**The current structure of the Polish NCJ and the standards of its impartiality according to the judgment of the Court of Justice of the European Union in joined cases C-585/18, C-624/18 and C-625/18**

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The major reform of the judiciary system in Poland, initiated in 2016, has generated a wide discourse on the issue of how the way in which judges are appointed, linked directly to the issue of the legitimacy of the judiciary itself. One of the most prominent voices in that discussion has been the judgment of the European Court of Justice of the European Union in the joined cases C-585/18, C-624/18 and C-625/18 on the independence of the National Council of the Judiciary and the Disciplinary Chamber of the Supreme Court, which had previously been established to rule on disciplinary cases of Supreme Court judges, labour and social security law, and on the transfer of a Supreme Court judge to retirement.

The genesis of the dispute takes place in 2018, when, as a result of the new Supreme Court Act, the retirement age for judges of the Supreme Administrative Court and the Supreme Court was lowered from 70 to 65[[1]](#footnote-1). In Case C-585/18, A.K., an active judge of the Supreme Administrative Court, made a statement about his desire to continue serving as a judge despite reaching the age of 65. As a result, on July 27, 2018, the NCJ issued a negative opinion on A.K.'s application in accordance with Article 37 § 1a of the Supreme Court Act of 2018. On August 10, 2018, A.K. appealed this decision to the Supreme Court. As a part of his appeal arguments, A.K. stressed that early retirement at age 65 is a violation of the second paragraph of Article 19(1) of the TEU and Article 47 of the Charter of Fundamental Rights of the European Union, also citing Directive 2000/78, particularly Article 9(1). Cases C-624/18 and C-625/18, on the other hand, concern two Supreme Court judges, C.P. and D.O., who surpassed the age of 65 before the introduction of the new legislation, but did not make the appropriate declaration of their desire to continue to serve as Supreme Court judges in accordance with the provisions of Article 37 § 1 Article and 111 § 1 of the new Supreme Court Act. After reviewing their situation, the President of the Republic of Poland, Andrzej Duda, declared that the judges had been indeed retired as of July 4, 2018, in accordance with the new legislation. C.P. and D.O. filed a lawsuit to the Supreme Court to establish that they still continued to serve as active judges of the Supreme Court, claiming a violation of Article 2(1) of Directive 2000/78, which prohibits discrimination on the basis of age. The cases were to be ruled by the newly established Disciplinary Chamber, which had been legislatively constituted, but not yet vacated by member judges. In each of the cases, the preliminary questions were submitted to the Court of Justice of the European Union. The Court did not answer some of them, because they applied to a hypothetical situation, as the Disciplinary Chamber had been vacated since the preliminary questions were issued. It did, however, answer two questions posed in Cases C-624/18 and C-625/18 regarding whether the Disciplinary Chamber is fact an independent and unbiased court under EU law, regarding the procedure of appointing its judges and, should the second question be answered in the negative, whether the Labour and Social Security Chamber of the Supreme Court may disregard the provisions of national law excluding its previous jurisdiction[[2]](#footnote-2).

 By the decision of the President of the CJEU on November 5, 2018, the three cases were joined and examined together[[3]](#footnote-3) in a judgment on November 19, 2019. In the ruling, the CJEU referred to the well-established case law of the European Court of Human Rights and Article 6(1) of The Convention for the Protection of Human Rights and Fundamental Freedoms, which requires that the mandatory condition of the independence of judiciary both from the executive and legislative branches has be respected. The CJEU also cited Article 47 of the Charter of Fundamental Rights, which guarantees the right to a fair and public trial within a reasonable time by an independent and impartial court, established by law. On the basis of Article 47 of the CFR, the Court has construed conditions which indicate that a judicial body does not meet the standards of judicial independence and impartiality. Such a body can be defined as a court which qualities, the method of its appointment and the procedure for vacating its members may raise reasonable doubts about its independence and impartiality regarding particular conflicting interests.[[4]](#footnote-4) Furthermore, the CJEU has authorized national courts to perform an examination of judicial independence and impartiality of judges, thus giving the Supreme Court the authority to conduct this evaluation to the Disciplinary Chamber and, by extension, the NCJ itself. This examination, carried out in consideration of the current systemic position of the Polish NCJ, which is directly responsible for the nomination of every judicial candidate, including members of the Disciplinary Chamber, in the event of a negative result, entitles the Supreme Court to waive the rules of national law which grant jurisdiction to the Disciplinary Chamber[[5]](#footnote-5). As for the requirements of an independent and impartial body of judicial power outlined by the CJEU, first and foremost such body should meet the requirements of external independence, which is the ability to carry out its tasks fully autonomously without outside interference or pressure in any form, and internal independence, which can be described as a remoteness of the judge to the parties involved in the dispute and their interests, objectivity and the absence of any interest in resolving the issue without the rigid enforcement of the law. In addition, the procedure of appointing the members of the judicial body, its systemic structure, the duration of its term of service, and the reasons for their exclusion or dismissal must be taken into consideration in such evaluation[[6]](#footnote-6). Moreover, in examining the fulfilment of those requirements, one of the factors would be whether the party involved in the proceedings done by said judicial body would be likely to have concerns that those requirements will not be met. However, The main factor will be whether these concerns can be considered objectively justified[[7]](#footnote-7). According to CJEU, the major participation of the NCJ itself in the process of appointing judges, the role of the President in the procedure and the absence of judicial review of these decisions are not objectionable[[8]](#footnote-8). Nevertheless, the circumstances that may raise concerns about the independence and impartiality of the reformed NCJ are, in particular, the fact that it was created during the ongoing, constitutional, 4-year term of its previously appointed members and the replacement of the appointers of the 15 members of the NCJ from the judiciary to a qualified majority of 3/5 of the members of the parliament, which resulted in an increase in the number of NCJ members appointed by political forces or elected by them from 23 of the 25 body members[[9]](#footnote-9).

 The CJEU judgment resulted in a ruling by the Supreme Court on December 5, 2019, which determined that, in light of the independence and impartiality requirements presented by the CJEU, in this particular case, the newly reformed NCJ is not an independent and impartial judicial body. Furthermore, there are significant doubts whether a judge appointed in such procedure is a lawful judge with the attribute of impartiality. This indicates that the Disciplinary Chamber cannot be described as a lawful, democratic court[[10]](#footnote-10). Despite that, the resolution of the Supreme Court's Extraordinary and Public Review Chamber of January 8, 2020, presented the view that even when taking into consideration the doubts regarding the independence and impartiality of the NCJ, the President's decision convalidates all possible deficiencies, including the NCJ's alleged defectiveness[[11]](#footnote-11); this constituted a fundamental divergence in the jurisprudence of the Supreme Court. At the request of the then First President of the Supreme Court, Professor Małgorzata Gersdorf, a resolution was passed by the three combined Chambers of the Supreme Court in order to unify the jurisprudence of the Supreme Court on January 23, 2020. It determined that the Disciplinary Chamber of the Supreme Court, whose members were appointed with the involvement of the defective NCJ, which does not meet the standards set by the CJEU, is not an impartial and independent body of jurisprudence, and its vacated members are disqualified by the fact that the structure of this specific court does not comply with Article 175 of the Polish Constitution - it was ruled, that it is an exceptional court, which can only be appointed in times of war. If it comes to other judges, it was stressed that the impartiality and independence of a judge must be examined in each specific case if that judge was appointed with the participation of the defectively functioning NCJ in its current form. It was also recognized that in the present situation of legal uncertainty, a judge should also take into consideration the institutional status of other fellow judges appointed to rule in the same case[[12]](#footnote-12). In response to the previously mentioned rulings on the legitimacy and impartiality of the NCJ, the Polish Parliament introduced the new Law on the System of Common Courts Act of December 20, 2019, thus introducing, among various new regulations, the disciplinary responsibility of judges[[13]](#footnote-13).

On February 20, 2024, a bill to amend the law on the National Council of the Judiciary, prepared by the Ministry of Justice, was submitted to the Speaker of the Parliament[[14]](#footnote-14). The draft provides for a number of changes that, in the view of the current government coalition, are intended to make the NCJ independent from the legislature, rebuild public trust in the judiciary, and constitute a further step towards restoring the rule of law in Poland, which has been called into question due to the reforms introduced by the United Right government in 2015-2023. It assumes, among other things, the restoration of the way in which the 15 members-judges of the NCJ are appointed by the judicial community, and not - as under the previous amendment - by the Parliament[[15]](#footnote-15).

As the draft has not yet reached its final legislative form at this point, making an assessment of the structure of the National Council of the Judiciary based on it in the event of the potential adoption of a law changing its shape by the Sejm remains impossible at present.

1. The Supreme Court Act of December 8th 2017, Journal of Laws. 2018 item 5 [↑](#footnote-ref-1)
2. Judgment of the Court (Grand Chamber) of 19 November 2019. A. K.and Others v Sąd Najwyższy, C.P. v Sąd Najwyższy and D.O. v Sąd Najwyższy, C‑585/18, C‑624/18 i C‑625/18, ECLI:EUC:2019:982, paragraph 37-52 [↑](#footnote-ref-2)
3. Ibid. paragraph 53 [↑](#footnote-ref-3)
4. Judgment of the Court (Grand Chamber) of 19 November 2019. A. K. and Others v Sąd Najwyższy, C.P. v Sąd Najwyższy and D.O. v Sąd Najwyższy, C‑585/18, C‑624/18 i C‑625/18, ECLI:EUC:2019:982, paragraph 118-123 [↑](#footnote-ref-4)
5. Ibid. paragraph 140-142 [↑](#footnote-ref-5)
6. Ibid. paragraph 121-123 [↑](#footnote-ref-6)
7. Ibid. paragraph 129 [↑](#footnote-ref-7)
8. Ibid. paragraph 133 [↑](#footnote-ref-8)
9. Ibid. paragraph 143 [↑](#footnote-ref-9)
10. Judgment of the Supreme Court of December 5, 2019, ref. III PO 7/18 [↑](#footnote-ref-10)
11. Resolution of the Extraordinary Control and Public Affairs Chamber of December 8, 2019, ref. I NOZP 3/19 [↑](#footnote-ref-11)
12. Resolution of the combined Chambers: Civil, Criminal and Labour and Social Insurance of the Supreme Court of January 23, 2020, ref. BSA I-4110-1/20 [↑](#footnote-ref-12)
13. Act of December 20, 2019 on amending the Act - Law on the system of common courts, the Act on the Supreme Court and selected other acts, Journal of Laws. 2020 item 190 [↑](#footnote-ref-13)
14. Print No. 219 Government draft law on amending the law on the National Council of the Judiciary. [↑](#footnote-ref-14)
15. Draft of January 11, 2024 Act of <date of issuance of act> on amending the Act on the National Council of the Judiciary [↑](#footnote-ref-15)