear employment matters involving Supreme Court judges and those related to the retirement of judges, which had been challenged in an earlier judgment of the CJEU (C-619/18). The CJEU also highlighted that the Disciplinary Chamber was comprised solely of newly appointed judges, which effectively prevented the judges already serving in the Supreme Court from being appointed as DC judges. The CJEU further noted that the DC enjoyed a particularly high degree of autonomy within the Supreme Court. The Court stressed that the independence of the Disciplinary Chamber should be assessed in the same way as that of the NCJ, i.e. in consideration of all relevant matters of law and of fact.
- 9 The CJEU ultimately did not assess the independence of the NCJ and the Disciplinary Chamber but set out detailed criteria to be followed by the Supreme Court in deciding whether the Chamber meets the standards arising from EU law.
- 10 The Court ruled that if the Supreme Court came to the conclusion that the Disciplinary Chamber does not meet these standards, the Supreme Court should ensure that the case is heard by an independent court. To this end, the Supreme Court may, relying on the principle of the primacy of EU law, disregard the provisions conferring exclusive jurisdiction on the Disciplinary Chamber and refer the case to be heard by the Chamber that had jurisdiction under the laws in force prior to the transfer of jurisdiction to the Disciplinary Chamber (e.g. the Labour, Social Insurance and Public Affairs Chamber).
- 11 The impact of the judgment extends not only to the Supreme Court's Disciplinary Chamber but also to other courts whose composition includes judges appointed with the participation of the incumbent NCJ. Each court is competent to assess whether a judicial panel hearing a case with the participation of a judge appointed on the basis of a resolution of the incumbent NCJ meets the standards of independence under EU law.

III. THE JUDGMENT'S IMPACT ON THE PROCEEDINGS IN WHICH QUESTIONS HAVE BEEN REFERRED FOR A PRELIMINARY RULING¹

- 12 The consequence of the CJEU judgment is that the Supreme Court must assess whether the DC satisfies the requirements of “judicial independence” within the meaning of EU law and the case-law of the CJEU², and therefore whether the Chamber can examine cases with an EU element. If the answer to those questions is negative, the Disciplinary Chamber becomes “invisible” for the EU system. Any legislative conferral of jurisdiction on the DC that enables its judges deal with cases with an EU element will constitute a breach of EU law.
- 13 As per CJEU's holding in *ASJP*, the status of national and EU judge is inseparable. If it turns out that the appointments of DC judges are invalid, they cannot continue to perform their duties, regardless of the subject-matter of the case they may hear, since each and every judge of the Chamber may need to apply EU law.
- 14 A logical consequence of the judgment is that the Supreme Court is obliged to disregard the relevant provisions of the Supreme Court Act (“SCA”), which establish the Chamber's jurisdiction to examine the three cases in which questions have been submitted for a preliminary ruling (i.e. actions for declaration and appeals against resolutions of the NCJ). The Supreme Court should therefore disregard Art. 27(1)(2)-(3) and Art. 79 SCA because their application would result in a breach of the principle of effective judicial protection.
- 15 The Court confirmed in *Torubarov* that the principle of effective judicial protection – on its own and without the need for any specific legal norms laid down in provisions of EU or national law – confers on individuals a right which they may rely on directly before national courts³. However, under the settled case-law of the CJEU, any national court, hearing a case within its jurisdiction as a body of a Member State, is obliged to disapply any provision of national law which is contrary to any provision of EU law with direct effect in the case pending before it⁴. This also applies to all legislative, administrative and judicial practices.
- 16 In effect, if the Supreme Court concludes that the Disciplinary Chamber does not meet the requirements of an independent court,

¹ The general impact of CJEU judgments is described in para. IV below.

² See judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses (ASJP)*, C-64/16, EU:C:2018:117.

³ See judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraph 56.

⁴ See judgment of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 55.

cases pending before the Supreme Court should be decided by the Labour and Social Insurance Chamber, in accordance with its former jurisdiction over employment matters concerning Supreme Court judges, including those related to discrimination on the grounds of age and raised in the questions referred for a preliminary ruling (see paragraph 166 of the judgment).

IV. JUDGMENT'S IMPACT BEYOND THE PROCEEDINGS IN WHICH QUESTIONS HAVE BEEN REFERRED FOR A PRELIMINARY RULING

A. GENERAL OBSERVATIONS

- 17 As recalled in *ASJP*, the second subparagraph of Article 19(1) TEU obliges all Member States to establish remedies sufficient to ensure effective judicial protection. Pursuant to this provision, every Member State must ensure that the bodies which, as “courts or tribunals” within the meaning of EU law, come within the judicial system in the fields covered by that law, meet the requirements of effective judicial protection.
- 18 This obligation will be sufficiently ascertained if a national court may be called upon to rule on issues connected with the application or interpretation of EU law and consequently – as a “court or tribunal” referred to in Art. 267 TFEU – constitutes a part of the Polish judicial system in the “fields covered by EU law” within the meaning of the second subparagraph of Article 19(1) TEU⁵. The Supreme Court, but also all common courts (district courts, regional courts and courts of appeal) and administrative courts satisfy the above criteria.
- 19 Since the CJEU noted that deficiencies in the judicial appointments procedure have an impact on the independence of courts, which is required under EU law, the judgment has a much broader meaning in the context of the Polish legal system. The approach taken by the CJEU will also have an impact on the status of CECPA and several hundred judges adjudicating in courts throughout Poland who have been appointed or promoted through the recommendation of the new NCJ. If the criteria described in the judgment are not met, all these judicial appointments may be considered to have been made in breach of EU law, i.e. the principle of effective judicial protection. Indeed, all national courts – irrespective of their jurisdiction, type or level – may at some point be called to rule on a question of EU law.

⁵ See order of 17 December 2018, *Commission/Poland*, C-619/18 R, EU:C:2018:1021, paragraph 43.

- 20 It should also be noted that apart from the discussed judgment, the CJEU is yet to rule on other preliminary questions from Polish courts, which concern the status of the NCJ, DC judges, CECPA and the Criminal Chamber of the Supreme Court.
- A. In *W.Ż.* (C-487/19) and *Prokurator Generalny* (C-508/19), cases commenced with questions referred for a preliminary ruling by the Supreme Court, the CJEU will determine the status of judges of the two newly-created chambers (the DC and CECPA). The questions are based on Art. 19(1) TEU, which addresses the principle of effective judicial protection, read in conjunction with Art. 47 CFR, which concerns judicial independence and appointments of judges who resolve cases with an EU element. The Supreme Court also asked if its judges appointed in violation of an EU standard should at all be considered “judges” in a situation where the judicial review of the appointment procedure was prevented and the procedure itself has been carried out despite a ruling that suspended that procedure, “in flagrant breach” of the laws of Poland.
 - B. In *Krajowa Rada Sądownictwa* (C-824/18), a case brought upon a question referred for a preliminary ruling by the Supreme Administrative Court, the CJEU will rule whether the procedure for the appointment of judges to the Supreme Court complies with EU standards given the absence of sufficiently effective measures of judicial review of this procedure.
 - C. Following a question referred for a preliminary ruling by the Regional Court in Warsaw (case no. X Ka 645/19), the CJEU will address the powers of the Minister of Justice to delegate judges to sit on other courts, as well as speak about the status of Supreme Court judges appointed by the new NCJ and the effect of decisions issued by these judges and the delegated judges.
 - D. Following a question referred for a preliminary ruling by the Court of Appeal in Krakow (case no. I ACa 649/19), the CJEU will have the opportunity to address the status of those judges of the Civil Chamber of the Supreme Court who have been appointed by the incumbent NCJ and decide whether a court composed of judges whose appointments raise doubts as to their compliance with the EU standard of independence is at all capable of issuing valid decisions.
 - E. Finally, following the European Commission's complaint (*Commission v Poland*, C-791/19), the CJEU will consider the regime of disciplinary liability of judges; this decision will also address the status of the Disciplinary Chamber against the background of the procedure for the appointment by the sitting NCJ. In *Commission*, the Court will invoke the criteria devised for the Supreme Court in the discussed judgment to carry out an actual independent assessment of the status of the Supreme Court's Disciplinary Chamber and the NCJ. This

is a natural consequence of the differences between the preliminary ruling procedure, where the final assessment is made by a national court, and the procedure under Article 258 TFEU, which authorises the CJEU to independently review the status of the Supreme Court and the NCJ.

B. IMPACT ON THE COURTS

- 21 The CJEU judgment creates the possibility to challenge the status of *all* judges appointed and promoted by the incumbent NCJ, not only DC judges. Given the absence of a separate judicial system established in Poland to deal exclusively with cases with an EU element, the impact of the judgment extends to all cases heard by judges appointed by the NCJ and all decisions issued in these cases. This is because a question requiring the interpretation or application of EU law may arise in any given case.
- 22 In other words, the interpretation of EU law adopted by the CJEU has an impact on the assessment of the legality of the judicial appointments made with the participation of the sitting NCJ. Since the performance of all judicial roles in Poland may involve the application of EU law as understood in ASJP, all appointments made with the participation of the incumbent NCJ may be deemed to be in breach of EU law.
- 23 The courts have the power to review whether judges appointed with the participation of the sitting NCJ meet the criteria of independence set out in the CJEU judgment. The Supreme Court will play a key role in this process, deciding cases in which questions have been referred to the CJEU for a preliminary ruling.
- 24 For that reason, from the moment when the discussed judgment was delivered, the judges appointed with the participation of the incumbent NCJ should refrain from adjudicating cases and performing other judicial activities as such course of action is required to protect the interests of the safety of legal transactions and respect for the individual's right to an independent court.
- 25 Bearing in mind the wording of the CJEU judgment and its subsequent execution in decisions to be later delivered by the Supreme Court and other courts, the judges appointed in procedures that satisfy European standards – i.e. by the NCJ prior to having been filled by 15 parliamentary appointees – should refrain from sitting in panels with judges who do not meet EU requirements owing to the need to respect the right to an independent court. Compliance with the above recommendations is crucial for guaranteeing the legal security of the parties to court proceedings.
- 26 For the same reasons (namely the expected judgement of the Supreme Court and right to a fair trial), court administration bodies

should exclude the judges appointed by the incumbent NCJ from performing judicial functions. This requirement also applies to the bodies of the Supreme Court and the Supreme Administrative Court.

- 27 The Supreme Court should use its powers to decide on the constitutional status of persons appointed by the sitting NCJ. It should also determine the nature and effects of judgments delivered by these judges so as to acknowledge the effects of the CJEU judgement, also from the national perspective. This will be of particular importance for the thousands of cases handled by judges of common courts appointed by the NCJ and for decisions handed down by those judges.
- 28 All national courts and administrative (executive) authorities should refuse to apply any national legislation that would enable judges appointed by the incumbent NCJ to hear and determine court cases. This applies in particular to legal actions brought before the DC and CECPA until they are filled with judges who satisfy EU requirements or until the jurisdiction of these chambers is transferred to other chambers of the Supreme Court. If it is necessary to bring such legal action, it should be referred to another Chamber of the Supreme Court, depending on the subject-matter of the case.

C. IMPACT ON THE NCJ

- 29 After the Supreme Court acknowledges the doubts expressed in the CJEU judgment in respect to the incumbent NCJ, it will be necessary to establish the Council with a composition that meets the requirements of EU law. This means that the sitting NCJ should suspend its activities due to the fact that 15 of its judicial members have been appointed in breach of the EU standards explicitly laid down in the grounds for the CJEU judgment (see Part II). Furthermore, in order to implement the principle of sincere cooperation under Article 4(3) TEU, all judicial members of the NCJ elected by the Sejm should consider resigning from their positions in order to enable the implementation of the judgment and guarantee the EU standard of judicial independence.
- 30 Also, all appointment procedures involving the incumbent NCJ should be suspended. This means that the NCJ and the President of the Republic of Poland are obliged to cease any activities aimed at filling judicial vacancies. In view of the above, both the President of the Republic of Poland and the Minister of Justice should cease notifying new judicial competitions, and judges and judge candidates should not submit their applications for judicial posts until the CJEU judgment is fully implemented. Consequently, persons involved in pending appointment procedures should consider withdrawing from such procedures immediately.

- 31 Consideration should also be given to other responsibilities and powers conferred on the NCJ by ordinary legislation, such as, for example, the authority to: review appeals submitted by judges or associate judges whose responsibilities have been changed (Article 22a(5) of the Act of 27 July 2001 on the Common Courts System [Common Courts Act, CCA]⁶); examine complaints concerning the activities of the president of a court of appeal and the Disciplinary Officer for Common Courts Judges (Art. 41b(3)-(3a) CCA); grant consent to the extension of the tenure of a judge who has reached the retirement age (Art. 69(1b) CCA); issue decisions on the return of a judge who has been retired due to a permanent incapacity to perform their duties or due to a change in the system of courts or the boundaries of judicial circuits (Art. 74(2) CCA); submit applications for the appointment of associate judges (Art. 106i CCA); make requests for taking investigative action by the Disciplinary Officer (Art. 114(1) CCA); lodge an appeal or an objection against a judgment issued by a disciplinary court (Art. 115b(4) and Art. 121(1) CCA); and submit a request for the resumption of disciplinary proceedings (Art. 125 CCA). The sitting NCJ should not exercise its aforementioned powers as they are directly linked to the status of the judge and have an impact on judicial independence.

D. IMPACT ON DECISIONS ISSUED BY JUDGES APPOINTED IN VIOLATION OF EU LAW

- 32 A decision of the Supreme Court determining that the Disciplinary Chamber does not meet the standards of independence set out in the CJEU judgment will also necessitate a ruling on the validity of the decisions issued by the Chamber. The same mechanism will apply to judgments delivered by judges of common courts appointed or promoted by the incumbent NCJ.
- 33 The CJEU judgment does not automatically set aside or nullify judgments delivered by judges appointed in breach of EU law.
- 34 The courts hearing ordinary and extraordinary appeals against decisions issued by judges appointed by the incumbent NCJ will determine whether the CJEU judgment has an impact on the validity of these decisions. The parties to the proceedings in which such decisions were delivered should have the right to challenge such decisions because of the defective composition of the adjudicating court.

⁶ Consolidated text: Journal of Laws (Dz.U.) of 2019, item 52 as amended.

E. IMPACT ON DISCIPLINARY PROCEEDINGS

- 35 It should be noted that the European Commission has lodged a complaint against Poland with the CJEU, pointing to deficiencies in Poland's disciplinary system for judges.⁷ That action also concerns the status of DC judges who were appointed with the participation of the sitting NCJ and whose status has been challenged in the CJEU judgment.⁸
- 36 The scope of the complaint is extremely broad and concerns multiple features of the disciplinary system: the Disciplinary Chamber, work of disciplinary officers, the possibility of abusing disciplinary rules to punish judges for their rulings, the possibility of initiating disciplinary proceedings for referring questions to the CJEU for a preliminary ruling, the lack of procedural safeguards in disciplinary proceedings, as well as its chilling effect on judges and the accompanying far-reaching influence of the executive on the system of disciplinary liability of judges. In its complaint, the Commission points out that the new disciplinary regime has led to a structural violation of judicial independence in Poland.
- 37 It is likely that the CJEU decides that the above elements of the disciplinary regime should be abolished on the grounds of their incompatibility with EU standards. This would mean that a number of important provisions governing disciplinary proceedings against judges would be rendered inapplicable on grounds of incompatibility with EU law. This is because the risk of the disciplinary system being abused for purposes of exerting political influence on judges' jurisprudential activities and undermining their independence is high and therefore the finding of a violation of EU law is plausible. In those proceedings, the CJEU will assess the status of the Disciplinary Chamber against the criteria set out in the discussed judgment. The Commission requested that the case be processed in an expedited procedure.
- 38 Since also the discussed CJEU judgment may lead to the DC being declared a body that does not satisfy requirements of EU law, any disciplinary proceedings against judges should be suspended until the Commission's complaint is examined. This is mainly because the panels of disciplinary courts have been assigned by the President of

⁷ *Commission v Poland*, C-791/19.

⁸ See also the following preliminary ruling proceedings: *Miasto Łowicz* (C-558/18), *Prokuratura Okręgowa w Płocku* (C-563/18) and *Prokuratura Rejonowa w Słubicach* (C-623/18). Cf. Polish Ombudsman's memo on the opinion of the Advocate General in joined cases C-558/18 and C-563/18 [*Notatka dotycząca opinii Rzecznika Generalnego TSUE E. Tancheva w połączonych sprawach C-558/18 (Miasto Łowicz) i C-563/18 (Prokuratura Okręgowa w Płocku)*], <https://www.rpo.gov.pl/pl/content/rpo-trybunal-luksemburski-bezpieczna-przystania-dla-sadow-krajowych>, accessed on 19.11.2019.

the DC (or a judge acting as President), who, in the light of the CJEU judgment cannot be considered an independent judicial officer under EU law.

- 39 Judges of disciplinary courts should therefore refrain from adjudicating until the adoption of new disciplinary legislation that meets the requirements of EU law, and in particular until the DC is filled with judges appointed in compliance with EU law and until its jurisdiction is transferred to another chamber of the Supreme Court composed of judges who satisfy the requirements of EU law.

F. IMPACT ON THE LEGISLATURE

- 40 The entire system of judicial appointments needs to be immediately brought into line with EU standards. Since all judges of the Supreme Court, administrative courts and common courts apply or may apply EU law, these courts must uphold the guarantees of judicial independence enshrined in EU law. Accordingly, the National Council of the Judiciary and the two new chambers of the Supreme Court (DC and CECPA) will have to comply with these standards, which will also apply to all past judicial appointments and promotions influenced by the incumbent NCJ.
- 41 After the meticulous analysis of the CJEU's judgement and accepting the concerns raised in this decision, the legislature is obliged to amend the Act on the National Council of the Judiciary, so as to ensure that national legislation complies with EU standards. This entails changing the rules for electing 15 judicial members of the NCJ by returning to the model that enables the judges to directly determine the NCJ composition while ensuring adequate representation of all types and levels of the judiciary. The composition of the NCJ should be formed in accordance with the CJEU judgment.