Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 1 August 2025 [1]

Case C-748/23 [Gekus] [i]

C. Limited
v
M. S.

(Request for a preliminary ruling from the Sąd Najwyższy (Supreme Court, Poland))

(Reference for a preliminary ruling – Article 267 TFEU – Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Procedure for the appointment of a national judge – Judicial independence and impartiality – *Nemo iudex in causa sua*)

I. Introduction

1. The well-known Latin adage '*nemo iudex in causa sua*' (no one is a judge in his or her own cause) is generally attributed to Edward Coke, a British barrister from the turn of the 17th century, [2] and was inspired by, inter alia, a passage of Emperor Justinian's *Corpus Juris Civilis*, dating back to 529 AD. [3] The ancient origins of this adage are hardly surprising, since the requirement that judges be impartial is one of the fundamental pillars of any judicial system. [4]

2. To date, the requirement of impartiality is one of the key components of the 'right to an effective remedy and to a fair trial' enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and of the 'right to a fair trial' set out in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), both of which make reference to an 'independent and impartial tribunal [previously] established by law'. [5] It is also enounced in numerous national constitutions [6] and international instruments. [7]

1 Original language: English.

i The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

2 See, inter alia, Yale, D.E.C., '*Iudex in propria causa*: An historical excursus', *The Cambridge Law Journal*, Vol. 33, Issue 1, 1974, pp. 80 to 96, and Neudorf, L., 'Judicial independence: The judge as a third party to the dispute', *Oxford University Comparative Law Forum 2*, 2015.

3 Code 3.5.1: 'neminem sibi esse iudicem vel ius sibi dicere debere' (no one shall decide his or her own case or interpret the law for himself or herself).

4 See also Opinion of Advocate General Ćapeta in *Vivacom Bulgaria* (C-369/23, EU:C:2024:612, point 1).

5 The word 'previously' only appears in Article 47 of the Charter.

6 For example, in Article 30(2) of The Constitution of the Republic of Cyprus.

7 For example, in Principle 2 of the United Nations' Basic Principles on the Independence of the Judiciary, adopted on 6 September 1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985.

3. The significance and scope of the principle of impartiality is brought to the fore by the present request for a preliminary ruling, submitted by the Sąd Najwyższy (Supreme Court, Poland). The present case arose in the context of the reform of the Polish justice system, which began in 2017 and which has been the subject of a number of judgments of the Court of Justice [8] and of the European Court of Human Rights ('the ECtHR' [9]). Those judgments identified a number of shortcomings in the reform, undermining the independence of the judiciary.

4. Those judgments led the Polish legislature to introduce, in 2022, a specific mechanism – a test of independence and impartiality of judges ('the independence and impartiality test') – to deal with such issues, where the need arises. The test is applied by a specific judicial panel at an *ad hoc* stage of the procedure. The aim of that test is, in essence, to determine whether the alleged irregularities in the appointment of judges might have had an impact on the legality of the composition of the national court in the cases in question. The questions referred by the Sąd Najwyższy (Supreme Court) concern the compatibility with EU law of a national provision or judicial practice concerning the implementation of that test.

II. National law

5. Article 29 of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017, [10] as amended by the ustawa o zmianie ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law on the Supreme Court and certain other laws), of 9 June 2022 [11] ('the Law on the Supreme Court'), provides:

'…

2. Within the scope of the activities of the [Sąd Najwyższy (Supreme Court)] or its bodies, it is not permitted to question the legitimacy of the [courts], constitutional state bodies or bodies for the supervision and protection of the law.

3. The [Sąd Najwyższy (Supreme Court)] or another organ of power may not ascertain or assess the lawfulness of the appointment of a judge or of the power to perform duties in the administration of justice that derives from that appointment.

4. The circumstances surrounding the appointment of a judge of the [Sąd Najwyższy (Supreme Court)] may not constitute exclusive grounds for challenging a decision taken with the participation of that judge or for questioning his or her independence and impartiality.

5. Compliance with the requirements of independence and impartiality by a judge of the [Sąd Najwyższy (Supreme Court)] or a seconded judge of the [Sąd Najwyższy (Supreme Court)] may be examined, taking into account the circumstances surrounding his or her appointment and his or her conduct after appointment, at the request of the litigant referred to in paragraph 7, if in the circumstances of a particular case this may lead to a breach of the principle of independence or

[8] See, inter alia, judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531); of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:924); and of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982).

[9] See, inter alia, ECtHR, 22 July 2021, *Reczkowicz v. Poland* (CE:ECHR:2021:0722JUD004344719); ECtHR, 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland* (CE:ECHR:2021:1108JUD004986819); and ECtHR, 15 March 2022, *Grzęda v. Poland* (CE:ECHR:2022:0315JUD004357218).

[10] Dz. U. of 2018, item 5.

[11] Dz. U. of 2022, item 1259.

impartiality affecting the outcome of the case, taking into account the circumstances of the litigant and the nature of the case.

6. An application for a declaration of compliance with the requirements referred to in paragraph 5 may be made against a judge of the [Sąd Najwyższy (Supreme Court)] or a judge seconded to that court and assigned to a bench hearing:

(1) an appeal;

…

7. Any party to the proceedings before the [Sąd Najwyższy (Supreme Court)] in the cases referred to in paragraph 6 shall have the right to file such an application.

…

15. The [Sąd Najwyższy (Supreme Court)] shall consider the application in camera in a panel of five judges chosen by lot from among all the members of the [Sąd Najwyższy (Supreme Court)], after hearing the judge against whom the application is made, unless a hearing is impossible or very difficult. The judge may submit his or her observations in writing. The judge concerned is excluded from the drawing of lots.

…

21. An appeal may be lodged with the [Sąd Najwyższy (Supreme Court)] against the order made following consideration of the application, in a panel of seven judges drawn by lot from among all the members of the [Sąd Najwyższy (Supreme Court)]. The judge concerned and the judge who participated in the contested order shall be excluded from the drawing of lots.'

III. Facts, national proceedings and the questions referred for a preliminary ruling

6. The dispute in the main proceedings is between C. Limited, a company established in Ireland ('the appellant'), and an Irish individual, M.S. ('the respondent'). It concerns the obligations of the parties and their liability for certain actions performed by them in the territory of Poland.

7. On 10 June 2021 the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland) ordered the respondent to pay an amount of money to the appellant.

8. On 29 July 2021, the respondent asked the High Court (Ireland), under Article 46, in conjunction with Article 45(1)(a), of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[12] to refuse to recognise and enforce the judgment delivered by the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw). The respondent argued that its right to a court established by law had been infringed as a result of the presence, on the judicial panel which delivered that judgment, of a judge who had unlawfully been seconded by the Minister Sprawiedliwosci (Minister of Justice, Poland).

[12] OJ 2012 L 351, p. 1.

9. At the same time, the respondent also lodged an appeal in cassation before the Sąd Najwyższy (Supreme Court) against the judgment of the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw). A three-judge panel, including Judge JG, was appointed to hear the appeal.

10. On 27 September 2023, the appellant filed an application for the independence and impartiality test to be carried out in respect of Judge JG, in accordance with the procedure set out in Article 29 of the Law on the Supreme Court. In that regard, the appellant relied on the circumstances surrounding, in particular, his appointment. Judge JG was appointed – as the appellant pointed out – as a judge of the Izba Cywilna Sądu Najwyższego (Civil Division of the Supreme Court) on the basis of a resolution of the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; 'the KRS'). However, the implementation of that resolution – because of the new composition of the KRS – had been suspended, by order of the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland). That court eventually annulled the resolution. In addition, the appellant also relied on the conduct of Judge JG after his appointment as a judge.

11. Five judges of the Sąd Najwyższy (Supreme Court) were drawn by lot to make up the five-judge panel hearing the application for an impartiality and independence test. This panel includes two judges of the Sąd Najwyższy (Supreme Court) appointed before 2018 and three judges appointed on the proposal of the KRS in its new composition.

12. During the formal examination of the admissibility of that application, the referring court – in a single-judge panel composed of the Judge-Rapporteur, who is also the President of that five-judge panel – expressed doubts as to how Article 29(5) of the Law on the Supreme Court should be interpreted and applied to ensure its compatibility with Article 19(1) TEU and Article 47 of the Charter.

13. In particular, the referring court expresses doubts as to whether the requirement of an independent and impartial tribunal established by law is fulfilled by three members of the five-judge panel drawn by lot to consider the appellant's application, in so far as they would be in a position very similar to that of the judge under review, because of the manner in which they were appointed.

14. In those circumstances, the Sąd Najwyższy (Supreme Court), sitting as a single judge, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the second subparagraph of Article 19(1) TEU, interpreted in light of Article 47 of the [Charter], be understood as meaning that the circumstances of a judicial appointment may in and of themselves indicate that a judge fails to meet the requirements of independence and impartiality if those circumstances result in a court being constituted in a manner that violates an individual's right to a tribunal or, alternatively, that the failure to meet those requirements is determined by the judge's passive acceptance (by continuing to give rulings) of irregularities in the procedure by which he or she was appointed, resulting in a court being constituted in a manner that violates an individual's right to a tribunal?

(2) Must the second subparagraph of Article 19(1) TEU, interpreted in [the] light of Article 47 of the [Charter], be understood as meaning that the test to determine whether a judge of the Sąd Najwyższy (Supreme Court …) is impartial cannot be conducted by judges whose participation – due to the fact that they were appointed as Supreme Court judges on a

proposal of the Krajowa Rada Sądownictwa (National Council of the Judiciary) constituted in accordance with the procedure set out in the ustawa z dnia 8 grudnia 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws …) – violates an individual's right to a tribunal?

(3) If the second question is answered in the affirmative, must the second subparagraph of Article 19(1) TEU, interpreted in [the] light of Article 47 of the [Charter], be interpreted as meaning that the Supreme Court is obliged not to include such judges in the panel conducting the impartiality test and, as a last resort, disapply the national provision providing for a panel of five judges in such cases, whereby the case should be heard by another panel provided for by national law which does not include such judges?'

15. Written observations in the present proceedings have been submitted by the appellant, the respondent, the Netherlands, Belgian, and Polish Governments and the European Commission. The respondent, the Polish Government and the Commission also presented oral argument at the hearing on 4 June 2025.

IV. Analysis

16. In the sections below, I shall first examine the admissibility of the questions (A) and then their merits (B). However, in accordance with the Court's request, my analysis will be mainly focused on two aspects: (i) the admissibility of the second and third questions referred; and (ii) the merits of the second question.

A. Admissibility

17. At the outset, I should recall that, according to settled case-law, it is in principle for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. [13]

18. It follows that questions relating to EU law enjoy a presumption of relevance: the Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [14] In particular, the Court has pointed out that a national court is not empowered to bring a matter before the Court by way of a reference for a preliminary ruling, unless a case is pending before it in which it is called upon to give a decision which is capable of taking account of the preliminary ruling. [15]

[13] See, to that effect, judgment of 25 February 2025, *Sąd Rejonowy w Białymstoku and Adoreikė* (C-146/23 and C-374/23, EU:C:2025:109, paragraph 37 and the case-law cited).

[14] Ibid.

[15] See, to that effect, judgment of 9 January 2024, *G. and Others (Appointment of judges to the ordinary courts in Poland)* (C-181/21 and C-269/21, EU:C:2024:1, paragraph 64 and the case-law cited) ('the judgment in *G. and Others*').

19. It is in the light of that case-law that I will now examine the admissibility of the three questions referred in the present case.

20. The appellant has raised an objection in relation to the admissibility of the *first question*, considering that an answer to that question is not relevant to the examination of its application of the independence and impartiality test. It emphasises that its application is based not only on the circumstances of the judicial appointment of the judge in question, but also on other elements, such as that judge's behaviour after the appointment.

21. I am unconvinced by that objection. By its first question, the referring court essentially asks the Court whether Article 19(1) TEU, read in the light of Article 47 of the Charter, should be interpreted as meaning that the circumstances of a judicial appointment may, in and of themselves, indicate that a judge fails to meet the requirements of independence and impartiality enshrined in those provisions.

22. If the Court were to provide a positive answer to that question, the referring court could, if the relevant conditions are satisfied, accept the appellant's application without having to consider whether the other elements put forward by it are of some significance. Accordingly, the first question referred appears relevant for the solution of the dispute pending before the referring court.

23. At the hearing, the parties also discussed the admissibility of the *second and third questions* referred. The main issue which they addressed was whether the referring court would be able to take into account the answers provided by the Court. Indeed, some doubts in that regard could arise from the fact that the referring court is, in the present case, a single-judge panel composed of the Judge-Rapporteur, who is also the President of a five-judge panel competent to examine the application submitted by the appellant. Moreover, the Law on the Supreme Court does not include specific rules on the abstention and recusal of the judges who, following the drawing of lots, are chosen to sit on the panel reviewing the application for the independence and impartiality test. In essence, the issue at the centre of the discussion was whether the referring court would be capable of remedying any potential issue that the Court were to identify when addressing the questions referred.

24. In that regard, all the parties who intervened at the hearing argued in favour of the admissibility of the second and third questions. In particular, they emphasised that the rules and principles of national law requiring respect of the right to a fair trial apply at any stage of the national proceedings, including the preliminary and incidental stage at issue in the main proceedings. In the absence of specific provisions which would allow the referring court to remedy any possible infringement of that right, that court could and should – those parties contend – turn to the general principles and rules of national law. Those principles and rules, a fortiori when interpreted in the light of Article 19(1) TEU and Article 47 of the Charter, as well as Article 6(1) ECHR, would lead to the exclusion from the panel of any judge whose independence or impartiality could be doubted in the eyes of the public.

25. I am also of the view that the second and third questions are admissible.

26. At this point, I should recall that, as the Court has consistently stated, there must be a *connecting factor* between the dispute at issue in the main proceedings and the provisions of EU law whose interpretation is sought, by virtue of which that interpretation is objectively required

for a decision to be taken by the referring court. [16]

27. Although the issue raised by the referring court does not concern some substantive provision of EU law that may be applicable in the relationship between the appellant and the respondent, there is a clear connecting factor between the provisions of EU law to which the questions referred relate and the dispute in the main proceedings. [17] It is uncontested that there is a dispute currently pending before the referring court, in which a genuine issue of a procedural nature arose *in limine litis*, concerning the proper composition of that court to hear and rule on a specific claim made by one of the parties.

28. The Court has consistently agreed to answer questions referred in those circumstances, in so far as the interpretation of EU law sought by the referring court may help to solve the procedural problems with which that court is faced, before being able to rule on the substance of the dispute. [18]

29. That approach is a fortiori appropriate in the present case, since the appellant's claim which the referring court has to examine concerns the independence or impartiality of a judge who will hear the case on appeal. In practice, refusing to rule on the second and third questions referred would mean that the referring court would have to address a possible issue of judicial independence or impartiality of a given judicial panel, whilst being itself potentially affected by the same problem. Such an approach by the Court would be paradoxical.

30. The present case thus differs from those in which national courts have sent a request for a preliminary ruling in cases which they manifestly lacked jurisdiction to hear, [19] were no longer pending before them or had become devoid of purpose. [20] It should also be distinguished from the cases in which the Court found the questions referred to concern issues that had already been definitively decided, or that pertained to a stage of the proceedings which had been definitively closed. [21] By the same token, the present case is unlike those in which the questions referred concerned provisions of EU law that were not applicable in the main proceedings, although relevant in similar judicial procedures pending at that time, [22] or in hypothetical future judicial procedures connected with the main proceedings. [23]

31. More generally, the present case is not one where a national court seizes the opportunity offered by a case – where, in principle, no genuine issue of EU law arises – to ask the Court questions on aspects of the national judicial system of a general or structural nature. The issues raised by the referring court are fully relevant to the present case and might determine the fate of

[16] See, in that regard, judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 48 and the case-law cited) ('the judgment in *Miasto Łowicz*').

[17] On this matter, see the judgment in *Miasto Łowicz*, paragraphs 49 to 52.

[18] See, for example, judgments of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 99 and 100); of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798, paragraphs 93 and 94); and of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931, paragraphs 48 and 49) ('the judgment in *Prokuratura Rejonowa*').

[19] See, for example, orders of 6 September 2018, *Di Girolamo* (C-472/17, EU:C:2018:684), and of 17 December 2019, *Di Girolamo* (C-618/18, EU:C:2019:1090).

[20] See, inter alia, judgment of 12 March 1998, *Djabali* (C-314/96, EU:C:1998:104, paragraphs 21 and 22).

[21] See, in particular, the judgment in *G. and Others*, paragraphs 74 to 80.

[22] See, for example, orders of 5 June 2014, *Antonio Gramsci Shipping and Others* (C-350/13, EU:C:2014:1516, paragraphs 11 and 12), and of 10 February 2015, *Liivimaa Lihaveis* (C-175/13, EU:C:2015:80, paragraph 20).

[23] See, for example, order of 16 May 1994, *Monin Automobiles* (C-428/93, EU:C:1994:192, paragraphs 12 to 15), and the judgment in *Prokuratura Rejonowa*, paragraphs 93 and 94.

the dispute, which then has a direct impact on the procedure for recognition and enforcement started in Ireland on the basis of Regulation No 1215/2012. The latter is also an element which cannot be ignored. [24]

32. The above finding of relevance cannot be called into question by the arguments discussed at the hearing.

33. First, the fact that the referring court is, *in casu*, a single-judge panel composed of the Judge-Rapporteur, who is also President of the five-judge panel charged with reviewing the appellant's application, is immaterial. In its judgment in *Prokuratura Rejonowa*, the Court was faced with a very similar situation, and did not consider that aspect to preclude the admissibility of the reference. [25]

34. Obviously, the admissibility of the reference in such cases is conditional upon the judicial panel sending a request for a preliminary ruling under Article 267 TFEU acting as a 'court or tribunal of a Member State'. One or more judges, acting individually or jointly, do not qualify as such. They must be formally charged with the task of hearing a specific dispute which is currently pending and on which they have jurisdiction to rule. Therefore, a single judge may or may not be a 'court or tribunal' within the meaning of Article 267 TFEU, depending on the circumstances of the case and the relevant national rules.

35. This was recently confirmed in the judgment in *G. and Others*: the mere fact that an individual judge was acting as the reporting judge in a case did not imply that he or she had, acting alone, the power to send a request for a preliminary ruling to the Court under Article 267 TFEU. As the Court found, that judge could not, 'alone, take into consideration any answers which the Court might give to his questions'. [26]

36. The situation in the present case is, however, different from that at issue in *G. and Others*. It is the president of the judicial panel having jurisdiction in the case that, in a preliminary step of the procedure, asks the Court to rule on a question that arose *in limine litis*, potentially affecting the correct establishment of the panel and, as a consequence, the lawfulness of its future activities. In fact, as I understand it, the referring court is, currently, at the stage of the procedure at which only the admissibility of the appellant's application to make use of the mechanism for independence and impartiality is being evaluated.

37. In his Opinion in *Prokuratura Rejonowa*, Advocate General Bobek pointed out that presidents of judicial bodies and, as far as specific proceedings are concerned, presidents of chambers or of judicial panels are generally not only endowed with additional powers, but are also entrusted with additional responsibilities. Inter alia, they must oversee the procedure and the internal deliberations of the panels over which they preside. Accordingly, he found it reasonable that a president of a judicial panel considers that he or she is required to ensure, as a preliminary matter, the correct composition thereof. [27]

[24] See, to that effect, the judgment in *Miasto Łowicz*, paragraph 49 and the case-law cited.

[25] See paragraphs 40 to 50 of the judgment in *Prokuratura Rejonowa*. See also, in detail, the Opinion of Advocate General Bobek in the same cases (EU:C:2021:403, points 48 to 66 and 73 to 129) ('the Opinion in *Prokuratura Rejonowa*').

[26] Paragraphs 69 to 72 of the judgment in *G. and Others*.

[27] Opinion in Joined Cases *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:403, points 63 to 66).

38. Asked at the hearing whether those considerations are applicable in respect of national procedures such as that at issue, the Polish Government answered in the affirmative. That government also confirmed that, under national law, the president of the judicial panel could take different courses of action in order to avoid an unlawful composition of the panel he or she is required to chair. For example, he or she could ask the President of the Supreme Court to run a new draw of lots to replace the judges that cannot sit on the panel.

39. This leads me to my next point.

40. The above finding of relevance also cannot be called into question by the fact that no provision of national law (or national judicial practice) expressly allows the referring court to take measures aimed at remedying a possible situation of incompatibility between the relevant national procedural rules and EU law that the judgment of the Court might ascertain.

41. The admissibility of the questions referred under Article 267 TFEU has consistently been assessed by the Court irrespective of the legal avenues available under national law to remedy the potential incompatibility between national law and EU law.[28] It is well established that 'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of [EU] law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent directly applicable [EU] rules from having full force and effect are incompatible with the requirements which are the very essence of [EU] law'.[29]

42. In fact, the subject of the third question referred concerns precisely this matter. In a nutshell, the referring court asks the Court what it should do to remedy a possible situation of incompatibility between the provisions of Article 29 of the Law on the Supreme Court and Article 19(1) TEU. Arguments concerning an alleged inability of the referring court, as the national law currently stands, to adopt corrective measures pertain, therefore, to the effects which may flow from the provisions of EU law to which the third question referred relates, in the light, in particular, of the primacy of EU law. Such arguments clearly relate to the substance of the question referred and, thus, cannot lead to the inadmissibility of the questions.[30]

43. In this context, I would add that, at the hearing, the Polish Government also emphasised that nothing precludes, *de jure*, a party from recusing one or more of the judges of that panel, which would trigger the relevant procedure to deal with that request. Furthermore, I presume that the national rules about abstention are also fully applicable at this stage of the procedure. This should prompt any judge who, in the light of the judgment of the Court in the present case, might consider himself or herself to be concerned by a problem of impartiality to abstain voluntarily from sitting on the panel.

44. In conclusion, I see nothing in the case file to rebut the presumption of relevance referred to in point 18 above. Consequently, I am of the view that the second and third questions referred are also admissible.

[28] See the Opinion in *Prokuratura Rejonowa*, point 90.

[29] See, for instance, judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraphs 22 and 23), and of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraphs 56 and 57).

[30] See, to that effect, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798, paragraph 90 and the case-law cited).

B. Merits

1. First question

45. By its first question, the referring court essentially asks the Court whether Article 19(1) TEU, in combination with Article 47 of the Charter, must be interpreted as meaning that the circumstances of a judicial appointment may, in and of themselves, indicate that a judge fails to meet the requirements of independence and impartiality, thereby leading to an infringement of the right to an effective remedy before a tribunal previously established by law.

46. The referring court indicates that, at national level, there are two lines of case-law regarding the admissibility of the application for the independence and impartiality test within the Sąd Najwyższy (Supreme Court). According to one interpretation of the national provisions in question (namely, Article 29 of the Law on the Supreme Court), an application for such a test must not only indicate (and prove) the unlawful circumstances surrounding a judge's appointment, but must also consider his or her conduct after the appointment, and the impact that the failure to meet the standard of independence and impartiality had on the outcome of the case in question. According to another interpretation of the national provision, the circumstances of a judicial appointment alone may be sufficient to cast doubt on the impartiality or independence of a judge, and the applicant is thus not required to invoke further elements for that purpose.

47. It seems to me that an answer to the issue raised by the referring court may be found in the case-law of the Court.

48. In the judgment in *Simpson*, the Court found that an irregularity in the appointment of judges may, in and of itself, entail an infringement of the right to an effective remedy before an independent and impartial tribunal previously established by law. That is so when 'that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system'. [31]

49. In the judgment in *Ástráðsson*, the Grand Chamber of the ECtHR came to a very similar conclusion. It applied a three-pronged test to determine whether an unlawful judicial appointment gives rise, in itself, to an infringement of the right to a 'tribunal established by law' set out in Article 6(1) ECHR. In essence, the ECtHR checked whether: (i) there was a manifest breach of the domestic rules on judicial appointments; (ii) the breach concerned a rule of fundamental importance for appointing judges; and (iii) the breach had been effectively reviewed and remedied by domestic courts. In particular, the ECtHR emphasised the need to assess the breach 'in the light of the object and purpose of the requirement of a "tribunal established by law", namely to ensure the ability of the judiciary to perform its duties free of undue interference

[31] 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, paragraph 75).

and thereby to preserve the rule of law and the separation of powers'. Accordingly, the ECtHR held that 'breaches of a purely technical nature that have no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold'. [32]

50. The above principles have been consistently confirmed in subsequent case-law of the Court of Justice, [33] and were applied specifically in the case giving rise to the judgment in *Krajowa Rada Sądownictwa*. In that case, the Court declared inadmissible a request for a preliminary ruling from the Sąd Najwyższy (Izba Kontroli Nadzwyczajnej i Spraw Publicznych) (Supreme Court (Chamber of Extraordinary Control and Public Affairs), Poland). The Court ruled that, because of *the manner in which its constituent judges were appointed*, the panel of judges in question did not have the status of an independent and impartial tribunal previously established by law, with the result that it did not constitute a 'court or tribunal' within the meaning of Article 267 TFEU. [34]

51. In this context, it may be useful to recall that, in its case-law, the Court has consistently emphasised the importance of the judicial appointment procedure. The Court has stated that, having regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, the procedure for the appointment of judges necessarily constitutes an inherent element of the concept of a 'tribunal established by law'. [35]

52. In the light of the above, I take the view that certain failures in the procedure for the appointment of judges may, in and of themselves, indicate that the judges in question fail to meet the requirements of independence and impartiality. In such cases, the party raising an issue in that respect cannot be required to adduce additional elements to corroborate that failure. In that respect, I note that all the parties which submitted observations in the present proceedings – with some nuances – agree with that conclusion.

53. However, at the hearing the Commission appeared to somewhat alter the position which it had taken in its written observations. In that regard, it emphasised the importance of considering the impact that an unlawful appointment may have on a specific dispute, with reference to the judgments of the Court in *Openbaar Ministerie* referred to in footnote 37 to the present Opinion. It should be recalled that those cases concerned the execution of a European Arrest Warrant (EAW) under Framework Decision 2002/584/JHA. [36] In its judgments, the Court in essence found that, when an executing judicial authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, including the procedure for the appointment of the members of the judiciary, it may refuse execution only if it finds that, in the particular circumstances of the case, there are substantial grounds for believing that such deficiencies may lead to a real risk of infringement of the right to a fair trial – before an independent and impartial tribunal previously established by law – of the person concerned. [37]

[32] ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418, §§ 244 to 252).

[33] See, in particular, judgments of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798, paragraph 130), and of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235, paragraph 122).

[34] Judgment of 21 December 2023, *Krajowa Rada Sądownictwa (Continued holding of a judicial office)* (C-718/21, EU:C:2023:1015, paragraphs 30 to 78).

[35] Ibid., paragraph 60 and the case-law cited.

[36] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended.

[37] Judgments of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033), and of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* (C-562/21 PPU and C-563/21 PPU, EU:C:2022:100).

54. I have difficulty understanding the basis on which the Commission draws a parallel with the present case.

55. The two-step test was originally conceived in situations involving the protection of persons who could be exposed to an infringement of the absolute prohibition on inhuman or degrading treatment,[38] and then extended to situations where the fundamental right to an effective remedy and a fair trial could be threatened.[39] This test has been developed and applied within a well-defined area of law, harmonised at EU level. With that case-law, the Court introduced, by *judicial fiat*, an unwritten ground for exceptionally refusing the execution of an EAW.[40]

56. However, as the Court has made clear in its judgments in *Openbaar Ministerie*, an executing judicial authority which has evidence of systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State cannot deny the status of 'issuing judicial authority', within the meaning of Framework Decision 2002/584, in respect of *all judges or all courts of that Member State* acting by their nature entirely independently of the executive. Indeed, the existence of such deficiencies does not necessarily affect every decision that the courts of that Member State may adopt in each particular case. An interpretation to the contrary would – the Court explained – amount to extending the limitations that may be placed on the principles of mutual trust and mutual recognition beyond 'exceptional circumstances', by leading to a general exclusion of the application of those principles in respect of a whole Member State. This would, inter alia, undermine the attainment of the objective of Framework Decision 2002/584 and call into question the principles of mutual trust and mutual recognition which underpin that framework decision.[41]

57. It is thus clear that, in situations such as those at issue in the *Openbaar Ministerie* cases, the systemic deficiency in the judicial system of a given Member State *may or may not* have repercussions on the manner in which the dispute at issue in the main proceedings is decided. By contrast, in the present case those repercussions may be inherent to the situation at issue before the referring court. As will be explained in the next section of this Opinion, some judges sitting on the panel may have to rule on an issue of law in which they potentially have a personal interest, because their ruling might affect their own legal position. Thus, even if we were to apply the logic underlying the judgments in *Openbaar Ministerie*, the risk of a possible adverse impact of the alleged lack of impartiality of the judges in question on disputes such as that at issue in the main proceedings is *in re ipsa*.

58. In the light of the above, the answer to the first question should, in my view, be that Article 19(1) TEU, in combination with Article 47 of the Charter, must be interpreted as meaning that the circumstances of a judicial appointment may, in and of themselves, indicate that a judge fails to meet the requirements of independence and impartiality if those circumstances entail an irregularity of such a kind and of such gravity that it gives rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned.

[38] See, in particular, judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198).

[39] See judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586).

[40] See, on this matter, my Opinion in *M.D.* (C-819/21, EU:C:2023:386, points 30 to 34).

[41] See, to that effect, judgments of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraphs 41 to 43), and of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* (C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paragraphs 63 and 82 to 102).

2. Second question

59. By its second question, the referring court in essence asks the Court whether Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, must be understood as precluding the examination of whether a national judge fulfils the requirement of independence and impartiality which is carried out by a judicial panel including judges who, owing to the manner in which they were appointed, may be in a position similar to that of the judge under review.

60. I take the view that the answer to this question should be positive.

61. I hardly need to emphasise, at the outset, that – in accordance with Article 19(1) TEU and Article 47 of the Charter – *any* judicial panel which has jurisdiction in fields covered by EU law, acting at *any* stage of the proceedings, in *any* given legal dispute must fulfil the requirement of judicial independence.

62. The Court has consistently stated that Article 19 TEU gives concrete expression to the value of the rule of law enounced in Article 2 TEU.[42] The right to effective judicial review by an independent tribunal – which is now enshrined in Article 47 of the Charter – has been referred to by the Court as forming part of 'the essence of the rule of law'.[43] The guarantees of access to an independent and impartial tribunal, in turn, represent the cornerstone of the right to a fair trial.[44]

63. According to settled case-law, the concept of 'judicial independence' in EU law has two aspects. The first aspect, which is external, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, being thus protected against external interventions or pressure liable to impair the independent judgement of its members and to influence their decisions.[45]

64. The second aspect – which is the one relevant in the present proceedings – is internal in nature and is linked to 'impartiality'. It 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.[46]

65. As Advocate General Ruiz-Jarabo Colomer emphasised in his Opinion in *De Coster*, impartiality requires a 'psychological attitude of initial indifference' from the judges with regard to the disputes, in order to be (and appear) equidistant from the parties.[47] More broadly, I would say that impartiality requires judges to have no vested interest, bias or prejudice in the disputes

[42] See, to that effect, judgment of 5 June 2023, *Commission* v *Poland (Independence and private life of judges)* (C-204/21, EU:C:2023:442, paragraph 69 and the case-law cited).

[43] See, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 36 and the case-law cited).

[44] See, for example, judgment of 5 June 2023, *Commission* v *Poland (Independence and private life of judges)* (C-204/21, EU:C:2023:442, paragraph 71).

[45] See, recently, judgment of 19 December 2024, *Vivacom Bulgaria* (C-369/23, EU:C:2024:1043, paragraph 30 and the case-law cited).

[46] Ibid., paragraph 31 and the case-law cited.

[47] C-17/00, EU:C:2001:366, point 93, with reference to the writings of jurist P. Calamandrei.

they hear, treating all parties equally and fairly. These principles are reflected in the Latin adage mentioned in the introduction of this Opinion, *nemo iudex in causa sua* – which has been referred to in a number of Opinions of Advocates General [48] and by the ECtHR. [49]

66. It seems to me self-evident that, in a case where issues of judicial independence of a given judge are being examined by a judicial panel, the members of that panel cannot themselves be affected by the same issues. This means that, where the independence of a judge is being questioned on the basis of an allegedly unlawful procedure of appointment, the judges reviewing the case cannot have been appointed through the same (or an equivalent) procedure.

67. Otherwise, they may not be – or, for that matter, may not appear to be – indifferent to the legal issues at stake, since they would be ruling on a matter which affects them directly. Their own status as independent judges could, in fact, be questioned if they were to entertain the issues raised by a party. Consequently, most individuals would probably be of the view that those judges have a personal interest in the outcome of the proceedings and, as such, cannot be fully impartial.

68. Accordingly, the answer to the second question should, in my view, be that Article 19(1) TEU, in combination with Article 47 of the Charter, must be interpreted as meaning that where the independence or impartiality of a judge is being reviewed by a judicial panel, on the ground of an allegedly unlawful procedure of appointment, the judges reviewing the case must not have been appointed through the same or an equivalent procedure.

3. Third question

69. By its third question, the referring court asks whether Article 19(1) TEU, read in the light of Article 47 of the Charter, must be interpreted as meaning that a national court reviewing the independence of some judges is obliged not to include on the judicial panel carrying out the assessment judges who may not be, or may not appear to be, impartial and, if so, what measures should be adopted for that purpose.

70. As the Court has consistently stated, Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, has direct effect. [50]

71. Accordingly, if a national law or practice is inconsistent with the requirements of Article 19(1) TEU and Article 47 of the Charter, the referring court is required to do whatever is possible to eliminate the incompatibility in order to ensure that full effect is given to the requirements of EU law in the case before it, thereby guaranteeing the right to a fair trial of the parties concerned. [51]

72. What specific measure the referring court could (or should) actually adopt, in the present case, depends mostly on national law. Indeed, in accordance with the principle of procedural autonomy, in the absence of harmonisation of national procedures, it is for the domestic legal system of every Member State to designate the courts and tribunals having jurisdiction and to lay

[48] See, notably, Opinion of Advocate General Hogan in *Banco de Santander* (C-274/14, EU:C:2019:802, point 31); Opinion of Advocate General Bobek in *Adler Real Estate and Others* (C-546/18, EU:C:2021:219, point 64); Opinion of Advocate General Tanchev in *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2020:1053, point 134); and Opinion of Advocate General Ćapeta in *Vivacom Bulgaria* (C-369/23, EU:C:2024:612, point 28).

[49] See, in particular, ECtHR, 23 November 2023, *Wałęsa v. Poland* (CE:ECHR:2023:1123JUD005084921, § 180).

[50] See, for example, judgment of 5 June 2023, *Commission* v *Poland (Independence and private life of judges)* (C-204/21, EU:C:2023:442, paragraph 78 and the case-law cited).

[51] Ibid., paragraph 228 and the case-law cited.

down the detailed procedural rules governing actions for safeguarding rights which individuals derive under EU law. That is so, provided that those national rules are no less favourable than those governing similar domestic situations (principle of equivalence) and do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness). [52]

73. Therefore, should the referring court find that the application of the relevant national legislation – as it stands, or simply as currently interpreted – would lead to an infringement of an individual's right to an effective remedy and a fair trial, that court could interpret the national rules in conformity with EU law [53] or, where appropriate, disapply the national provisions in question, [54] in order to exclude the judges who may be, or may appear to be, lacking the necessary impartiality in the case at hand.

74. This might mean, for example, that the application at issue in the main proceedings would be heard by a panel formed by fewer judges or that, following a new drawing of lots, other judges could be selected to complete the five-judge panel. There are, of course, other measures that could be envisaged. In principle, there is no specific measure that is required by EU law, as long as the one provided for by national law ensures the effectiveness of the principles deriving from Article 19(1) TEU and Article 47 of the Charter.

75. As set out in points 24, 38 and 43 above, there appear to be general principles and rules of national law that may fill the possible gap created by the absence of specific rules, in the Law on the Supreme Court, to deal with situations such as that at issue in the main proceedings.

76. In the light of the foregoing, the answer to the third question should, in my view, be that Article 19(1) TEU, in combination with Article 47 of the Charter, must be interpreted as meaning that judges who may be, or may appear to be, lacking the necessary impartiality in reviewing a case concerning judicial independence should be excluded from the judicial panel hearing the case. It is for the domestic legal system of the Member State concerned to lay down the detailed procedural rules to ensure that such a case is heard by a judicial panel which complies with the requirements stemming from the fundamental right to an effective remedy and to a fair trial.

V. Conclusion

77. In conclusion, I propose that the Court answer the questions referred for a preliminary ruling by the Sąd Najwyższy (Supreme Court, Poland) as follows:

Article 19(1) TEU, interpreted in the light of Article 47 of the Charter of Fundamental Rights of the European Union,

[52] See, recently, judgment of 3 April 2025, *Kypriaki Dimokratia* (C-283/24, EU:C:2025:236, paragraph 37 and the case-law cited).

[53] In that regard, the Court has consistently held that the obligation to interpret national law in conformity with EU law requires national courts, including those adjudicating at last instance, to change settled national case-law, where necessary, if it is based on an interpretation of domestic law that is incompatible with the objectives of EU law. Consequently, a national court cannot, in particular, validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law, for the sole reason that that provision has consistently been interpreted in a way that is incompatible with EU law. See, to that effect, judgment of 30 April 2025, *CT* (C-370/24, EU:C:2025:300, paragraphs 44 and 45 and the case-law cited).

[54] See, with further references, judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 58).

must be understood as meaning that:

(1) The circumstances of a judicial appointment may, in and of themselves, indicate that a judge fails to meet the requirements of independence and impartiality if those circumstances entail an irregularity of such a kind and of such gravity that it gives rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned.

(2) Where the independence or impartiality of a judge is being reviewed by a judicial panel, on the ground of an allegedly unlawful procedure of appointment, the judges reviewing the case must not have been appointed through the same or an equivalent procedure.

(3) Judges who may be, or may appear to be, lacking the necessary impartiality in reviewing a case concerning judicial independence should be excluded from the judicial panel hearing the case. It is for the domestic legal system of the Member State concerned to lay down the detailed procedural rules to ensure that such a case is heard by a judicial panel which complies with the requirements stemming from the fundamental right to an effective remedy and to a fair trial.