Notice of the Polish Commissioner for Human Rights (CHR) on the opinion of CJEU Advocate General E. Tanchev regarding joined cases: C-558/18 (*Miasto Łowicz*) and C-563/18 (*Prokuratura Okręgowa w Płocku*)

1. On 24 September 2019 CJEU Advocate General E. Tanchev delivered an opinion regarding the joined cases: C-558/18 (Miasto Łowicz) and C-563/18 (Prokuratura Okręgowa w Płocku). The Advocate General suggested the Court should rule that the requests for preliminary ruling, submitted by the District Court in Łódź (Poland) in case C-558/18 and by the District Court in Warsaw (Poland) in case C-563/18, are inadmissible. In those cases, the national courts referred to the CJEU questions for preliminary ruling[1], regarding the compliance of Polish regulations on disciplinary proceedings with the EU guarantees on judicial independence, in the light of the principle of effective judicial protection (Article 19(1)(2) of the Treaty on the European Union; hereinafter: the TEU)[2]. In particular, the Polish courts sought to establish whether Article 19(1)(2) of the TEU should be interpreted in such a way whereby the member states' obligation, under that provision, to establish remedies necessary to ensure effective legal protection in fields covered by the EU law contradicts national provisions which significantly increase the risk of the infringement of the guarantee of independent disciplinary proceedings against judges in Poland due to: political influence on the performance of disciplinary proceedings, the risk of using the system of disciplinary measures to exert political control over the subject matter of judicial rulings, as well the possibility to use evidence derived from crime in disciplinary proceedings against judges.

2. The CHR draws particular attention to the first part of the opinion (cf. point 86-98) of the Advocate General which indicates that in reference to cases pending before the courts that addressed the CJEU with their questions, **material scope of the EU law shall be applied**, i.e. Article 19(1)(2) TEU shall be applicable in those cases. **That means that, in principle, in cases such as those pending before the national courts, it is possible to address the CJEU with a request for a preliminary ruling.** It also means that, in the view of the Advocate General, in

[1] The subject matter of the discussed questions is available under: http://curia.europa.eu/juris/document/document.jsf?text=&docid=210390&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1434257

[2] Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

order to apply the guarantee of judicial independence pursuant to Article 19 (1) TEU, it is enough to establish that the national judge potentially applies the EU law (see case C-64/16 *ASJP*). **Therefore, there is no need to establish that the judge applies EU law in a specific case pending before him/her.** The result of such a construction of the scope of application of Article 19(1) TEU is the fact that, for instance, with respect to a criminal case concerning kidnapping for ransom without the traditional EU component (C-563/18) or a civil case concerning damages from the State Treasury without any EU component involved (C-558/18), **the protection of the independence of the national judge, pursuant to EU law, is possible.** As the Advocate General put it:

> *„94. I am therefore unconcerned that the disputes in the main proceedings pertain to the application of provisions of Polish law in the field of public administration in Case C-558/18 and of Polish criminal law in Case C-563/18. As made clear by the Court in paragraph 51 of Commission v Poland (Independence of the Supreme Court) (C-619/18) and reproduced in point 87 of this Opinion, the material scope of the second subparagraph of Article 19(1) TEU is not linked in any way to whether the substantive dispute in which judicial independence is being challenged concerns EU law. As pointed out above in points 88 and 89 of this Opinion, the material scope of the second subparagraph of Article 19(1) TEU is broad. […]"*

3. **The acknowledgement, in that part of the opinion, that judicial independence guarantees, stemming from Article 19(1)(2) TEU shall apply in cases without the traditional EU component is a significant and critical statement of the Advocate General. It is noteworthy that the Advocate General agreed in this respect with the arguments of the CHR and rejected the arguments presented by the Polish government and the Attorney General (cf. point 93 of the opinion).**

4. Inadmissibility of the questions of the Polish courts in discussed cases results, in the view of the Advocate General, from the fact that, pursuant to Article 267 of the Treaty on the Functioning of the European Union (hereinafter: TFEU), the CJEU shall not issue advisory opinions on general or hypothetical issues and neither the orders for reference nor case files contain sufficient explanations concerning the link between the analyzed Polish provisions and relevant EU legislation. **In the opinion of the Advocate General questions for preliminary rulings fail, therefore, to meet the requirements pertaining to references for preliminary rulings, mentioned in Article 94 of the rules of procedure before the CJEU** (hereinafter "CJ Rules"). In other words, the Advocate General believes that the questions of the Polish courts contain

procedural shortcomings and for this reason they fail to provide grounds for the issuance of evaluation on possible infringement of judicial independence **in cases at hand.**

5. In that regard the CHR emphasizes that the response of the CJEU to questions submitted by the District Court in Łódź and the District Court in Warsaw will be possible if the Great Chamber of the CJEU interprets premises for admissibility of requests for preliminary rulings as well as the scope of the protection of judicial independence granted pursuant to Article 19(1)(2) TEU and Article 94 of the CJ Rules in developing the latest adjudicatory trends (case C-64/16 *ASJP*). **In accordance with judicial decisions taken by the CJEU so far** (including without limitation the most frequently quoted ruling in C-286/88 *Falciola*[3] case) **those cases should be, most probably, considered inadmissible.** The European Commission (cf. point 57 of the opinion) also set forth arguments in a similar vein. **Yet, the CHR as well as EFTA Surveillance Authority argued during the hearing that the CJEU should develop its latest case law concerning the interpretation of judicial independence of national courts and admissibility of requests for preliminary rulings[4].**

6. In cases pending before courts of law in joined cases C-558/18 and C-563/18 no traditional EU component is present – directly or indirectly nor the one that could be derived from Article 19(1) TEU interpreted in light of the CJEU ruling in case C-64/16 *ASJP*, i.e. parties to pending proceedings do not acquire rights from Article 19 (1) TEU, like Portuguese judges did in case C-64/16 *ASJP* (potentially applying EU law in their judicial activity). National courts do not apply EU law (subject matter of cases is not related to EU law), yet they may apply EU law in other cases that they examine. The subject matter of cases pending before national courts, however, is not directly related to the EU component. Yet, those courts decided to examine - in light of the principle of effective judicial protection - legal changes implemented in relation to the system of disciplinary procedure against judges because they believe that the above-mentioned system may have a negative impact on judicial independence. Leaving aside possible limitations, stemming from the assumptions of the preliminary procedure, these are the cases in which Article 19(1)(2)

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[3] Judgment of the CJ of 26.01.1990, C-286/88, *Falciola Angelo SpA v . Comune di Pavia*, ECLI:EU: C:1990:33.

[4] Cf. the whole argumentation of the Commissioner for Human Rights in Polish: https://www.rpo.gov.pl/sites/default/files/Argumentacja szczegółowa RPO przed Wielką Izb w połączonych sprawach C 558/18 (Miasto Łowicz) i C 563/18 (Prokuratura Okęgowa w Płocku).pdf

TEU is supposed to constitute sole basis for examining Polish provisions determining the status of a national court as an independent court. **The subject matter of the case pending before the national court does not refer, in this instance, to a "field covered by EU law", even though regulations concerning disciplinary procedure may enter in that scope** (see case C-8/19 *RH,* point 19). In the discussed cases the courts wish to determine that the institutional status of a court in every instance is "covered by EU law" as such.

7. If we were to assume that in the aftermath of the ruling C-64/16 *ASJP* also in such cases as C-558/18 and C-563/18 Article 19 (1) TEU provides for the possibility to examine national standards in any case, the only link between a given case and Article 19(1)(2) TEU would simply be the court adjudicating in that case but the crux of the matter at hand would be irrelevant. Yet, it cannot be ruled out that the CJEU interpreted requirements stemming from Article 19 TEU in such a way. It is not certain whether this was the intention of the CJEU while passing the ruling C-64/16 *ASJP*. **Yet, it is beyond all doubt that Article 19(1)(2) TEU could be applied when a disciplinary procedure is instigated against a national judge. In such a procedure, namely, the judge who is accused of violating the law, may acquire rights directly from Article 19(1)(2) TEU as long as he/she performs a role in a national court that, at least potentially, has authority to interpret and apply EU legislation.**

8. When examining the request for accelerated procedure in cases put forward by the DC in Warsaw and DC in Łódź, **the Court pointed out that dispute before the national court may only be of hypothetical nature in the context of disciplinary proceedings**[5], assuming at the same time that in accordance with Article 267 TFEU national judges may not be limited when it comes to the possibility to initiate preliminary procedure. **There is a possibility, therefore, that the CJEU examines that case in the context of the C-286/88 *Falciola* ruling, in which the sole impressions of judges that their independence was at risk were not considered sufficient to present an answer by the Court.** This was also the line of reasoning presented by the Advocate General with regard to questions presented by Polish courts who ultimately stated that those questions were inadmissible, also due to the fact that they contain, in his view, only a subjective

[5] Order of the President of the CJ of 1.10.2018 on joined cases C-558/18 and C-563/18, the town of Łowicz v. State Treasury - Łódź regional governor (C-558/18), and the District Public Prosecutor's Office in Płock v. VX, WW, XV (C-563/18), ECLI:EU:C:2018:923, point 21.

assessment of the judge concerning the impact of national legislation on his independence (points 117 and 118 of the opinion).

9. **The CHR observes, however, that there is still room for another interpretation of cases brought before the Great Chamber of the CJEU. As a result of this possibly varying interpretation, the CJEU may modify the way premises for the admissibility of requests for preliminary rulings in those cases are construed.**

10. It should be emphasized that after the submission of requests to the CJEU, **explanatory proceedings against Polish judges were instigated** and they may lead, ultimately, to the initiation of the disciplinary procedure. The above-mentioned proceedings were directly related to the submitted preliminary questions. Even if, as emphasized by the Advocate General, officially explanatory proceedings referred to the "identity of the content of the references" (see point 120 of the opinion), **during the hearing the CHR pointed out that these types of proceedings may have a freezing effect among judges considering addressing the CJEU**. The CHR also observed that recently there has been an increase in the number of such explanatory proceedings in Poland, also in the number of disciplinary proceedings with respect to the content of rulings passed by national courts. Furthermore, such actions of Polish authorities should be examined in a broader context:

- The application of the Attorney General to the Constitutional Tribunal (case file no. K 7/18) aimed at determining the unconstitutionality of Article 267 TFEU in the scope in which it allows Polish courts to ask preliminary questions in cases pertaining to the organization of the judiciary (which ultimately leads to making it impossible to ask preliminary such questions at all);
- passing by the legislator of amendments to legal regulations, aimed at discontinuation of pending judicial proceedings (before the Supreme Court and the Supreme Administrative Court) with reference to which preliminary questions were addressed to the CJEU (cf. case C-824/18).

The CHR demonstrated in the proceedings before the CJEU that **the desire for unleashing the freezing effect, discouraging judges from lodging requests for preliminary rulings is of systemic and not incidental nature.** As far as the admissibility of preliminary questions is concerned, the CHR believes that questions should be considered admissible as **in examined cases**

there is a real EU component derived from the need to ensure the effectiveness (*effet utile*) of the operation of the preliminary procedure stemming from Article 267 TFEU. Those cases showed, namely, that the Polish system lacks sufficient guarantees allowing for the elimination of risk of using the system of disciplinary measures with respect to controlling judicial decisions to address the CJEU with requests for preliminary rulings. **The possibility to "safely" ask a preliminary question and receive an answer without interference from any other authority should be available also in those cases in which posed preliminary questions were ultimately considered inadmissible.** The assessment of the scope of application of EU law as well as the admissibility of preliminary questions falls, namely, within an exclusive authority of the CJEU. The Advocate General, however, decided that this aspect is irrelevant since, ultimately, no disciplinary procedure was instigated against the judges (cf. point 120 of the opinion).

11. Moreover, the CHR suggests that the CJEU may adopt a new approach to the protection of independence of national judges in light of Article 19(1)(2) TEU. The CHR believes that point 40 of ruling C-64/16 *ASJP* should be interpreted in such a way that EU member states must **ensure that a national court vested with the examination of cases with an EU component is covered by the protection of standards established pursuant to Article 19(1) (2) TEU in every case pending before such a court.** This protection should become effective once the legislator has entrusted the national court with cases with an EU component and not upon the commencement of case examination by such a court. **According to the Commissioner for Human Rights, the protection of judicial independence in areas covered by EU law, established pursuant to Article 19(1)(2) TEU, may not be divisive and fragmentary.** In order to ensure the effectiveness of that protection, it should extend over the whole judicial activity of a given national judge, i.e. it should cover both, cases with an EU component as well as the ones without it. Adopting another standpoint in that regard could result in the ineffectiveness of the protection of independence of national judges granted pursuant to Article 19(1)(2) TEU, which would put the practical effectiveness (*effet utile*) of Article 19(1) TEU at risk. Partial (fragmentary) abolition of that protection for a judge who meets the requirements of point 40 of the *ASJP* ruling would render the protection of the independence of that judge illusive. A Member State would be able, namely, to influence the independence of that judge, e.g. by initiating disciplinary proceedings (deprived of relevant guarantees stemming from Article 19(1) TEU) in cases not covered by EU law. It is beyond

any doubt that such an action of the state would have an impact on the conduct of the judge in equivalent cases within the scope of the application of EU law which that judge would need to examine.

12. This manner of construing the scope of application of Article 19(1)(2) TEU leads to the conclusion that judges may address the CJEU with requests for preliminary rulings also with regard to purely internal matters. In this way, a judge would be, first and foremost, protected from the freezing effect resulting from influence that authorities could attempt to exert on that judge with reference to cases beyond the scope of EU's law application. **An answer provided by the CJEU will be essential for those national courts to pass rulings under circumstances guaranteeing their independence, as required by Article 19(1)(2) TEU, even if examined cases do not directly demonstrate any link with another EU component.** The result of the cooperation between national courts and the CJEU, in the way proposed by the CHR, would be a binding standpoint of the CJEU stating that in the scope in which the system of disciplinary procedures fails to meet the requirements of EU law, it could not be applied with respect to a judge who has been entrusted with making decisions on the application or construction of EU law. This would create viable environment for adjudicating under conditions guaranteeing independence, as required by EU law and ensure due effectiveness of Article 19(1) TEU. As a result, judges would, first and foremost, have freedom in enjoying the cooperation with the CJEU. **It would be hugely significant both, for the effectiveness of the operation of the judicial system of the EU, for which judicial independence constitutes a key value, but also in terms of the requirements concerning the rule of law, stemming from Article 2 TEU. Yet, it would also be of importance to citizens who would be reassured that the national court determining their EU rights is not under the influence of consequences of actions taken by the member state in cases beyond the application of EU law.**

13. Additionally, it should be emphasize that, if current judicial practice of the CJEU concerning the admissibility of requests for preliminary rulings was to be applied, then, in theory, in all other cases, even when the traditional EU component was present, the national courts would not be able to verify the state of their independence guarantees in the context of disciplinary proceedings. Prior to the instigation of disciplinary procedure, its examination in terms of EU legislation would always be hypothetical in nature and its impact on the judicial independence

would merely constitute a subjective impression of a particular judge. This, in turn, would result in the possibility for national judges to verify their independence guarantees exclusively within the pending disciplinary procedure initiated against them. Such a situation should, in that case, be viewed as a violation of the principle of effective judicial protection (Article 19(1) (2) TEU and Article 47 CFREU) in light of the interpretation adopted by the CJEU in case C-432/06 *Unibet* (points 62-64). In that ruling, the CJEU determined that the possibility to challenge the compliance with EU legislation of actions undertaken by the authorities of a member state solely with regard to procedures in which an individual entity may be liable to a specific sanction (when it is the only method of questioning the compliance of national law with EU regulations) would be insufficient to fulfil the prerequisites of the EU principle of effective judicial protection. **Therefore, allowing for incidental examination of regulations pertaining to disciplinary procedures by national courts covered by protection under Article 19(1) TEU, i.e. in a situation when a national court is vested with settling cases with an EU component, would constitute a natural and safe method for ensuring effective protection of judges' independence** - without exposing them to the risk of sanctions. **Yet, in contrast with the statement made by the Advocate General** (point 124 of the opinion), **the CHR did not argue for using the *Unibet* ruling as grounds for exempting the national court from the obligation to comply with the admissibility requirements concerning lodging of a reference for a preliminary ruling.** What the CHR argued for was to interpret the conditions for the admissibility of preliminary questions and Article 94 of the Rules of the CJ in the spirit of the principle of effective judicial protection and modify the construction of those conditions in such a way to consider those questions permissible. Since the problem of disciplinary provisions may only be "raised" in a safe manner incidentally in proceedings whose object is not disciplinary provisions, which is required by the principle of effective judicial protection, then a judge in these types of proceedings should also be allowed to submit a question to the CJEU. The possibility for modifying these conditions depending on the context is indicated in the judicial practice of the CJEU, *inter alia*, in ruling C-362/14 in *Schrems* case (point 65).

14. If one was to assume that the protection of independence under Article 19(1) TEU covers all cases settled by a national judge, then all questions raised by Polish courts cannot be viewed as hypothetical due to the subject matter of national regulations concerning disciplinary

procedures for judges as well as due to actual actions taken by the member state pursuant to those provisions. In that respect it should be observed that in line with the judicial practice of the CJEU (C-8/19 RH, point 47):

> „[…] the requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must contain the **necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions** (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the legal system) ('LM')*, C-216/18 PPU, EU:C:2018:586, paragraphs 64 and 67 and the case-law cited)."

It can be concluded that national provisions must guarantee that there will be no **risk** of using the system of disciplinary measures for exerting political control over judicial rulings. Therefore, only the exclusion of risk in that regard makes the provisions compliant with Article 19(1)(2) TEU. Failure to exclude such a risk may be considered a systemic (structural) defect since the disciplinary system may apply to any judge in the country, including the judges of the last instance courts in the meaning of Article 267(3) TFEU. If there was any risk of using such a system to exert political control over judicial rulings, the whole judicial system of the EU member state would be endangered.

Even if we were to acknowledge that in this case references for a preliminary ruling contained some informational shortcomings with regard to the actual and legal state of affairs (cf. point 116 of the opinion) **during the hearing both, the CHR (cf. point 67-69 of the opinion)[6], the EFTA Surveillance Authority (cf. point 80 of the opinion), as well as the Commission (cf. point 81 and 82 of the opinion)[7] presented to the Tribunal remarks concerning the conflict between Polish disciplinary regulations for judges with the EU standard.** It remains to be seen whether, just like the Advocate General (cf. point 116 of the opinion), the Great Chamber of the Court of Justice will also acknowledge that submitted information is insufficient to justify the requests for a preliminary ruling.

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[6] Cf. also the argumentation of the CHR in Polish https://www.rpo.gov.pl/sites/default/files/Argumentacja szczegółowa RPO przed Wielką Izb w połączonych sprawach C 558/18 (Miasto Łowicz) i C 563/18 (Prokuratura Okręgowa w Płocku).pdf

[7] The objections of the Commission against the Polish rules on disciplinary proceedings are well known already since 3.04.2019 – see the press release in connection with initiating the prejudicial phase of Art. 258 TFEU proceedings against Poland under https://europa.eu/rapid/press-release_IP-19-1957_en.htm

15. **To conclude, the response to requests for preliminary rulings in joined cases C-558/18 and C-563/18 will require a development of the previous case-law of the CJEU concerning the admissibility of preliminary questions and the scope of EU law application in terms of judicial independence guarantees in light of Article 19(1) TEU.** National courts, once entrusted with the power to apply EU law, would automatically acquire protection under Article 19(1) (2) TEU, which they could exercise independently, irrespective of the type of the proceedings - not only in cases focusing directly on the discussed matter but also in cases examined in relation to the presence of another EU component. **Under such circumstances in virtually all cases settled by the court, in the meaning of Article 267 TFEU, which possibly applies EU law (in other examined cases), irrespective of the subject matter of the case at hand, the judge would be able to challenge national regulations threatening the independence of the national court protected under Article 19(1)(2) TEU.** If such an understanding of the consequences of the ruling C-64/16 *ASJP* were to be adopted, each national judge would potentially turn into a guardian of the significant component of the legal order pursuant to Article 2 TEU – guardian of the status of the national court as an EU court responsible for the effective application of EU law. **On the other hand the CJEU would become a "safe harbour" for those national courts which are looking for protection against infringements of judicial independence.**

16. The CHR reminds that the issues discussed above relate to the preliminary procedure between national courts and the CJEU and not to a direct complaint in which the Republic of Poland, represented by the government, acts as a defendant. Therefore, **the outcome of the procedure, in case preliminary questions are considered admissible, will only be the ruling of the CJEU containing the interpretation of Article 19(1) TEU and not a judgement determining transgression of lack thereof on the part of the Republic of Poland.** In the event that the CJEU considers the questions inadmissible, the national court will be obliged to proceed without the ruling of the Court.

17. Yet, it should be reminded that even if the Great Chamber fails to provide answers to Polish courts in joined cases C-558/18 and C-563/18, disciplinary provisions that may apply to judges who can settle potential disputes containing an EU component shall become an object of the CJEU ruling as a result of the complaint lodged with the CJEU by the European Commission

on 10 October 2019[8] . The Commission states that that the new disciplinary regime undermines the judicial independence of Polish judges and does not ensure the necessary guarantees to protect judges from political control, as required by the Court of Justice of the EU as well as Article 19(1) TEU read in connection with Art. 47 of the Charter of Fundamental Rights of the European Union[9].

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[8] See https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6033

[9] See earlier press releases issued in connection with the letter of formal notice and the reasond opinion: https://europa.eu/rapid/press-release_IP-19-1957_en.htm and https://europa.eu/rapid/press-release_IP-19-4189_en.htm