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THE FINAL BLOW TO THE HUNGARIAN LAW LOWERING JUDGES' RETIREMENT AGE STRUCK BY THE EUROPEAN COURT OF JUSTICE

Posted on 26 Novembre 2012 by [Katalin Kelemen](#)

After the Venice Commission (see a previous post [here](#)), with its [Opinion no. 663/2012](#) issued in May, and the Hungarian Constitutional Court's decision delivered in July (available in Hungarian [here](#)), on 6 November also the Court of Justice of the European Union expressed its opinion ([Case C-286/12 European Commission v Hungary](#)) on art. 90 (ha) of the Hungarian Act on the Legal Status and Remuneration of Judges (the Act's text is available in English [here](#)), finding a violation of the principle of equal treatment. The provision in question lowered the upper-age limit of mandatory retirement of ordinary judges, prosecutors and notaries from 70 to 62 years, with retroactive effect.

In his speech reacting to the ECJ's decision Prime Minister Viktor Orbán stated: „It has been a long time that I have not seen a dead dog being beaten in his head. That is the situation here.” (see the video [here](#), at 04:27) He referred to the fact that the law found to be incompatible with EU law by the European Court had already been annulled by the Hungarian Constitutional Court a few months before.

However, the ECJ examined also the [Transitional Provisions](#) of the Hungarian Fundamental Law (in particular Art. 12), not challenged before

the Constitutional Court (see par. 46 of the ECJ's reasoning). Furthermore, the three bodies' opinions offer different arguments and were delivered on different legal bases. The Venice Commission in March examined the practical arguments advanced by the Hungarian government in defence of the law (arguing that younger judges are more suitable to carry a heavy workload and more ambitious and flexible), but found them not convincing and not sufficiently proven (par. 104-105). The Commission expressly invited the Hungarian authorities „to provide for a less intrusive and not so hasty solution for a gradual decrease of the upper-age limit” (par. 110). Later in July the Hungarian Constitutional Court found a violation of judicial independence, enshrined in art. 26, par. 1 of the new Fundamental Law (its text is available [here](#), in English). The law was challenged by a few judges forced to retire by lodging a new form of constitutional complaint introduced by the new Constitutional Court Act (discussed in detail in a previous [post](#)). Indeed, the complainants reached the Constitutional Court directly, i.e. not through an ordinary court's proceedings, as the challenged law interfered with their rights directly (see art. 26, par. 2 of the new Constitutional Court Act). Art. 90 (ha) was declared unconstitutional, but the decision was far from unanimous. Seven judges expressed their dissent in six dissenting opinions (the Court is composed of 15 judges). The opinion of the Court was delivered by its President, Judge Péter Paczolay.

The European Commission started an infringement procedure against Hungary well before the decision of the Constitutional Court, with a letter of formal notice sent on 17 January 2012, in which it set out its view that the obligations under [Directive 2000/78/EC](#) on equal treatment in employment and occupation had not been fulfilled by Hungary. After issuing a reasoned opinion (in March), the European Commission brought an action to the Court of Justice in June, 12 days before the publication of the Venice Commission's opinion. It means that the proceedings before the Hungarian Constitutional Court and before the European Court of Justice for some time ran parallel. Both expressed a negative opinion on the challenged law, even if on different legal bases. As mentioned above, the Constitutional Court found a violation of the principle of judicial

independence, enshrined in the national constitution, while the ECJ found an incompatibility with an EU Directive.

In its judgment the ECJ takes into consideration the Hungarian Constitutional Court's decision (par. 21) and the Hungarian government's argument that the case has lost its purpose and there is no longer need to adjudicate on part of the action (par. 23 and 40). However, the Court does not depart from its case-law, and confirms that the failure to fulfil obligations must be examined on the basis of the position in which the Member State at issue found itself at the end of the period laid down in the reasoned opinion (see, among others, cases [C-209/02 Commission v Austria](#) and the very recent [C-565/10 Commission v Italy](#)), in this case on 7 April 2012, well before the decision of the Constitutional Court. The ECJ also underlines that the repeal of the challenged law by the Constitutional Court did not directly affect the validity of those individual measures by which the employment relationships of the judges concerned were brought to an end, those persons are not automatically reinstated (par. 46).

In fact, those 234 judges who were forced to retire on the basis of the challenged law are obliged to bring proceedings for the annulment of those measures in order to be reinstated. Several proceedings have been initiated before labour courts all over the country. A few of them have already reached the court of appeal level. For example, two judges from Kaposvár won their case before the Court of Appeal of Zalaegerszeg, which at the end of October [ordered](#) their reinstatement. The judgment obliged the [National Judicial Office](#) to propose the re-appointment of the judges concerned to the President of the Republic within 8 days. Thus, the Court of Appeal affirmed the labour court's judgment which had been appealed by the National Judicial Office arguing that the court had no competence for the reinstatement of the judges, but only for a declaration of the unlawfulness of their forced retirement. The decision of the Court of Appeal of Zalaegerszeg will in all likelihood be followed by the other courts in the other ongoing cases.

As to the decision of the European Court of Justice delivered on 6

November, the reasoning concerning the substance of the action (par. 48-81) relies heavily on recent case-law, in particular on *Fuchs and Köhler* (Joined Cases [C-159/10 and C-160/10](#)) and *Prigge and Others* ([C-447/09](#)), that interpret Article 6 on discrimination on grounds of age of Directive 2000/78/EC. The Court examines the question of legitimate aim that could objectively and reasonably justify the contested provisions, and states beforehand that the aim of standardisation of the age-limit for compulsory retirement in the context of professions in the public sector can constitute a legitimate employment policy objective (par. 61). Also the aim of establishing a more balanced age structure facilitating access to young lawyers to the professions of judge, put forward by Hungary in the pre-litigation procedure, can constitute a legitimate aim of employment and labour market policy, according to the Court (par. 62). However, these aims can justify the contested discriminative measure only if it is an appropriate and necessary means of achieving them (principle of proportionality).

As regards the first aim (standardisation of the age-limit in the public sector), the Court accepts the argument that the contested measure is an appropriate means of achieving this aim, but refuses to accept its necessary nature. According to the Court, the retired judges had a well-founded expectation that they would be able remain in office until the age of 70 (par. 67). The contested provisions abruptly lowered the age-limit to 62 without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned (par. 68). It also means that their retirement pension will be at least 30% lower than their remuneration, and the cessation of functions does not take into account contribution periods, which does not therefore guarantee the right to a pension at the full rate (par. 70). The Court states that there was no evidence provided that would have proved that more lenient provisions would not have made it possible to achieve the objective at issue (par. 71).

As regards the second aim (establishing a more balanced age structure facilitating access for young lawyers to the professions of judge), the ECJ considered the contested provisions not even appropriate to achieve it, as in the medium and long terms they do not ensure a more balanced age

structure. The Court explains that while in 2012 the turnover of personnel in the professions concerned is subject to a very significant acceleration due to the fact that eight age groups (from 63 to 70) will be replaced by one single age group, that turnover rate will be subject to an equally radical slowing-down in 2013 when only one age group will have to be replaced (par. 78).

Concluding, the European Court of Justice declares that by adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 Hungary has failed to fulfil its obligations under Articles 2 and 6(1) of Directive 2000/78/EC, because the above mentioned measure gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued.