Reports of Cases

OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 20 June 2024[1]

Case C-197/23

S. S.A.
v
C. sp. z o.o.,
intervening party:
Prokurator Prokuratury Regionalnej w Warszawie

(Request for a preliminary ruling from the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland))

(Reference for a preliminary ruling – Rule of law – Article 19(1) TEU – Legal remedies – Effective judicial protection – Independent and impartial tribunal previously established by law – Principle of 'internal' judicial independence – National rules governing random allocation of cases to judges – Modification of the formation of the court – Flagrant violation of national rules – Provisions prohibiting a court of second instance from declaring proceedings at first instance invalid)

1. The present reference for a preliminary ruling from the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland)[2] seeks an interpretation of Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). The action in the main proceedings was brought by S. S.A. ('Company S') against C. sp. z o.o. ('Company C') in relation to a commercial framework agreement.

2. The present case essentially raises two questions. First, the Court is called upon to rule on the question whether the irregular (re)allocation of a specific case to a reporting judge in national proceedings falls within the scope of the second subparagraph of Article 19(1) TEU. In other words, is that irregular (re)allocation capable of undermining the perception of courts and tribunals as independent and impartial, in particular, in a case where that irregular (re)allocation (i) amounts to a 'flagrant violation' of the applicable national rules and (ii) cannot be reviewed on appeal by the court of second instance owing to the fact that national provisions explicitly prohibit such a legal remedy? The second – related – question is whether such an irregularity coupled, in particular, with an absence of judicial review or legal remedy amounts to a breach of the requirements of effective judicial protection before an independent and impartial tribunal

[1] Original language: English.

[2] The order for reference dates from 28 April 2022 but was lodged at the Registry of the Court of Justice on 24 March 2023.

previously established by law; that is, whether any and every irregularity in the (re)allocation of a case to a reporting judge could raise doubts in the minds of individuals as to the independence and impartiality of the judge to whom the case has been (re)allocated.

I. Legal framework

A. The Code of Civil Procedure

3. Article 47(1) of the Code of Civil Procedure [3] provides that 'at first instance, the court shall hear cases in a single-judge formation, unless otherwise provided by a specific provision.'

4. According to Article 379(4) of that code, 'proceedings shall be invalid … if the composition of the court of trial is contrary to statutory provisions or if the case was heard in the presence of a judge subject to exclusion by operation of law'.

5. Article 386(2) of the Code of Civil Procedure provides that 'where the proceedings are declared invalid, the court of second instance shall set aside the judgment under appeal, set aside the proceedings in so far as they are invalid and refer the case back to the court of first instance.'

B. The Law on the ordinary courts

6. Article 45 of the Law on the ordinary courts [4] provides as follows:

'1. A judge or trainee judge may be replaced in his or her duties by a judge or trainee judge of the same court, or by a judge seconded pursuant to Article 77(1) or (8).

2. The replacement referred to in paragraph 1 may be the result of a measure taken by the president of the division or the president of the court, adopted at the request of the judge or trainee judge or of his or her own motion, in order to ensure that the proceedings are conducted in due form.

…'

7. Under Article 47a(1) of the Law on the ordinary courts, 'cases shall be allocated to judges and trainee judges at random according to the specific categories of cases, with the exception of the allocation of cases to a duty judge'.

8. Article 47b of that law provides:

'1. A change in the composition of the court may take place only where it is impossible for the court to hear and determine the case in its current composition or where there is a lasting

[3] Ustawa z 17 listopada 1964 r. Kodeks postępowania cywilnego (Law of 17 November 1964 establishing the Code of Civil Procedure, consolidated text, Dz.U. of 2021, item 1805, as amended) ('the Code of Civil Procedure').

[4] Ustawa z 27 lipca 2001 r. Prawo o ustroju sądów powszechnych (Law of 27 July 2001 on the organisation of the ordinary courts, consolidated text, Dz.U. of 2020, item 2072) ('the Law on the ordinary courts'), as amended by Ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw z 20 grudnia 2019 r. (Law amending the Law on the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws of 20 December 2019, Dz.U. of 2020, item 190) ('the Law of 20 December 2019').

obstacle to the court hearing and determining the case in its current composition. The provisions of Article 47a shall apply *mutatis mutandis*.

2. If it is necessary to take measures in a case, in particular where this is required by separate provisions or justified on grounds of the proper course of the proceedings, and where the formation of the court to which the case has been allocated cannot do so, measures shall be taken by the formation designated in accordance with the substitution plan and, if measures are not covered by the substitution plan, by the formation designated in accordance with Article 47a.

3. Decisions in the cases referred to in paragraphs 1 and 2 shall be taken by the president of the court or by a judge authorised by him or her.

…'

9. The Law of 20 December 2019 added paragraph 4 to Article 55 of the Law on the ordinary courts, which is worded as follows:

'Judges may adjudicate in all cases in the place to which they are posted and also in other courts in the cases defined by law (jurisdiction of the judge). The provisions relating to the allocation of cases and to the appointment and modification of the formations of the court shall not limit a judge's jurisdiction and cannot be a basis for determining that a formation is contrary to the law, that a court is improperly composed or that a person not authorised or competent to adjudicate forms part of that court.'

10. In accordance with Article 8 of the Law of 20 December 2019, Article 55(4) of the Law on the ordinary courts is also to apply to cases begun or terminated before the date of entry into force of the Law of 20 December 2019.

C. 2015 Rules of Procedure

11. Article 43(1) of the 2015 Rules of Procedure[5] provides that 'cases shall be allocated to reporting judges (judges and trainee judges) at random, according to the distribution of activities established, by an IT tool [('the LPS system')[6]] on the basis of a random number generator, separately for each register, list or other recording device, unless the provisions of this Regulation provide for other allocation rules …'.

12. Under Article 52b of those rules of procedure:

'1. The substitution table shows the alternates (judges, trainee judges and jurors) for each working day.

2. The duty table indicates the duty judges and trainee judges for each day.

3. The substitution and duty tables shall determine the number of alternate and duty [judges and trainee judges] by period of time, by division or by type of cases allocated to alternate and duty

[5] Rozporządzenie Ministra Sprawiedliwości z 23 grudnia 2015 r. Regulamin urzędowania sądów powszechnych (Regulation of the Minister for Justice of 23 December 2015 laying down rules concerning the operation of the ordinary courts) (Dz.U. of 2015, item 2316) ('the 2015 Rules of Procedure').

[6] *System Losowego Przydziału Spraw* (system for random case allocation to judges).

[judges and trainee judges], as well as the order in which substitutions shall be made, and cases allocated to duty [judges and trainee judges] where more than one [judges and trainee judges] are alternates and on duty.

…'

13. Article 52c of the 2015 Rules of Procedure provides:

'1. In the event of the absence of the reporting judge at the hearing, the president of the division shall cancel the hearing if it is possible to inform the persons concerned, unless the proper course of the proceedings clearly requires that the hearing be held.

2. The case in respect of which the hearing has not been cancelled shall be heard by the alternate judge as provided in the substitution plan for the day in question. If the alternate has been unable make adequate preparations or if the examination of the case by that alternate requires that a substantial part of the procedure be re-opened, the president of the division shall order that the hearing be cancelled. …

…

4. The alternate judge shall have the authority to assign the case examined under paragraph 2 to himself or herself. In this case, the IT tool shall assign him or her one case fewer in the same category.

…'

II. Succinct presentation of the facts and procedure in the main proceedings and the questions referred for a preliminary ruling

14. On 27 April 2018, Company S brought a commercial action before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland). Company S acts as the assignee of a claim against Company C, which operates in the retail sector. The former seeks an order that the latter pay the sum of 4 572 648 Polish zlotys (PLN) (approximately EUR 1 045 000), corresponding to cash premiums on the turnover achieved in a given accounting year (arrears margins), which it received in the context of a framework agreement concluded with the assignor. According to Company S, the receipt of those premiums was contrary to national competition law.

15. The case was assigned to the 16th Commercial Division of that court and, under the software system for the random allocation of cases, it was allocated to Judge E.T., vice-president of that division, sitting as a single judge.

16. However, on 25 March 2019, the day of the hearing, Judge E.T. being absent on account of leave at her request, the President of the 16th Commercial Division appointed Judge J.K., the judge on duty that day, to hold the hearing, and the case was therefore allocated to her.

17. By judgment of 16 September 2019, delivered by the single judge of the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) composed of Judge J.K., the application made by Company S was dismissed.

18. The latter brought an appeal on 27 October 2019 before the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw), which is the referring court.

19. In that appeal, Company S submits that the proceedings before the court of first instance were invalid under Article 379(4) of the Code of Civil Procedure, on the ground that the adjudicating panel of that court was contrary to the law since it breached the principle of the constant composition of court formations, in that the case was heard by Judge J.K. in place of reporting Judge E.T., who had been randomly selected by the LPS system.

20. After taking considerable measures of inquiry and checks with regard to the court of first instance[7] in order to review the lawfulness of the proceedings before that court, the referring court finds that the modification of the composition of the court adjudicating at first instance – whereby the case was heard by Judge J.K. in place of original reporting judge E.T. – occurred in 'flagrant violation' of the provisions of national law on the allocation of cases and the appointment and modification of the formations of a court, that is to say, Article 47b(1) of the Law on the ordinary courts, read in conjunction with Article 52c(4) of the 2015 Rules of Procedure. It also points out that not all the necessary formalities concerning such a replacement were completed, suspecting the court of first instance of having amended certain documents in an attempt to remedy those irregularities a posteriori.

21. The referring court states that it does not know the reason for that replacement, which it considers to be irregular and deliberate, while noting that the use of such a process could lead to the transfer of a relatively large number of cases from one judge to another.

22. It also points out that, in theory, it cannot be ruled out that the composition of a single-judge formation may be deliberately altered in sensitive cases. This may happen when the judge initially selected at random by the LPS system fixes a hearing at a date on which he or she will be on leave at his or her request and the fact of his or her absence is used in order to replace that judge with a judge who, on that date, appears on the table of judges on duty and whose name may be known in advance.

23. Finally, the referring court cites resolutions of the Sąd Najwyższy (Supreme Court, Poland), according to which the composition of a panel of judges in breach of the provisions of national law relating to the allocation of cases and to the appointment and modification of the panels hearing the case may constitute a ground for declaring the proceedings invalid, as provided for in Article 379(4) of the Code of Civil Procedure.

24. It notes, however, that any review in that regard in the context of an appeal is prohibited since the introduction of Article 55(4) of the Law on the ordinary courts.

25. It is in those circumstances that the referring court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) [TEU], in conjunction with Article 47 of the [Charter], be interpreted as meaning that a court of first instance of a Member State …, the formation of which is composed of a single judge of that court assigned to hear a case in ["flagrant violation"] of the provisions of national law on the

[7] As many as 36 paragraphs of the order for reference are devoted to the measures of inquiry and checks (see paragraphs 21 to 56 thereof).

allocation of cases and the appointment and modification of the formations of a court, does not constitute an independent and impartial tribunal previously established by law which ensures effective legal protection?

(2) Must Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) [TEU], in conjunction with Article 47 of the [Charter], be interpreted as precluding the application of provisions of national law, such as the second sentence of Article 55(4) of the [Law on the ordinary courts], in conjunction with Article 8 of the [Law of 20 December 2019], in so far as they prohibit a court of second instance from declaring invalid … proceedings before a national court of first instance in an action brought before that court on the grounds that the composition of that court was contrary to the law, the court was improperly composed, or a person not authorised or competent to adjudicate participated in the decision, as a legal sanction ensuring effective legal protection where a judge is assigned to hear a case in ["flagrant violation"] of the provisions of national law on the allocation of cases and the appointment and modification of the formations of a court?'

III. Procedure before the Court of Justice

26. Written observations were submitted by Company C (the defendant in the main proceedings), the Prokurator Prokuratury Regionalnej w Warszawie (Prosecutor of the Regional Prosecutor's Office, Warsaw, Poland; 'the regional prosecutor'), the Polish Government and the European Commission. A hearing was held on 7 March 2024, at which all of the abovementioned parties were represented, save for the regional prosecutor.

IV. Assessment

A. The jurisdiction of the Court and the admissibility of the questions referred

27. Company C and the regional prosecutor put forward various arguments in that regard. [8]

28. First, Company C and the regional prosecutor argue, in essence, that the request for a preliminary ruling is inadmissible, since it seeks an interpretation of national law and the connection with EU law is not sufficiently clear.

29. However, suffice it to recall the case-law of the Court, according to which 'the second subparagraph of Article 19(1) TEU is intended inter alia to apply to any national body which can rule, as a court or tribunal, on questions concerning the application or interpretation of EU law and which therefore fall within the fields covered by that law'. [9] It is common ground that that is the case here. Both the court of first instance (the regularity of composition of which is questioned) and the court of second instance (which is the referring court and whose powers of

[8] At the hearing, the Polish Government withdrew its written observations, including the objection of inadmissibility, and presented entirely new observations. It argued, in essence, that (i) the requirement of an independent and impartial tribunal previously established by law precluded the case from being heard by a new judge who had been appointed as the reporting judge in 'flagrant violation' of national rules on the allocation of cases, and (ii) EU law requires the court of second instance to disapply national provisions, which preclude it from examining whether, at first instance, the aforementioned requirement had been met.

[9] Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, 'the judgment in *Miasto Łowicz*', paragraphs 33 and 34 and the case-law cited).

review of such irregularity are prohibited, or revoked, by national law) may be called upon to rule on questions relating to the application or interpretation of EU law. Therefore, they must meet the requirements of effective judicial protection.

30. Secondly, the regional prosecutor argues that the request for a preliminary ruling concerns rules governing the organisation of the judicial system of a Member State, which, like any question relating to the organisation and operation of State bodies, falls within the exclusive competence of that State.

31. That argument can be rejected on the basis of settled case-law. Indeed, 'although it is true that the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law' [10] and, in particular, from the second subparagraph of Article 19(1) TEU. [11]

32. Thirdly, the regional prosecutor submits that, under Article 51 of the Charter, Article 47 thereof, to which the questions referred relate, is inapplicable, since the case in the main proceedings is not connected with EU law. That inapplicability is reinforced, in the case of the Republic of Poland, by Protocol (No 30) on the application of the [Charter] to Poland and to the United Kingdom.

33. The Court has explained the difference in the respective scopes of the second subparagraph of Article 19(1) TEU and of Article 47 of the Charter: 'while Article 47 of the Charter helps to ensure respect for the right to effective judicial protection of any individual relying, *in a given case*, on a right which he or she derives from EU law, the second subparagraph of Article 19(1) TEU seeks to ensure that *the system of legal remedies established by each Member State* guarantees effective judicial protection in the fields covered by EU law'. [12]

34. I take the view that, admittedly, the dispute in the main proceedings itself appears to have no link with a provision of EU law. Indeed, in support of its action against the defendant in the main proceedings (Company C), the applicant (Company S) has relied solely on a provision of national law and, in turn, the referring court has not given any indication that would suggest that that provision has any link with EU law. It therefore appears that, by virtue of Article 51(1) of the Charter, Article 47 thereof is not, as such, applicable to the case in the main proceedings.

35. However, as the case-law of the Court [13] makes clear, in a situation such as the one at hand, notwithstanding the fact that Article 47 of the Charter is not, as such, applicable to the case in the main proceedings, that article remains relevant for the purposes of the interpretation of Article 19(1) TEU. In that regard the Court has held that 'since the second subparagraph of Article 19(1) TEU requires all Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law, within the meaning in particular of *Article 47 of the Charter*, that latter provision *must be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU*' (emphasis added).

[10] Judgment of 18 April 2024, *OT and Others (Abolition of a court)* (C-634/22, EU:C:2024:340, paragraph 24 and the case-law cited).

[11] Judgment in *Miasto Łowicz*, paragraph 36 and the case-law cited.

[12] Judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraph 52). See also Opinion of Advocate General Rantos in *Krajowa Rada Sądownictwa (Continued holding of a judicial office)* (C-718/21, EU:C:2023:150, point 20 and footnotes 26 to 28).

[13] Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, 'the judgment in *RS*', paragraphs 36 and 37).

36. Fourthly, the regional prosecutor argues, in essence, that the first question referred for a preliminary ruling is not 'real', since an answer to that question is not necessary in order for the referring court to rule on the case in the main proceedings.

37. To my mind, it is sufficient to point out that (i) the referring court states that the type of irregularities concerned involves a risk that the presumption of the independence of the court of first instance has been cast into doubt, and (ii) the referring court is prevented by a national legal provision [14] from drawing the consequences of those irregularities. Therefore, the referring court seeks to ascertain whether that provision must be disapplied under the second subparagraph of Article 19(1) TEU.

38. According to settled case-law, 'questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance'. [15]

39. Based on the foregoing considerations, I am satisfied that the questions referred in the present case can be considered by the Court to be 'necessary' to enable the referring court to 'give judgment' in the case before it. [16]

40. Fifthly, the regional prosecutor submits, in essence, that, contrary to Article 94(a) of the Rules of Procedure of the Court of Justice, the referring court has not provided any explanation as to the reasons behind the choice of the various provisions of EU law cited in the questions referred.

41. In relation to Article 2 and Article 6(1) and (3) TEU, it must be pointed out that the referring court does not set out any reasons as to why it is asking the Court to interpret those specific provisions. However, I take the view that it is apparent from the grounds of the order for reference that the questions referred concern, in essence, the interpretation of the requirements of effective judicial protection before an independent and impartial tribunal previously established by law, pursuant to the second subparagraph of Article 19(1) TEU. As regards Article 2 TEU, Article 19 TEU gives concrete expression to the value of the rule of law affirmed therein. [17] In those circumstances, the assessment in answer to the questions referred must be carried out under the second subparagraph of Article 19(1) TEU, as interpreted in the light of Article 2 TEU and taking due account of Article 47 of the Charter. [18]

B. Substance

1. Preliminary observations

42. Before I turn to the questions referred, as a preliminary observation it is necessary to address several objections raised by Company C and the regional prosecutor.

[14] Article 55(4) of the Law on the ordinary courts.

[15] See judgment in *Miasto Łowicz*, paragraph 43 and the case-law cited.

[16] Ibid., paragraph 45 and the case-law cited.

[17] See judgment in *RS*, paragraph 39 and the case-law cited.

[18] See judgment of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235, paragraphs 77 to 79).

43. First, Company C and the regional prosecutor dispute the presentation of national law in the order for reference, taking the view that it is partial and biased. The regional prosecutor also submits that the national law does not contain the concept of 'flagrant violation' of the provisions relating to the allocation of cases and the modification of the formation of a court, a concept used by the referring court which contrasts that notion with that of a 'mere deviation' (one that is accidental, unconscious, involuntary or made in error).

44. To my mind, it is sufficient to recall settled case-law, according to which 'the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law'. [19]

45. Therefore, the Court should rely on the assessment of the referring court, according to which the reallocation of the case to another reporting judge at first instance could, in principle, lead to the annulment of the judgment given at first instance on account of a 'flagrant violation' and/or irregularity in those proceedings, whereas Article 55(4) of the Law on the ordinary courts constitutes an obstacle to that potential annulment.

46. Secondly, Company C and the regional prosecutor argue, in essence, that provisions relating to the allocation of cases and the modification of the formation of a court are rules of an administrative and technical nature only, the essential aim of which is to ensure equitable distribution of the workload and which, by their nature, would not likely be a channel for external influence, namely from the executive or legislative branches. Therefore, such rules of an administrative and technical nature should not fall within the scope of EU law.

47. In that regard, the Court has already held that 'it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence. The rules applicable to the status of judges and the performance of their duties as judges must, in particular, be such as to preclude … also … influence which [is] more indirect and which [is] liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals'. [20]

48. The doubts expressed by the referring court when it states that there is a serious risk that breaches of national rules on the (re)allocation of cases to the formations of courts have the aim, in particular, in concert between the judges concerned, of allowing one judge to replace another in a specific case or in certain types of cases are sufficient grounds to view those issues not as exclusive matters of an administrative and technical nature, but as issues that fall to be assessed in the light of the requirements stemming from EU law relating to the guarantee of an independent and impartial tribunal previously established by law.

49. Thirdly, Company C and the regional prosecutor submit, in essence, that the application of a provision of national law which provides for the invalidity of proceedings where the composition of the formation of a court is contrary to the law [21] can be confined to irregularities relating to the composition of the court as a whole, but not to the composition of particular formations of a court.

[19] Judgment of 8 June 2016, *Hünnebeck* (C-479/14, EU:C:2016:412, paragraph 36). See also judgment of 6 December 2018, *Preindl* (C-675/17, EU:C:2018:990, paragraph 24 and the case-law cited).

[20] Judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 197 and the case-law cited).

[21] Such as Article 379(4) of the Code of Civil Procedure.

50. At the outset, it should be pointed out, as the Court did in the judgment in *Simpson and HG*,[22] that 'according to the settled case-law of the European Court of Human Rights [("the ECtHR")], the reason for the introduction of the term "established by law" in the first sentence of Article 6(1) ECHR [[23]] is to ensure … in particular, [that] the principle of the rule of law [is respected] and covers not only the legal basis for the very existence of a tribunal, but *also the composition of the bench in each case* and any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular, including, in particular, provisions concerning the independence and impartiality of the members of the court concerned'. Therefore, rules such as the ones in the main proceedings relating to the (re)allocation of a case to the reporting judge are clearly relevant for the purposes of verifying whether the guarantee of an independent and impartial tribunal previously established by law was respected.

51. Therefore, as argued by the Polish Government at the hearing, the requirement to guarantee an independent and impartial tribunal stemming from the second subparagraph of Article 19(1) TEU should be respected by national provisions relating to the allocation of cases to judges and the modification of the formations of a court a fortiori where this is compounded by national provisions which preclude a court of second instance from reviewing alleged irregularities in the (re)allocation of cases at first instance.

2. Consideration of the two questions together

52. By the two questions referred, which it is appropriate to address together, the referring court asks, in essence, the Court of Justice to assess the cumulative effect of an irregular application of the rules on the (re)allocation of a case to a reporting judge and the lack of a legal remedy in that regard, as well as the conformity of that cumulative effect with EU law, in particular with the second subparagraph of Article 19(1) TEU, interpreted in the light of Article 2 TEU and taking into consideration Article 47 of the Charter.

53. I will address the questions referred by (a) assessing whether the requirement to guarantee an independent and impartial tribunal previously established by law covers rules on the (re)allocation of cases to judges; (b) addressing the question whether the requirement under EU law that an independent and impartial tribunal previously established by law must 'ensure effective judicial protection in the fields covered by EU law' is applicable to the present case; (c) discussing the test to be applied when examining whether the irregular (re)allocation of cases to judges is liable to jeopardise the requirements of effective judicial protection before an independent and impartial tribunal previously established by law and whether it should entail the annulment of the proceedings at first instance; and, finally, (d) addressing the impact of the Court's judgment in *Commission* v *Poland (Independence and private life of judges)*[24] on the present case.

[22] Judgment of 26 March 2020, *Review Simpson* v *Council* and *HG* v *Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, 'the judgment in *Simpson and HG*', paragraph 73 and the case-law cited). Emphasis added.

[23] The Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR').

[24] Judgment of 5 June 2023 (C-204/21, EU:C:2023:442; 'the judgment in '*Commission* v *Poland (Independence and private life of judges)*').

(a) The requirement to guarantee an independent and impartial tribunal previously established by law covers rules on the (re)allocation of cases to judges

54. As a starting point, it is important to recall the existing international guidance and case-law regarding the guarantee of an independent and impartial tribunal previously established by law in so far as it relates to case (re)allocation systems. In that respect, national rules on the designation and modification of the formations of a court have already been examined, in particular, by the Venice Commission [25] and the ECtHR.

55. The Venice Commission, in its report of 16 March 2010, [26] sets out certain standards that States should meet. It recommends, inter alia, that the (re)allocation of cases to judges be governed by objective and transparent criteria established by law. The Venice Commission also stresses that the concept of a tribunal established by law implies national rules which guarantee independence and impartiality not only of the court as a whole but also of an individual judge. [27] In my view, that requirement necessarily extends not only to such rules per se, but also to their application, which must also be carried out in an objective and transparent – that is, non-arbitrary – manner.

56. Furthermore, it follows from the case-law of the ECtHR that the doubts of a party to the proceedings regarding the independence and impartiality of a judge are legitimate where domestic law provides *no sufficient procedural guarantees to prevent judicial influencing*. [28]

57. Such a legal framework was lacking in the *Miracle Europe Kft v. Hungary* case, where the judge who allocated cases to other judges had far-reaching discretionary power. In that judgment, [29] the ECtHR found that, as a result of a discretionary reallocation of the case, the relevant court was not a tribunal established by law and, therefore, ruled that there was a violation of the right to a fair hearing under Article 6(1) ECHR. Those findings of the ECtHR highlight how important it is for (re)allocations of cases to judges to be carried out strictly in accordance with the law and in an objective and transparent manner. [30]

58. We can also draw upon the existing case-law of the Court of Justice.

59. The Court ruled in the judgment in *Commission* v *Poland (Disciplinary regime for judges)*, [31] in particular, on national provisions which conferred on the President of the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court) the *discretionary power to designate* the disciplinary

[25] The Venice Commission, officially the European Commission for Democracy through Law, is an advisory body of the Council of Europe.

[26] *Report on the independence of the judicial system – Part I: The independence of judges*, adopted by the Venice Commission at its 82nd Plenary Session, Venice, 12-13 March 2010, point 81 and point 82(16).

[27] Ibid., points 77 and 79.

[28] See Sillen, J., 'The concept of "internal judicial independence" in the case law of the European Court of Human Rights', *European Constitutional Law Review*, No 15, 2019, p. 121, with many references to relevant case-law of the ECtHR.

[29] ECtHR, 12 January 2016, CE:ECHR:2016:0112JUD005777413, 'the judgment in *Miracle Europe*', § 58.

[30] As legal literature explains, 'once a case has been allocated to a judge …, in principle, it cannot be reassigned to a different judge or court … without the latter's consent, except where such reassignment is justified by the good administration of justice', that is, 'for example, when the judge or chamber to which cases requiring quicker treatment than usual (for example, in family matters or in criminal proceedings) faces unexpected circumstances that are likely to significantly extend the duration of the proceedings, at the expense of the interests of litigants' (Adam, S., 'Good administration of justice from an EU law perspective: striking balance between disciplinary liability and judicial independence', in Adam, S., Derveaux, I., Grasso, I. and Vaz Ventura, F. (eds), *The Rule of law and good administration of justice in the digital era*, Bruylant, 2024, p. 158).

[31] Judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596, 'the judgment in *Commission* v *Poland (Disciplinary regime for judges)*', paragraph 172).

tribunal with territorial jurisdiction to hear a disciplinary case conducted in respect of a judge of the ordinary courts *without the criteria to be fulfilled by such a designation having been specified in the applicable legislation*.

60. The Court held there that 'where no such criteria have been laid down, such a power could, inter alia, be used in order to direct certain cases to certain judges while avoiding assigning them to other judges, or in order to put pressure on the judges thus designated'. [32]

61. I take the view that those findings, when assessed in the light of the principle of the rule of law, become relevant not only in a case where no criteria for the (re)allocation of cases to judges have been laid down in the law but also where, in the absence of judicial review, despite the fact that such criteria exist in law, they are not applied at all or they are not applied in an objective and transparent manner, since similar negative effects could arise in such situations.

62. It follows from the foregoing considerations that the requirement of the guarantee of an independent and impartial tribunal previously established by law under the second subparagraph of Article 19(1) TEU, interpreted in the light of the principle of the rule of law as enshrined in Article 2 TEU, demands that, where a Member State has laid down rules on the (re)allocation of cases to judges, those rules must be effective and applied in an objective and transparent manner.

(b) The second subparagraph of Article 19(1) TEU, which explicitly requires that 'effective legal protection in the fields covered by [EU] law' is ensured, is applicable to the present case

63. According to the case-law of the Court, 'it is … for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in [the] fields [covered by EU law]'. [33] This reflects the explicit wording of the second subparagraph of Article 19(1) TEU.

64. When establishing such a system, Member States are required to give full effect to the principle of effective judicial protection, which is a general principle of EU law. In that context, the Court has held that 'the second subparagraph of Article 19(1) TEU gives concrete expression to the value of the rule of law set out in Article 2 TEU and, in that regard, obliges the Member States to establish a system of legal remedies and procedures ensuring respect for individuals for their right to effective judicial protection in all the fields covered by EU law, the principle of effective judicial protection referred to in the second subparagraph of Article 19(1) TEU being a general principle of EU law now enshrined in Article 47 of the Charter'. [34]

65. It follows from my analysis above (points 54 to 62 of the present Opinion), from the very wording of the Treaty on European Union and from the case-law of the Court (points 63 and 64 of the present Opinion) that, in a situation in which the independence and impartiality of a tribunal as required by the second subparagraph of Article 19(1) TEU are called into question, on account of an irregular (re)allocation of a case to a judge, the existence of a right to an effective legal remedy and the jurisdiction of a court to enforce such a right in order to review such an alleged irregularity is essential in order to ensure an effective application of the requirement to guarantee an independent and impartial tribunal previously established by law.

[32] Ibid., paragraph 173.

[33] Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 34).

[34] Judgment in *Commission* v *Poland (Independence and private life of judges)*, paragraphs 269 and 286.

66. It appears that, in the present case, a provision of national law [35] provides for the exclusion of case (re)allocation rules in their entirety from any judicial review in the context of an appeal. Therefore, it must be assessed whether the second subparagraph of Article 19(1) TEU – interpreted in the light of Article 2 TEU in so far as it enshrines the principle of the rule of law and taking due account of Article 47 of the Charter as reflecting the right to an effective legal remedy as a general principle of EU law – precludes the application of such a national provision with respect to the irregular (re)allocation of cases, on the ground that it is incompatible with the second subparagraph of Article 19(1) TEU.

67. By such a prohibition, the national legislature appears to have decided – in an absolute manner – that no irregularity in relation to the (re)allocation of cases at first instance may be reviewed on appeal, whereas, as the referring court maintains in the order for reference, it cannot necessarily be ruled out that the irregularities concerned involve a risk of substantial harm to the independence or impartiality of the formation of a court. Given the role conferred on national courts within the legal order of the European Union and, in particular, in ensuring the rule of law, such courts at any level must, at all times, be perceived as independent and impartial. This necessarily means that, in a case where a national court of second instance is seised on the basis of there being sufficient grounds to believe that that perception with respect to the court of first instance is called into doubt (such as appears prima facie to be the case in the main proceedings), an effective legal remedy must be available to the party seeking such a review.

68. Therefore, in my view, an absolute prohibition on legal remedies in such a situation would run counter to the second subparagraph of Article 19(1) TEU, according to which Member States are, through their national courts, to provide 'remedies sufficient to ensure effective legal protection in the fields covered by [EU] law'. Indeed, the very fact that a national court *may* be seised to interpret and apply EU law is sufficient to trigger the application of that provision. [36]

69. In the present case, the referring court has established that there is not only a 'flagrant violation' of the rules on the (re)allocation of cases to judges, but also that the above is compounded by the prohibition of a legal remedy. The cumulative effect of those two elements is such that it could raise reasonable doubts in the minds of individuals as to the imperviousness of the court of first instance to internal or external influence and its neutrality with respect to the interests before it. Such doubts may, as observed by the referring court, lead to that formation of the court not being seen to be independent or impartial, which in turn is likely to prejudice the trust which justice in a democratic society governed by the rule of law is intended to inspire in those individuals. [37]

70. Moreover, such an absolute exclusion of the case (re)allocation rules in their entirety from any review in the context of an appeal would deny the essence of the principle that justice should not only be done, but it should also be seen to be done.

[35] Article 55(4) of the Law on the ordinary courts.

[36] See Prechal, S., 'Article 19 TEU and national courts: A new role for the principle of effective judicial protection?', in Bonelli, M., Eliantonio, M. and Gentile, G. (eds.), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective*, Oxford, 2022, p. 23.

[37] See, by analogy, judgment in *Commission* v *Poland (Disciplinary regime for judges)*, paragraph 112.

(c) The test for irregularities in the (re)allocation of cases to judges which are such as to jeopardise the requirements of effective judicial protection before an independent and impartial tribunal previously established by law

71. It can be inferred from the case-law of the Court that not every irregularity will necessarily give rise to a declaration of invalidity of the proceedings of the court of first instance by the court of second instance, and irregularities without substantial consequences for the existence of an effective remedy may go unsanctioned by a declaration of invalidity. [38]

72. Indeed, not every irregularity, committed in the context of allocating a case to the formation of a court or reallocating it to a different formation, leads *ipso facto* to an infringement of the second subparagraph of Article 19(1) TEU and accordingly must be subject to judicial review on appeal.

73. For instance, as the Commission pointed out at the hearing, an incorrect compilation of the table of substitute judges or the scheduling of the names thereon (for instance, not in alphabetical order but according to date of birth) would appear prima facie to be of secondary nature. Indeed, such irregularities appear, in principle, incapable of undermining the functioning of the national judicial system, and the guarantees of independence and impartiality, within the meaning of the second subparagraph of Article 19(1) TEU. The purpose of that article is to catch only issues of a certain gravity and/or of a systemic nature, to which the national legal system is unlikely to offer an adequate remedy. [39]

74. In that connection, it may be pointed out that the case-law of the ECtHR addresses the question of the gravity of irregularities that may amount to a breach of the right to a 'tribunal established by law' by way of the 'threshold test'. [40] The ECtHR refers in the judgment in *Miracle Europe* to a 'flagrant violation' of the applicable domestic law. As pointed out above, the principle of the effective judicial protection of individuals' rights under EU law thus referred to in the second subparagraph of Article 19(1) TEU and, therefore, the requirement to guarantee the independence and impartiality of courts and tribunals is a general principle of EU law stemming from the constitutional traditions common to the Member States, which is now reaffirmed by Article 47 of the Charter. [41] It should be recalled that Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed in the ECHR, without adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union. Account must therefore be taken of the corresponding rights of the ECHR for the purpose of interpreting the Charter, as the minimum threshold of protection. [42] Such consistency of interpretation is of utmost importance in terms of understanding what constitutes a breach of the requirements of effective judicial protection before an independent and impartial tribunal previously established by law.

[38] See, by analogy, judgment in *Simpson and HG*, paragraphs 75 to 80.

[39] See Opinion of Advocate General Bobek in Joined Cases *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:403, point 143 et seq.). See also Opinions of Advocate General Tanchev in *Commission v Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:529, point 115), and in *Joined Cases Miasto Łowicz and Prokuratur Generalny* (C-558/18 and C-563/18, EU:C:2019:775, point 125); see also Opinion of Advocate General Rantos that I cite in footnote 12 to the present Opinion.

[40] See ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418, §§ 235 to 290.

[41] Judgment in *Commission* v *Poland (Disciplinary regime for judges)*, paragraph 52.

[42] Judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 124 and the case-law cited).

75. Therefore, to my mind, the test should be strict and only allegations of 'flagrant violations' of applicable national provisions on the (re)allocation of cases to judges should trigger the right to judicial review within the appeal proceedings in accordance with the second subparagraph of Article 19(1) TEU, as interpreted in the light of Article 2 TEU and Article 47 of the Charter, in so far as it is only such violations that are capable of casting doubt on the independence and impartiality of a Member State court or tribunal.

76. It is for the referring court to rule on such allegations by taking into account the following considerations. To my mind, it can be inferred from the judgment in *Simpson and HG* that, where the irregularity is of a substantial nature and gravity, there is the impression that other institutions have abused their discretionary power by jeopardising the integrity of the result that drives the given process, thus sowing a legitimate doubt in the minds of the parties and individuals as to the independence of a reporting judge or that of a court.

77. It is therefore for the referring court to determine the nature and gravity of the irregularity, whether the (re)allocation of the case to the judge at first instance complied with the applicable national law and with the requirement to ensure effective judicial protection before an independent and impartial tribunal previously established by law, in accordance with the second subparagraph of Article 19(1) TEU, as interpreted in the light of Article 2 TEU and taking due account of Article 47 of the Charter. The referring court must carry out its assessment in the light of all the relevant circumstances. It should not only review the conformity of the change in the formation of a court with *national law* but also examine, inter alia, the *circumstances* in which that change took place as well as the question whether that change was based on considerations which are arbitrary.

78. In carrying out such an assessment, the referring court should bear in mind that, as the case-law of the Court makes clear, 'the requirement that courts be independent, which follows from the second subparagraph of Article 19(1) TEU, has two aspects to it. The first aspect … is external in nature … [and] the second aspect, which is *internal* in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect *requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law*.' [43]

79. To my mind, those two aspects – external and internal – form part of the test to find whether the specific situation in which the case has been (re)allocated to a reporting judge at first instance is of such a type and of such gravity as to create a real risk that (a) *other persons or administrative bodies within the judiciary itself* could exercise undue discretion undermining the *integrity of the outcome of the (re)allocation of cases to judges* and (b) the result of such a (re)allocation could call into question the objectivity and absence of any 'interest in the outcome of the proceedings' and thus give rise to a reasonable doubt in the minds of individuals as to the independence and impartiality of the judge(s) concerned.

80. It follows that it is for the referring court to rule, in view of all the relevant circumstances, on whether the irregular application of national rules on the (re)allocation of cases to judges in the case in the main proceedings is such as to constitute a breach of the requirement to guarantee an

[43] Judgment in *RS*, paragraph 41; emphasis added.

independent and impartial tribunal previously established by law, which requires that the proceedings at first instance be declared invalid in order to ensure effective judicial protection in the fields covered by EU law.

(d) Impact of the Court's judgment in Commission v Poland (Independence and private life of judges)

81. On 5 June 2023 – after the submission of the reference for a preliminary ruling in the present case – the Court had the opportunity to rule that Article 55(4) of the Law on the ordinary courts (the very provision also at issue in the main proceedings) infringed the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter.

82. In particular, in the judgment in *Commission* v *Poland (Independence and private life of judges)*,[44] the Court held that that infringement was due to the fact that Article 55(4) of the Law on the ordinary courts laid down prohibitions which may apply more generally, notwithstanding any objections by an individual, to the effect that national provisions relating, in particular, either to the allocation of cases or to the appointment or modification of the formations of a court or to the application of such provisions would be contrary to the requirements of EU law inherent in the right to an independent and impartial tribunal previously established by law.

83. Therefore, further to that judgment, which declared Article 55(4) of the Law on the ordinary courts incompatible with the second subparagraph of Article 19(1) TEU, in conjunction with Article 47 of the Charter, the Polish national courts are to disapply[45] that Article 55(4) until it has been repealed by the Polish legislature in accordance with Article 260(1) TFEU[46] and the principle of sincere cooperation (Article 4(3) TEU). As the case-law of the Court makes clear, this requirement follows from the principle of the primacy of EU law, which 'requires a national court … to … disapply, of its own motion, any national rule or practice … which is contrary to a provision of EU law with direct effect'.[47] According to settled case-law, the second subparagraph of Article 19(1) TEU has such effect.[48]

84. It follows from the foregoing considerations that the Polish courts must now (further to the judgment in *Commission* v *Poland (Independence and private life of judges)*) disapply Article 55(4) of the Law on the ordinary courts and may thus, in the present case, apply Article 379(4) of the Code of Civil Procedure and/or any other applicable national provision in order to ascertain whether a case at first instance has been (re)allocated to a reporting judge in a regular manner, that is, in accordance with applicable national provisions as well as with the requirements of an independent and impartial tribunal previously established by law, thereby ensuring effective judicial protection as enshrined in the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU and taking due account of Article 47 of the Charter.

44 Paragraphs 226 and 227.

45 See also judgment of 13 July 2023, *YP and Others (Lifting of a judge's immunity and his or her suspension from duties)* (C-615/20 and C-671/20, EU:C:2023:562, paragraphs 61 to 64 and the case-law cited). See also the judgment in *Commission* v *Poland (Independence and private life of judges)*, paragraph 271.

46 It was apparent at the hearing that as of 7 March 2024 that provision was not yet repealed.

47 Judgment in *Commission* v *Poland (Independence and private life of judges)*, paragraph 228 and the case-law cited.

48 Ibid., paragraph 78 and the case-law cited.

V. Conclusion

85. I propose that the Court of Justice answer the questions referred for a preliminary ruling by the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland) as follows:

The second subparagraph of Article 19(1) TEU, interpreted in the light of Article 2 TEU and taking due account of Article 47 of the Charter of Fundamental Rights of the European Union,

must be interpreted as precluding a national provision that includes an absolute prohibition of a legal remedy for a breach of national rules on the (re)allocation of cases to judges where such a breach creates a real risk that (a) other persons or administrative bodies within the judiciary itself could exercise undue discretion, undermining the integrity of the outcome of the (re)allocation of cases to judges, and (b) the result of such a (re)allocation could call into question the objectivity and absence of any interest in the outcome of the proceedings, apart from the strict application of the rule of law, and thus give rise to a reasonable doubt in the minds of individuals as to the independence and impartiality of the judge(s) concerned.

It is for the referring court to disapply such a provision of national law and proceed to apply Article 379(4) of the Code of Civil Procedure and/or any other applicable national provision in order to examine, in view of all the relevant circumstances, whether the irregular application of national rules on the (re)allocation of cases to judges is of such a type and of such gravity as to constitute a breach of the requirement to guarantee an independent and impartial tribunal previously established by law and to justify declaring the proceedings at first instance invalid, with the aim of ensuring effective judicial protection in the fields covered by EU law.