Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 17 June 2021 [1]

Case C-55/20

Ministerstwo Sprawiedliwości
joined parties:
Pierwszy Zastępca Prokuratora Generalnego, Prokurator Krajowy,
Rzecznik Dyscyplinarny Izby Adwokackiej w Warszawie

(Request for a preliminary ruling from the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Court of the Bar Association in Warsaw, Poland))

(Reference for a preliminary ruling – Freedom to provide legal advice – Disciplinary proceedings against a lawyer – Respective scopes of application of Directive 2006/123/EC and Directive 98/5/EC – Applicability of Directive 2006/123/EC to disciplinary proceedings – Authorisation schemes – Concept of 'court or tribunal' – Local Bar Association Disciplinary Court composed of non-professional judges – Article 47 of the Charter of Fundamental Rights and Article 19(1) TEU – Powers of lower courts where a higher national court lacks independence)

I. Introduction

1. In July 2017, the Prokurator Krajowy – Pierwszy Zastępca Prokuratora Generalnego (Public Prosecutor – First Deputy of the General Prosecutor) ('the National Prosecutor') requested the Rzecznik Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Agent of the Bar Association in Warsaw, Poland) ('the Disciplinary Agent of the Bar Association in Warsaw' or 'the Disciplinary Agent') to initiate disciplinary proceedings against the lawyer of the former President of the European Council, Donald Tusk. In the view of the National Prosecutor, the statements made by that lawyer when publicly commenting on the possibility of his client being charged with a criminal offence amounted to unlawful threats and disciplinary misconduct. Twice, the Disciplinary Agent either refused to initiate such proceedings or decided to discontinue them. Twice, the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Court of the Bar Association in Warsaw, Poland) ('the Disciplinary Court'), following an appeal lodged by the National Prosecutor or the Minister of Justice, overturned those decisions and remitted the case back to the Disciplinary Agent.

2. The present request for a preliminary ruling has been made in a third 'round' of those proceedings, within which the Disciplinary Court is examining the decision of the Disciplinary Agent to discontinue once more the disciplinary inquiry against that lawyer, following an appeal

[1] Original language: English.

lodged again by the National Prosecutor and the Minister of Justice. The referring court seeks to know whether Directive 2006/123/EC ('the Services Directive')[2] and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') are applicable to disciplinary proceedings pending before it. However, it appears that the crux of the matter before the referring court lies elsewhere: what concrete consequences, in procedural terms, is the referring court to draw from the Court's judgment in *A. K. and Others*,[3] in view of the fact that its ruling might be subsequently appealed before the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court, Poland)? How can that court, in specific and practical terms, ensure compliance with EU law?

II. Legal framework

A. EU law

1. The Services Directive

3. Recital 33 of the Services Directive states that 'the services covered by this Directive concern a wide variety of ever-changing activities … The services covered are also services provided both to businesses and to consumers, such as legal or fiscal advice …'.

4. Pursuant to recital 39, 'the concept of "authorisation scheme" should cover, inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession. …'.

5. Article 1(5) of the Services Directive provides that:

'This Directive does not affect Member States' rules of criminal law. However, Member States may not restrict the freedom to provide services by applying criminal law provisions which specifically regulate or affect access to or exercise of a service activity in circumvention of the rules laid down in this Directive.'

6. Article 4 of the Services Directive contains a number of definitions for the purposes of that directive. Under Article 4(6), 'authorisation scheme' is defined as 'any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof'.

7. Article 9(3) of the Services Directive, which is part of section 1, entitled 'Authorisations', within Chapter III on the 'Freedom of establishment for providers', provides that that section shall not apply to those aspects of authorisation schemes which are governed directly or indirectly by other Community instruments.

[2] Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

[3] Judgment 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).

8. Article 10 of the Services Directive, which is entitled 'Conditions for the granting of authorisation', reads as follows:

'1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.

2. The criteria referred to in paragraph 1 shall be:

(a) non-discriminatory;

(b) justified by an overriding reason relating to the public interest;

(c) proportionate to that public interest objective;

(d) clear and unambiguous;

(e) objective;

(f) made public in advance;

(g) transparent and accessible.

…

6. Except in the case of the granting of an authorisation, any decision from the competent authorities, including refusal or withdrawal of an authorisation, shall be fully reasoned and shall be open to challenge before the courts or other instances of appeal.

…'

B. National law

1. General provisions on the Bar Association

9. By virtue of Article 9 of ustawa z dnia 26 maja 1982 r. – Prawo o adwokaturze (Law of 26 May 1982 on Advocates) ('the Law on Advocates'):

'1. The following are the bodies of the Bar: the National Bar Assembly, the Supreme Bar Council, the Higher Disciplinary Court, the Bar Disciplinary Agent and the Higher Audit Committee.

2. Only lawyers may be members of the bodies of the Bar.'

10. Article 11 of the Law on Advocates provides that:

'1. Elections to the bodies of the Bar and to the bodies of the Bar Associations and Bar Chambers shall be conducted by secret ballot with an unlimited number of candidates.

2. The term of office of the bodies of the Bar and of the bodies of the Bar Associations and Bar Chambers shall be four years, but they are obliged to operate until such time as newly elected bodies have been established.

…

4. Individual members of the bodies referred to in paragraph 1 may be dismissed before the expiry of their term of office by the body which elected them.

…'

11. Under Article 58 of the Law on Advocates:

'The following matters shall come within the scope of the Supreme Bar Council:

…

(13) suspension of the right to perform functions for breach of the essential obligations of individual members of the bodies of Bar Associations and bodies of Bar Chambers, with the exception of members of Disciplinary Courts, and applying to the competent bodies for revocation thereof;

…'

2. Provisions regarding disciplinary misconduct

12. Under Article 80 of the Law on Advocates:

'Lawyers and trainee lawyers shall be subject to disciplinary liability for conduct contrary to the law, ethical principles or dignity of the profession or for infringement of their professional obligations …'

13. Article 81(1) of the Law on Advocates reads as follows:

'The disciplinary penalties are as follows:

(1) caution;

(2) reprimand;

(3) fine;

(4) suspension of the right to engage in professional activity for a period of between three months and five years;

…

(6) expulsion from the Bar.'

14. In accordance with Article 82(2) of the Law on Advocates:

'Expulsion from the Bar shall entail removal from the register of lawyers with no right to apply for re-registration in that register for a period of 10 years from the date on which the ruling imposing expulsion from the Bar becomes final.'

3. Provisions regarding the administration of justice by the Bar Association Disciplinary Courts

15. Pursuant to Article 40, point 2, of the Law on Advocates:

'The scope of the activities of the General Assembly of the Bar Association shall include … selection of the chairperson, the president of the Disciplinary Court, the Disciplinary Agent, the chairperson of the audit committee and the members and alternate members of the district Bar Council, Disciplinary Court and audit committee.'

16. Under Article 91 of the Law on Advocates:

'1. The following shall adjudicate in disciplinary cases:

(1) a Disciplinary Court of the Bar Association;

(2) the Higher Disciplinary Court.

2. The Disciplinary Court of the Bar Association shall hear all cases as the court of first instance, with the exception of the cases specified in Article 85(3) and hearings of an appeal against a decision of a Disciplinary Agent not to initiate disciplinary proceedings or to discontinue disciplinary proceedings.

3. The Higher Disciplinary Court shall hear:

(1) as the court of second instance, cases heard at first instance by Disciplinary Courts of the Bar Association;

(2) as the court of first instance, disciplinary cases of members of the Supreme Bar Council and regional bar councils;

(3) other cases provided for in this Law.

…'

17. Under Article 89(1) of the Law on Advocates:

'A Disciplinary Court shall be independent as regards its rulings.'

4. Provisions regarding the procedure before the Disciplinary Courts of the Bar Association

18. Under Article 88a(4) of the Law on Advocates:

'The parties to the proceedings and the Minister for Justice shall have the right to lodge an appeal against rulings and decisions terminating disciplinary proceedings within 14 days of the date of delivery of a copy of the ruling or decision, together with a statement of grounds, and instruction regarding the time limit for, and manner of lodging an appeal.'

19. Under Article 91c of the Law on Advocates:

'An appeal on a point of law shall be lodged to the Supreme Court through the Higher Disciplinary Court within 30 days of the date of delivery of the ruling, together with the statement of grounds.'

20. Under Article 95n of the Law on Advocates:

'In cases not governed by this Law, the provisions of the following provisions shall apply *mutatis mutandis* to disciplinary proceedings:

(1) the Code of Criminal Procedure;

(2) Chapters I to III of the Criminal Code.'

21. Under Article 100 § 8 of the Kodeks postępowania karnego ('the Code of Criminal Procedure'):

'After pronouncement or delivery of the ruling and order, the parties to the proceedings shall be instructed regarding their right to lodge an appeal, and the time limit for, and manner of doing so, or that the ruling or order is not amenable to appeal.'

22. Under Article 521, paragraph 1, of the Code of Criminal Procedure:

'The Public Prosecutor General and also the Ombudsman may lodge an appeal on a point of law against any final ruling of the court terminating proceedings.'

III. Facts, national proceedings and the questions referred

23. On 20 July 2017, the National Prosecutor requested the Disciplinary Agent of the Bar Association in Warsaw to initiate disciplinary proceedings against R.G., the lawyer of the former President of the European Council, Donald Tusk. In the opinion of the National Prosecutor, R.G. had gone beyond the limits of an advocate's freedom of expression when he publicly commented on 10 and 11 October 2016 on the possibility that his client would be charged with a criminal offence. From the point of view of the National Prosecutor, the statements made by R.G. could be construed as unlawful threats and disciplinary misconduct.

24. On 7 November 2017, the Disciplinary Agent of the Bar Association in Warsaw refused to launch a disciplinary inquiry. On 23 May 2018, on appeal by the National Prosecutor, that decision was overturned by the Disciplinary Court of the Bar Association in Warsaw. The case was referred back to the Disciplinary Agent.

25. On 18 June 2018, the Disciplinary Agent initiated a disciplinary inquiry vis-à-vis R.G. for the abovementioned facts. On 28 November 2018, the Disciplinary Agent decided to discontinue the inquiry after finding that R.G.'s actions did not amount to disciplinary misconduct. On 13 June 2019, following an appeal by the National Prosecutor and by the Minister for Justice, that decision was overturned by the Disciplinary Court. The case was referred back, for the second time, to the Disciplinary Agent for reconsideration.

26. On 8 August 2019, the Disciplinary Agent discontinued once again the disciplinary inquiry into R.G. Both the National Prosecutor and the Minister for Justice appealed against that decision. Accordingly, it appears that the Disciplinary Court is currently seised with that matter for a third time.

27. In those factual and legal circumstances, the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Court of the Bar Association in Warsaw) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the provisions of Chapter III of [the Services Directive], including Article 10(6) of the Services Directive, applicable to proceedings concerning the disciplinary liability of Polish advocates and foreign lawyers registered with a Bar Association, in connection with which liability an advocate may, inter alia, be fined, suspended, or expelled from the bar, and a foreign lawyer may, inter alia, be fined, have his right to provide legal assistance in the Republic of Poland suspended, or be prohibited from providing legal assistance in the Republic of Poland? If the answer to the above question is in the affirmative, do the provisions of the [the Charter], including Article 47 thereof, apply to the above proceedings before Bar Association courts in cases where there is no right of appeal against the rulings of those courts to national courts or where such rulings are subject only to an extraordinary appeal, such as an appeal on a point of law to the Sąd Najwyższy (Supreme Court), also in cases where all the essential elements are present within a single Member State?

(2) In a case where, in the proceedings referred to in Question 1, under the national legislation in force the body competent to hear an appeal on a point of law against a ruling or decision of a Bar Association disciplinary court or an objection to an order refusing such an appeal on a point of law is a body that, in the view of that court, which is consistent with the view expressed by the Sąd Najwyższy (Supreme Court) in its judgment of 5 December 2019, case reference III PO 7/18, is not an independent and impartial tribunal for the purposes of Article 47 of the Charter, is it necessary to disregard the national provisions establishing the jurisdiction of that body and is it the duty of the Bar Association disciplinary court to refer such an appeal on a point of law or objection to a judicial body which would have jurisdiction if those national provisions had not precluded it?

(3) In a case where – in the proceedings referred to in Question 1 – no appeal on a point of law can be lodged against a ruling or decision of a Bar Association disciplinary court, according to the position of that court, either by the Public Prosecutor General or the Ombudsman, and that position is:

(a) contrary to the position expressed in the resolution of 27 November 2019, case reference II DSI 67/18, adopted by a seven-judge panel of the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), that is, the body which, under the national legislation in force, is competent to hear an objection to an order refusing an appeal on a point of law, but which, in the view of the Bar Association disciplinary court, which is

consistent with the view expressed by the Sąd Najwyższy (Supreme Court) in its judgment of 5 December 2019, case reference III PO 7/18, is not an independent and impartial tribunal for the purposes of Article 47 of the Charter;

(b) consistent with the position previously expressed by the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court [Poland]), that is, the judicial body that would have jurisdiction to hear such an objection if those national provisions had not precluded it;

may (or should) the Bar Association disciplinary court disregard the position expressed by the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court)?

(4) If in the case referred to in Question 3, an appeal by the Minister for Justice has been lodged with a Bar Association disciplinary court, and:

(a) one of the factors which in the view of the Sąd Najwyższy (Supreme Court) as expressed in its judgment of 5 December 2019, case reference III PO 7/18, as well as in the view of the Bar Association disciplinary court, justify the assumption that the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), that is, the body referred to in Question 3(a), is not an independent and impartial tribunal for the purposes of Article 47 of the Charter, is the influence of the executive, including the Minister for Justice, on its composition;

(b) the function of Public Prosecutor General, who – according to the position expressed by the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), that is, the body referred to in Question 3(a), would be entitled to lodge an appeal on a point of law against the decision made on appeal, and according to the position of the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court), that is, the judicial body referred to in Question 3(b), and also according to the position of the Bar Association disciplinary court, is not entitled to lodge such an appeal, is by operation of law actually performed by the Minister for Justice,

should the Bar Association disciplinary court ignore that appeal if it is the only way in which it can ensure that the proceedings are compatible with Article 47 of the Charter and, in particular, prevent interference in those proceedings by a body which is not an independent and impartial tribunal for the purposes of that provision?'

28. Written observations were submitted by the National Prosecutor, the Netherlands and Polish Governments, and the European Commission.

29. On 16 February 2021, the Disciplinary Court responded to the Court's request for clarification made in accordance with Article 101 of the Rules of Procedure of the Court of Justice.

IV. Assessment

30. This Opinion is structured as follows. I shall first examine whether the Disciplinary Court of the Bar Association in Warsaw is a 'court or tribunal' within the meaning of Article 267 TFEU (A). I shall then address Question 1 regarding the applicability of the Services Directive and of

Article 47 of the Charter to disciplinary proceedings against lawyers (B) before turning to Questions 2 to 4 concerning the powers of the Disciplinary Court to ensure compliance with EU law (C).

A. Is the Disciplinary Court a court or tribunal within the meaning of Article 267 TFEU?

31. It is established case-law that, in order to assess whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court will take into account the following factors: whether the body is established by law; whether it is permanent; whether its jurisdiction is compulsory; whether its procedure is *inter partes*; whether it applies rules of law; and whether it is independent. [4]

32. The Disciplinary Court fulfils most of these conditions. As explained in its order for reference, and not contested by any of the interested parties, the Disciplinary Court was established by the Law on Advocates; it is permanent; it applies procedural rules laid down in the Law on Advocates and in the Code of Criminal Procedure; its decisions are binding and enforceable. In addition, the Disciplinary Court appears to have compulsory jurisdiction over the disciplinary disputes entrusted to it by national law.

33. However, while the Commission considers that the Disciplinary Court is therefore a 'court or tribunal' within the meaning of Article 267 TFEU, both the National Prosecutor and the Polish Government disagree with that conclusion.

34. According to the National Prosecutor, the Disciplinary Court is not a court or tribunal in view of the stage reached by the disciplinary proceedings at issue and the subject matter of the dispute. Within the main proceedings, the Disciplinary Agent of the Warsaw Bar Association has not yet charged R.G. with having committed a disciplinary offence. As such, the part of the proceedings designated for hearing each side of the argument has not been opened. In addition, when reviewing the decision of the Disciplinary Agent to discontinue the disciplinary proceedings, the Disciplinary Court is not to decide on R.G.'s right to exercise his professional activity under Chapter III of the Services Directive, but simply to verify whether the decision preventing a ruling on the disciplinary liability of R.G. was well founded.

35. According to the Polish Government, not only is the Disciplinary Court not a court within the meaning of Article 179 of the Polish Constitution, it also cannot be considered independent for the purposes of Article 267 TFEU. First, its members are elected, for a renewable mandate of four years, by the General Assembly of the Bar Association concerned. Accordingly, the judges sitting on the Disciplinary Court adjudicate on disciplinary cases which relate to their own colleagues, through the support of whom they were elected and may potentially be renewed. Second, members of the Disciplinary Court do not benefit from any guarantee regarding their tenure. They can be removed before the end of their mandate by the body that elected them, namely the General Assembly comprising all the lawyers of the Bar Associations concerned. Third, it is doubtful that judges sitting on the Disciplinary Court are impermeable to external elements. In the present case, the President of the Disciplinary Court, although not a member of the chamber,

[4] See, for example, judgments of 17 September 1997, *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 23 and the case-law cited); of 9 October 2014, *TDC* (C-222/13, EU:C:2014:2265, paragraph 27); of 6 October 2015, *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraph 17 and the case-law cited); and of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347, paragraph 23).

would have informed the parties to the case that they could challenge the staying of the proceedings for the purposes of the request for a preliminary reference, while the adjudicating chamber took the view that the order for reference could not be challenged.

36. In short, while the National Prosecutor contests the existence of a genuine *inter partes* dispute pending before the Disciplinary Court, the Polish Government considers that body not to be *independent*. I shall deal with those two points in turn.

1. A dispute inter partes*?*

37. In order for there to be a court or tribunal within the meaning of Article 267 TFEU, that provision requires there to be a dispute *inter partes*. Although forming part of the *Dorsch* criteria,[5] it is perhaps fair to acknowledge that that condition has not been an insurmountable one – the Court has repeatedly stated that it is not an absolute criterion.[6]

38. Moreover, a national court may refer a question to the Court only if there is a case *pending* before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.[7] Within those limits, it is nonetheless for the national court alone to decide when exactly, in terms of the stage of the main proceedings, it deems it appropriate to refer a question to the Court of Justice for a preliminary ruling.[8] The Court requires only that the dispute be pending at the time of the request for a preliminary ruling.[9]

39. In the present case, the National Prosecutor claims that the proceedings before the Disciplinary Court are not *inter partes* because the 'dispute' concerns the decision (of the Disciplinary Agent) to discontinue the disciplinary inquiry (as opposed to a decision opening such proceedings or imposing an actual disciplinary sanction). In this way, it appears to be suggested that the stage of proceedings is an earlier one, with no direct exchange between R.G. and the competent disciplinary bodies having yet taken place. There is thus no genuine dispute pending.

40. I disagree.

41. The National Prosecutor appears to conflate two matters: there being *inter partes* proceedings between *some* parties and there needing to be a very specific dispute concerning two *concrete* parties. On that basis, the National Prosecutor in essence suggests that, because there is no 'full trial' on merits as part of disciplinary proceedings between two specific parties, there is accordingly no real dispute and, thus, no *inter partes* proceedings.

5 Judgment of 17 September 1997, *Dorsch Consult* (C-54/96, EU:C:1997:413) ('*Dorsch*'). See above, point 31 of this Opinion.

6 See, for example, judgments of 17 September 1997, *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 31), and of 31 January 2013, *D. and A.* (C-175/11, EU:C:2013:45, paragraph 88).

7 See, for example, judgments of 27 April 2006, *Standesamt Stadt Niebüll* (C-96/04, EU:C:2006:254, paragraph 13 and the case-law cited); of 16 June 2016, *Pebros Servizi* (C-511/14, EU:C:2016:448, paragraph 24); and of 4 September 2019, *Salvoni* (C-347/18, EU:C:2019:661, paragraph 26).

8 See, for example, judgments of 17 July 2008, *Coleman* (C-303/06, EU:C:2008:415, paragraph 29 and the case-law cited), and of 22 December 2008, *Les Vergers du Vieux Tauves* (C-48/07, EU:C:2008:758, paragraph 20 and the case-law cited).

9 See, for example, judgment of 13 April 2000, *Lehtonen and Castors Braine* (C-176/96, EU:C:2000:201, paragraph 19).

42. However, in order for there to be a dispute *inter partes*, the case-law outlined above simply requires a genuine dispute about the law and its application between some parties. [10] Seen in this light, an *inter partes* dispute of such type is clearly present since the parties consist of the Disciplinary Agent, on the one hand, and the National Prosecutor and the Minister for Justice, on the other, and the dispute is being brought before a third party, namely the Disciplinary Court. Whether R.G. is, technically speaking, a party to that dispute already, and the stage at which under national law he is allowed to have full party rights as the accused party, is, in terms of there being a genuine dispute *inter partes*, irrelevant.

43. The same is true with regard to the stage of the proceedings: again, also in terms of admissibility, the case-law of the Court does not limit the exact stage of the national proceedings at which a request for a preliminary ruling might be made. All that is required is that there be a genuine dispute [11] between some parties, which, for the purposes of the main proceedings, clearly appears to be the case.

44. In my view, therefore, there is no doubt that an *inter partes* dispute within the meaning of Article 267 TFEU is present in the main proceedings.

2. Independence

45. The concept of 'independence' has two features. First, as regards *external* independence, it is settled case-law that the body concerned must be able to exercise its functions wholly autonomously, without being subject to any hierarchical constraint or being subordinate 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 judgment of its members and influence their decisions. [12]

46. The irremovability of the members of the body concerned constitutes a guarantee that is essential to judicial independence in that it serves to protect the person who has the task of adjudicating in a dispute. [13] The guarantee of irremovability of the members of a court or tribunal thus requires that dismissals of members of that body should be determined by specific rules, by means of express legislative provisions offering safeguards that go beyond those provided for by the general rules of administrative law and employment law which apply in the event of an unlawful dismissal. [14] Those guarantees of independence require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. [15]

[10] See, equally, judgment of 25 June 2009, *Roda Golf & Beach Resort* (C-14/08, EU:C:2009:395, paragraph 33 and the case-law cited).

[11] *A contrario*, for the purposes of admissibility, contrived cases – see judgments of 11 March 1980, *Foglia (I)* (104/79, EU:C:1980:73), and of 16 December 1981, *Foglia (II)* (244/80, EU:C:1981:302). See also judgment of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, in particular paragraphs 12 and 26).

[12] Recently, see, for example, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, in particular paragraphs 117 to 119).

[13] See, for example, judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17, paragraphs 57 and 58 and the case-law cited).

[14] Judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17, paragraph 60). See also, to that effect, judgment of 9 October 2014, *TDC* (C-222/13, EU:C:2014:2265, paragraphs 32 and 35).

[15] Judgment of 9 October 2014, *TDC* (C-222/13, EU:C:2014:2265, paragraph 32).

47. The second, *internal*, aspect of the concept of independence mostly relates to impartiality. It seeks to ensure a level playing field for 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. Thus, the concept of 'independence', which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision. [16]

48. In the present case, two elements relating to the composition of the Disciplinary Court have been singled out, in essence, by the Polish Government as potentially problematic from the point of view of independence: the alleged lack of irremovability of its members and the fact that it is composed of lawyers, members of the Bar, acting, in a way, as 'lay judges' rather than professional judges.

49. I cannot but agree with the Polish Government as regards the importance of judicial independence and the imperative for a body, if it wishes to be called a 'court' worthy of the name, to comply with all requirements relating to both the *external* and *internal* dimensions of the concept of judicial independence. However, in the present case, following clarifications made by the referring court, I fail to see why the Disciplinary Court would not fulfil those criteria if assessed for the purposes of Article 267 TFEU.

50. First, starting with the alleged lack of irremovability of members of the Disciplinary Court, on its text, Article 11(4) of the Law on Advocates indeed states that the individual members of the bodies of the Bar, thus including the Disciplinary Court, which is one of those bodies, may be dismissed before the expiry of their term of office by the body that elected them, namely the General Assembly of the Bar Association. [17]

51. There appear to be, nonetheless, no further legal provisions, or at least none that have been brought to the attention of this Court by any of the interested parties, that would give specific expression as to when, how or why the members of the Disciplinary Court may be removed. The absence of any such provisions may suggest that the arrangements for the removal of members have not been determined by specific rules and instead the general rules of administrative law and employment law apply. As a consequence, the removal of its members would not be limited to certain exceptional cases, as is required by the Court's case-law in order to be characterised as a 'court or tribunal'. [18]

52. However, at the Court's request for clarification, the Disciplinary Court stated that Article 11(4) of the Law on Advocates has always been a dead letter of the law and never implemented. There is no provision that would specify how and when the General Assembly of the Bar Association could dismiss a member of the Disciplinary Court before the expiry of his or her mandate. According to the Disciplinary Court, it also follows from Article 58, point 13, of the Law on Advocates that a person sitting on the Disciplinary Court cannot be removed before the end of his or her mandate. By the same token, the rules of procedure of the National Bar

[16] See, for example, judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17, paragraphs 61 and 62 and the case-law cited).

[17] Reproduced above, in point 10 of this Opinion. See also Article 40(2) of the Polish Law on the Bar, above in point 15 of this Opinion.

[18] See, for example, judgments of 9 October 2014, *TDC* (C-222/13, EU:C:2014:2265, paragraphs 33 to 36), and of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17, paragraphs 66 to 68).

Assembly do not contain any provision concerning the removal of members of the Disciplinary Court. Finally and in any event, the Warsaw Bar Assembly has never dismissed a member of the Disciplinary Court.

53. In my view, the Disciplinary Court has provided enough to establish that Article 11(4) of the Law on Advocates is ineffective. It would thus appear that the members of the Disciplinary Court are indeed irremovable and, consequently, the external independence of that court in terms of irremovability of its members is not an issue.

54. Second, it has also been suggested, this time around with regard to internal independence and impartiality, that the Disciplinary Court is not independent because it is composed of lawyers, members of the Bar, and not professional judges. For this reason, the Disciplinary Court does not represent an independent third party, but rather a collection of individuals which are both elected and renewed, and therefore possibly influenced by their peers.

55. Indeed, there are concerns that are occasionally voiced with regard to proceedings, in particular disciplinary proceedings, which are carried out by one's peers. They range from allegations of corporatism within a profession to the likelihood of conflicts of interests. On one side of the spectrum, a 'false professional solidarity' is reproached, in particular by the outside world, occasionally unhappy with the outcome of individual disciplinary proceedings, often believing the sanctions to be too lenient, even suggesting that no independent trial exists within such systems due to the 'mutually assured protection' within that profession. On the other side of that spectrum, it is sometimes suggested, more frequently perhaps from within the profession itself, that a disciplinary body composed in this way was in a concrete case not impartial due to personal affections, connections, or grudges, resulting in a vested interest in seeing a colleague sanctioned.

56. Unless and until any of those general allegations are established, either at the level of the law, or in practice and application of the law,[19] allowing for the independence of a judicial body to be questioned, I consider such insinuations or conjectures to be of little relevance for the purposes of assessing whether or not a national body might be qualified as a court or tribunal within the meaning of Article 267 TFEU. As I have recently suggested, the assessment of independence under Article 267 TFEU requires that the concept of a court or tribunal be examined at the structural, institutional level. It is examined by looking at the judicial body making the reference as such, while taking into account the function that that body is called to exercise in the specific circumstances of a case.[20]

57. I fail to see why, in structural terms, judicial bodies composed of 'non-professional judges' could not be seen per se as courts or tribunals within the meaning of Article 267 TFEU, provided of course that, as part of their judicial activity, they meet all the requirements of judicial independence. In other words, the requirement of independence is *exactly the same for any court*, whether it is composed of 'professional judges' or 'lay judges', or a combination of both.

[19] In detail, see my Opinion in *Asociația "Forumul Judecătorilor din România" and Others* (C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19, EU:C:2020:746, points 240 to 248).

[20] See also my Opinion in Joined Cases *WB and Others* (C-748/19 to C-754/19, EU:C:2021:403, points 52 and 166).

58. It might be recalled that the structure of the national judicial system is by default a matter of choice for each Member State.[21] In that regard, it is certainly the case in a number of Member States that matters concerning the discipline of members of certain professions are adjudicated upon by the members of those very professions, and hence 'non-professional' judges. That tends to be the case for a number of 'liberal' professions, such as doctors, veterinarians, dentists, architects, pharmacists or, in the present case, lawyers. The benefits of such institutional choice are rather clear: the necessary expertise in matters of professional requirements and discipline in the relevant, often complex, field.[22]

59. In the past, the Court did not hesitate to answer requests for a preliminary ruling by such bodies if the requirements of Article 267 TFEU were found to have been met. In some cases, the Court did engage in a detailed discussion about the nature of the body in question, for example, with regard to the Netherlands Commissie van Beroep Huisartsgeneeskunde (Appeals Committee for General Medicine)[23] or the Italian Consiglio Nazionale Forense (National Bar Council).[24] In other cases, the Court answered the question(s) raised without first examining whether they were raised by a 'court or tribunal'. That was the case, for instance, with regard to the Oberste Berufungs- und Disziplinarkommission für Rechtsanwälte (Appeals and Disciplinary Board for Lawyers, Austria),[25] a 'Local Disciplinary Chamber of Dentists' in France,[26] or a Belgian 'Appeals Committee of the Association of Architects'.[27] However, the Court did not hesitate to reject a request for a preliminary ruling where it found the referring body wanting in terms of independence.[28]

60. The bottom line of all these cases, with regard to judicial bodies composed of 'non-professional judges'[29] is the reason for which the assessment of the criterion of independence is carried out under Article 267 TFEU. That assessment, although having at its heart the same criterion of independence as other provisions of EU law, is not, as opposed to Article 47 of the Charter for example, concerned with a meticulous identification of any individual breach of individual rights stemming from EU law.[30] The purpose of that assessment under Article 267 TFEU is to identify appropriate institutional partners in the Member States that may enter into a dialogue with the Court in order to ensure the uniform interpretation of EU

21 See, for instance, judgment 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, paragraph 130 and the case-law cited).

22 It might be added that the same is true for judges themselves and judicial discipline: a number of disciplinary panels for judges in the Member States are composed of judges, either exclusively or predominantly. Following the argument of the Polish Government to its (il)logical end, would it then also mean that disciplinary panels for judges cannot be composed of (other) judges because such panels would be composed of one's peers and would thus also not be independent?

23 Judgment of 6 October 1981, *Broekmeulen* (246/80, EU:C:1981:218, paragraphs 8 to 17).

24 Judgment of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, paragraphs 15 to 30). See also, although impliedly, the previous judgment of 30 November 1995, *Gebhard* (C-55/94, EU:C:1995:411).

25 Judgment of 22 December 2010, *Koller* (C-118/09, EU:C:2010:805), in the context of a dispute concerning the rejection of an application relating to admission to the aptitude test for the profession of lawyer.

26 Order of 23 October 2018, *Conseil départemental de l'ordre des chirurgiens-dentistes de la Haute-Garonne* (C-296/18, not published, EU:C:2018:857), in the context of disciplinary proceedings against a dentist.

27 Judgment of 8 April 1992, *Bauer* (C-166/91, EU:C:1992:184), in a case where a Belgian resident had unsuccessfully applied to have his name entered on the list of trainees of a local Association of Architects.

28 See, for instance, order of 28 November 2013, *Devillers* (C-167/13, not published, EU:C:2013:804).

29 Naturally not limited to disciplinary bodies only, but also other judicial bodies. See, for example, judgment of 30 May 2013, *F.* (C-168/13 PPU, EU:C:2013:358), upon reference from the French *Conseil constitutionnel* (Constitutional Council) which, in the course of its history, has mainly been composed of non-professional judges, often even including 'non-lawyers'. See also my Opinion in *Eurobox Promotion and Others* (C-357/19 and C-547/19, EU:C:2021:170, points 215 to 219).

30 See in detail my Opinion in Joined Cases *WB and Others* (C-748/19 to C-754/19, EU:C:2021:403, points 161 to 169).

law. It is indeed in order to ensure the proper functioning of the EU legal order that the Court should have an opportunity to rule on issues of interpretation and validity of EU law arising from national proceedings which may affect the exercise of rights granted by EU law. [31]

61. Against that background, the Polish Government did not explain, beyond mere abstract statements based on conjectures, why the Disciplinary Court does not satisfy the independence requirement, integral to the concept of a 'court or tribunal' within the meaning of Article 267 TFEU. Following clarification provided by the Disciplinary Court, it does not appear that the latter lacks independence (external or internal) so that it would be unable to seise the Court by way of request for a preliminary ruling.

62. I am therefore of the view that the Disciplinary Court (of the Bar Association in Warsaw) is entitled to refer the dispute in the main proceedings to the Court of Justice under Article 267 TFEU.

B. Question 1: the Services Directive and Article 47 of the Charter

1. Admissibility

63. It is worth recalling at the outset that according to established case-law, questions referred for a preliminary ruling 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 this Court to determine, enjoy a *presumption of relevance*. The Court may refuse to rule on a question referred for a preliminary ruling by a national court 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. [32]

64. In this context, both the National Prosecutor and the Polish Government consider that the present request for a preliminary ruling is inadmissible because an answer is not necessary for settling the dispute in the main proceedings. Those parties maintain that Questions 2 to 4 are inadmissible because the referring court is only concerned with the subsequent stage of the main proceedings, namely a hypothetical appeal to the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court). As far as Question 1 is concerned, both interested parties submit that it is also inadmissible because that question has only been asked for the purposes of receiving an answer to Questions 2 to 4. Furthermore, no EU law provision in fact applies to the present case and therefore EU law is of no use to R.G.

65. I disagree. In my view, Question 1 is clearly admissible.

66. First, at a conceptual level, I cannot embrace the 'inadmissibility by association' effectively being suggested by the National Prosecutor and the Polish Government. In the past, the Court has traditionally looked at each of the questions asked by referring courts independently, certainly to the extent that such questions can logically be dissociated. Each question is examined

[31] See, to that effect, for example, judgment of 6 October 1981, *Broekmeulen* (246/80, EU:C:1981:218, paragraph 16).

[32] See, for example, judgments of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraphs 26 and 27), and of 9 July 2020, *Verein für Konsumenteninformation* (C-343/19, EU:C:2020:534, paragraph 19 and the case-law cited).

separately as regards its own merits, which often leads to (as is frequently the case in the case-law) some of the questions being answered while others are declared inadmissible within one and the same proceedings. There is no vicarious (in)admissibility.

67. Second, the case-law embraces a rather generous approach to admissibility.[33] When it comes to the repartition of roles between the national courts and the Court of Justice, it is not the role of this Court to second-guess the ulterior motives of a national court. It is even far less appropriate to imply bad faith on the part of a national court and, on the basis of that conjecture, refuse to provide an answer to a question referred.

68. Third, as concerns the content of Question 1 for the purposes of admissibility, there is a sufficient link between the facts of this case and the national provisions at issue, on the one hand, *and* the Services Directive, on the other hand – the interpretation of which is sought by the referring court. It cannot be held that Question 1 seeks an interpretation which has manifestly no relation to the facts of the main action or its purpose. In other words, Question 1 is substantively connected to a clearly identified EU law instrument, the interpretation of which is being sought by the referring court.[34]

69. Fourth, whether or not the applicant in the main proceedings will be able to draw an actual benefit from the Court's answer, once a final decision on merits is handed down by the referring court, is not relevant for the purposes of admissibility.[35] Making admissibility dependent on a certain answer on merits means placing the proverbial cart before the horse.[36]

70. In summary, it certainly does not appear to me that the answer to the first question raised by the referring court concerning the Services Directive is of no relevance whatsoever for the decision to be taken by that court in the main proceedings. It follows, without prejudice to the forthcoming assessment of admissibility of Questions 2, 3 and 4, that Question 1 is admissible.

2. Applicability of the Services Directive

71. By the first part of its first question, the referring court seeks to know whether the Services Directive, in particular due to Article 10(6) thereof, is applicable to proceedings concerning the disciplinary liability of a lawyer that could ultimately lead to a decision such as one which results in his or her removal from the bar. In the event that an answer in the affirmative is provided, the referring court asks, in the second part of its question, whether the Charter, including Article 47 thereof, applies to such proceedings before courts of the Bar Association.

72. In my view, the answer to both parts of that question ought to be in the affirmative. In order to explain why I believe that to be the case, I shall first examine the respective scopes of application of the Services Directive and Directive 98/5/EC[37] (a), before turning to the applicability of the Services Directive to legal services and, in particular, to disciplinary proceedings against lawyers (b).

[33] See, for a more recent example, judgment of 1 October 2019, *Blaise and Others* (C-616/17, EU:C:2019:800, paragraphs 31 to 39).

[34] See judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 49). See also order of 6 October 2020, *Prokuratura Rejonowa w Słubicach* (C-623/18, EU:C:2020:800).

[35] See, for example, to that effect, judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraphs 38 to 40).

[36] See also my Opinion in *Bundesrepublik Deutschland (Interpol red notice)* (C-505/19, EU:C:2020:939, point 34).

[37] Directive of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77, p. 36).

(a) The respective scopes of the Services Directive and Directive 98/5

73. According to the Polish Government, EU law does not apply to the present case. In particular, the Services Directive is not applicable because Directive 98/5 serves as a *lex specialis* and that *lex specialis* is not materially applicable to the case.

74. I disagree.

75. Under Article 3(1) of the Services Directive, 'if the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions'. Article 3(1) also mentions four such EU secondary acts. [38] Although Directive 98/5 is not one of them, the list of acts mentioned therein is not exhaustive. [39]

76. Indeed, as to its content, Directive 98/5 governs rules of professional conduct (Article 6) and disciplinary proceedings (Article 7) of lawyers practicing in a Member State other than the one in which they obtained their professional qualification. In particular, Article 7 regulates the respective disciplinary powers and duties of the competent home and host authorities. Article 9 thereof requires decisions to cancel the registration of a lawyer and decisions imposing disciplinary measures to state the reasons on which they are based. In addition, a remedy shall be made available against such decisions before a court or tribunal in accordance with the provisions of domestic law.

77. However, other than that, I remain puzzled by the argument put forward by the Polish Government. I have difficulty in seeing how a *lex specialis*, namely Directive 98/5, which is clearly not applicable to a domestic lawyer, could prevent the application of a *lex generalis*, that being the Services Directive, which clearly is applicable, both *ratione personae* and *materiae*.

78. First, Chapter III of the Services Directive, which concerns the freedom of establishment, applies also to purely internal situations, thus to the provision of legal services by lawyers who have not exercised free movement. [40] Thus, by default, as much as it is applicable to legal services as well, Chapter III of the Services Directive applies to *all lawyers*, irrespective of whether they are, as to their qualification, 'purely domestic' or 'cross-border' lawyers.

[38] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1); Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416); Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23); and Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22).

[39] As suggested by the wording 'these include', used in Article 3 of the Services Directive, and by the overall purpose of that provision.

[40] Judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 110).

79. Second, as regards *foreign lawyers* specifically, the Services Directive will be applicable by default *to the extent only* that its general provisions have not been superseded, in line with Article 3(1) of the Services Directive, by a specific provision of Directive 98/5. However, even with regard to foreign lawyers, it is questionable how far Directive 98/5 provides otherwise with regard to the specific guarantees of Articles 9 and 10 of the Services Directive. [41]

80. Third, although it is for the referring court to verify, it does not appear that R.G. is a foreign lawyer, within the meaning of Directive 98/5. [42] As a *domestic lawyer*, the Services Directive would apply to him in any event, while Directive 98/5 would in no way be relevant to the present case.

81. In summary, in either case, Directive 98/5 simply does not provide otherwise. There seems to be no discernible conflict with any specific provision of EU law governing the issue for the purposes of Article 3(1) of the Services Directive.

(b) The Services Directive and disciplinary proceedings against lawyers

82. All interested parties, as well as the referring court, agree that the Services Directive is applicable to legal services and that registration with the bar association in order to be allowed to practice constitutes an authorisation scheme within the meaning of that directive. That being said, there is disagreement as to whether disciplinary proceedings constitute part of such an authorisation scheme. While the referring court and the Commission are of the view that it does, the Netherlands and Polish Governments disagree.

83. Article 2 of the Services Directive, which sets out the material scope of the directive, states that the provisions of legal counsel fall within the scope of the directive. Indeed, legal representation is undoubtedly a specific type of service that, because of its importance for the sound administration of justice, is provided by a closely regulated profession subject to specific deontological rules. [43] The fact remains that, although subject to specific rules, legal representation is a service under the Services Directive.

84. According to Article 9(1), Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme *unless*: (a) that scheme does not discriminate against the provider in question; (b) the need for such a scheme is justified by an overriding reason relating to the public interests; (c) the objective pursued cannot be attained by means of a less restrictive measure.

85. In agreement with all the parties concerned, there is no doubt that rules relating to registration with the Bar Association are part of an authorisation scheme within the meaning of the Services Directive since those rules concern the very *access* to the profession as a lawyer. [44]

[41] See, in particular and to that effect, Article 9(3) of the Services Directive regarding authorisation schemes: 'this section shall *not* apply to *those aspects* of authorisation schemes which are *governed directly or indirectly by other Community instruments*' (my emphasis), which suggests that it does not apply to *other* aspects of authorisation schemes. See also judgment of 7 May 2019, *Monachos Eirinaios* (C-431/17, EU:C:2019:368, paragraphs 30 and 31), which distinguishes between the (harmonised) registration of foreign lawyers and the (non-harmonised) exercise of the activity within Directive 98/5.

[42] As would also be implied, at the end of Question 1 submitted by the referring court, by the reference to 'cases where all the essential elements are present within a single Member State'.

[43] Further, see my Opinion in Joined Cases *Uniwersytet Wrocławski and Poland* v *REA* (C-515/17 P and C-561/17 P, EU:C:2019:774, points 103 and 104).

[44] As defined in Article 4(6), read in the light of recital 49, of the Services Directive.

86. However, should disciplinary proceedings against a lawyer also be considered as another element of that authorisation scheme?

87. According to the referring court and the Commission, disciplinary proceedings against a registered lawyer are also part of the scheme since, as a result of such proceedings, lawyers may be suspended, or expelled, and prevented from re-registering for 10 years. Such measures constitute a withdrawal of authorisation for the purposes of Article 10(6) of the Services Directive.

88. By contrast, according to both the Netherlands and Polish Governments, the disciplinary procedure, when taken in isolation, is not an 'authorisation scheme' within the meaning of the Services Directive, nor is it part of the authorisation scheme either. Although a disciplinary sanction may eventually mean that it is impossible to continue carrying out the service, it does not amount to a refusal or a withdrawal of the authorisation. In any event, Article 10(6) of the Services Directive is not applicable in the main proceedings because the present dispute concerns the decision of the Disciplinary Agent to discontinue the proceedings, not a decision to impose a disciplinary sanction. As a result, no decision of suspension or expulsion of the lawyer could be adopted in those proceedings. Furthermore, according to the Netherlands Government, disciplinary rules in general cannot be characterised as 'requirements' within the meaning of Article 4(7) of the Services Directive.

89. I agree with the referring court and the Commission.

90. Admittedly, the Services Directive does not contain any specific provision regarding disciplinary rules or procedures. This is hardly surprising since the Services Directive (in particular, but not limited to, Chapter III) applies horizontally, thus drafted to a large degree in general and abstract terms, and seeks to safeguard the freedom of establishment for providers and free provision of a vast array of services.

91. I agree that disciplinary proceedings against a lawyer, taken in isolation, can hardly amount to an authorisation scheme under the Services Directive. However, I also fail to see the logic as to why such proceedings assessed in the context of the Services Directive should ever been seen as a separate scheme. Instead, from the vantage point of the Services Directive, such proceedings are clearly part of a package of rules concerning access, exercise, and ultimately the forced cessation of the provision of services.

92. Under the Services Directive, Member States shall impede neither the access to an activity covered by the Services Directive, nor the exercise thereof. Although the Services Directive tends to focus on the access, it contains numerous provisions that also concern both access and exercise,[45] or simply the exercise of the freedom of establishment.[46] Disciplinary proceedings aim, in a way, at ensuring the quality of the exercise of the provision of legal counsel. Within that dimension, they indeed could be seen as one element of the broader scheme regulating access to and exercise of that type of service. That would mean that disciplinary rules and the application thereof in the context of specific proceedings must be 'monitored' by virtue of the Services Directive to ensure that they comply with Article 10(2) thereof regarding authorisation schemes.

93. However, in my view, the wording of Article 10(6) of the Services Directive assuages any lingering doubt as to whether or not decisions effectively 'terminating' the access to and exercise of a given type of service are also included. It reads: 'Except in the case of the granting of an

[45] For example, Articles 3(1), 5(1), 6(1)(b), 8(1), 9(1), 10(4), 14(1), 15(2) of the Services Directive.

[46] Already in Article 1(1) of the Services Directive.

authorisation, *any* decision from the competent authorities, including refusal or *withdrawal* of an authorisation, shall be fully reasoned and shall be open to challenge before the courts or other instances of appeal.'[47]

94. Against such wording, and the logic of the Services Directive, I fail to see how one could reasonably claim that a decision disbarring a lawyer does not amount to a withdrawal of his or her authorisation to practice and, thereby, provide legal services. Withdrawal of an authorisation already granted is simply a revocation of the access already granted. This broadly phrased provision not only suggests that any (unfavourable) decision regarding the access to or the exercise of a service falls within the Services Directive, but also that it must be open to challenge.

95. This conclusion is not altered by the reference made by the Polish Government to Article 1(5) of the Services Directive, which states that the latter directive 'does not affect Member States' rules of criminal law'. Disciplinary procedures are not per se identical to criminal law and criminal proceedings. Moreover, even if they were, *quod non*, Article 1(5) specifies that 'Member States may not restrict the freedom to provide services by applying criminal law provisions which specifically regulate or affect access to or exercise of a service activity in circumvention of the rules laid down in this Directive'.[48]

96. In a similar vein, I see no traction in the argument advanced by the Polish Government, according to which no decision removing R.G. from the Bar Association has yet been imposed upon R.G., and that it effectively cannot be imposed in the specific proceedings concerning the review of the decision by the Disciplinary Agent not to pursue an alleged disciplinary offence.

97. In that regard, it suffices to note that the normative scope of an EU law instrument cannot be defined *ex post facto* in an outcome-dependent way, with the case falling either within or out of the scope of EU law depending on whether a person is eventually convicted or acquitted.[49] In general, the fact that certain proceedings fall within the scope of an EU law instrument *rationae materiae* is sufficient for the entirety of those proceedings, irrespective of the ultimate outcome or stage at which they close, also to fall within the scope of EU law.

98. In summary, in answer to the first part of Question 1, Chapter III of the Services Directive applies, as part of an authorisation scheme governing the exercise of the activity of lawyers, also to disciplinary proceedings initiated against lawyers, the result of which may affect the ongoing ability of those lawyers to provide legal services under the Services Directive.

3. Article 47 of the Charter

99. The answer to the second part of Question 1, enquiring about the applicability of the Charter, in particular Article 47, to the proceedings before the referring court, is straightforward.

100. It is established case-law that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law. If national legislation falls within the scope of EU law, the Court, when requested to give a preliminary ruling, must provide

[47] My emphasis.

[48] See, for example, judgment of 4 July 2019, *Kirschstein* (C-393/17, EU:C:2019:563, paragraphs 61 to 63). See also, although non-binding, the *Handbook on the implementation of the Services Directive* (p. 15).

[49] See also my Opinion in Joined Cases *Ministerul Public – Parchetul de pe lângă Înalta Curte de Casație și Justiție – Direcția Națională Anticorupție and Others* (C-357/19 and C-547/19, EU:C:2021:170, points 109 to 115), regarding the same argument raised with regard to the scope of application of Article 325(1) TFEU.

all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures. [50]

101. Thus, as long as the Services Directive is applicable, the Charter, including Article 47, is in principle also applicable to the case. This means that the referring court is to apply Article 47 of the Charter in the proceedings pending before it.

102. However, as has been raised by the National Prosecutor and the Polish Government in their submissions regarding admissibility, it is admittedly not entirely clear which exact individual right deriving from EU law could *specifically* be at issue in the case pending before the referring court. Indeed, while the prospective outcome of the main proceedings may eventually have detrimental effects on the legal position of R.G. (by being made subject to disciplinary proceedings as a result), it has been pointed out that R.G. is not yet a party in the main proceedings. The case before the referring court appears to be between the Disciplinary Agent, on the one side, and the National Prosecutor and the Minister for Justice, on the other side. [51] Thus, indeed, it is not immediately apparent which of these (it seems public law entities), would be endowed with fundamental rights under the Charter in the main proceedings.

103. Be that as it may, even if Article 47 of the Charter were not applicable before the referring court due to a lack of any impact upon a specific individual right guaranteed under the Charter, which is for the referring court to ascertain, it is still the case that Article 19(1) TEU, the content of which is essentially the same as Article 47 of the Charter, [52] would still apply. [53] Unlike Article 47 of the Charter, it indeed suffices, for Article 19(1) TEU to apply, that a national court *may be called upon* to rule on questions concerning the application or interpretation of EU law. [54]

104. There is no doubt that, also in view of the foregoing conclusion relating to the applicability of the Services Directive to the proceedings before the Disciplinary Court in general, the referring court may also be called upon to rule on EU law in this regard.

C. Questions 2 to 4: the powers of national courts in securing compliance with EU law

105. By Question 2, the referring court essentially asks the Court whether it should disregard the national provisions establishing the jurisdiction of the body (namely the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court)) that is competent to hear an appeal on a point of law against a decision of that same referring court (or an objection to an order refusing such an appeal on a point of law) when that body is not independent and impartial within the meaning of Article 47 of the Charter. Is it then the duty of the referring court to refer appeals on a point of law to the judicial body which previously had jurisdiction (namely the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court))?

[50] See, for example, judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 19 and the case-law cited); of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraphs 49 and 50); and of 16 October 2019, *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:861, paragraphs 59 and 60).

[51] See also above, point 42 of this Opinion.

[52] See, for example, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraphs 115 and 116).

[53] Regarding the relationship and respective scopes of Article 19(1) TEU and Article 47 of the Charter, see my Opinion in Joined Cases *WB and Others* (C-748/19 to C-754/19, EU:C:2021:403, points 161 to 169).

[54] See, for example, judgment of 24 June 2019, *Commission* v *Poland (Independance of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 56 and the case-law cited).

106. By Question 3, the referring court asks more specifically whether it may (or should) disregard the legal position expressed by the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court) regarding the right of appeal on a point of law of the General Prosecutor (being at the same time Minister for Justice) and the Ombudsman.

107. By Question 4, the referring court essentially wonders whether it should ignore the appeal lodged by the Minister for Justice (being at the same time General Prosecutor) if that is the only way to be sure that the proceedings before it are compatible with Article 47 of the Charter. The referring court points to the risk that, even if the measures referred to in Questions 2 and 3 are carried out, the potential appeal on a point of law brought by the General Prosecutor (being at the same time Minister for Justice) may still end up being heard by the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court).

108. A fair amount of additional information is needed in order fully to appreciate the scope of Questions 2, 3 and 4. Therefore, in the following sections, I shall start by setting out the context and the recent changes made in the national law and procedure (1), before examining the admissibility of those questions (2). Having reformulated those questions, I shall close by recalling the powers of national courts which derive from EU law and ensure effective judicial protection of EU law derived rights at the national level (3).

1. The national legislative and judicial background

109. There are three elements of the national legal context, as presented by the referring court, that should be emphasised.

110. First, the referring court recalls that the Court has already ruled on the question as to whether the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court) is an independent and impartial tribunal for the purposes of Article 47 of the Charter.[55] With reference to that judgment, the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour and Social Insurance Chamber), Poland) ruled on 5 December 2019 that the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court) was not an independent and impartial tribunal for the purposes of Article 47 of the Charter.[56] One factor leading the Sąd Najwyższy (Supreme Court) to that conclusion was the influence of the executive and, in particular, that of the Minister for Justice over the composition of that body.

111. Second, as far as the role of the General Prosecutor/Minister for Justice[57] is concerned, the referring court notes that his role within the disciplinary proceedings against the members of the Bar Association has recently been expanded, following a controversial interpretation of national law by the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court).

112. According to the referring court, in the case-law of the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court), and also in legal literature, the position unequivocally held until recently was that neither the Prokurator Generalny (General

[55] Judgment 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).

[56] Decision No III PO 7/18.

[57] Taking into account the fact that, in Poland, the office of the Minister for Justice has been merged with that one of the General Prosecutor – see my Opinion in Joined Cases *WB and Others* (C-748/19 to C-754/19, EU:C:2021:403). For a critical (and indeed) negative assessment of the fusion of both offices, see Venice Commission, Opinion on the Act on the Public Prosecutor's Office, as amended (2017) Opinion 892/2017.

Prosecutor), nor the Rzecznik Praw Obywatelskich (Ombudsman) had a right, under Article 521 of the Code of Criminal Procedural Code in conjunction with Article 95n(1) of the Law on Advocates to lodge an appeal on a point of law against decisions of the Disciplinary Courts of the Bar Associations to uphold a decision of the Disciplinary Agent to refuse to initiate a disciplinary inquiry or to discontinue such an inquiry. This view is shared in full by the referring court.

113. However, the referring court also points out that a diametrically opposed position has been embraced in resolution of 27 November 2019 of a panel of seven judges of the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court).[58] Under that position, Article 521 of the Code of Criminal Procedure does apply in Bar Association disciplinary proceedings and therefore the General Prosecutor may lodge an appeal on a point of law against a decision of the Disciplinary Court of the Bar Association upholding the decision of a Disciplinary Agent to discontinue a disciplinary inquiry.

114. That resolution was apparently adopted in a different case, albeit concerning the same lawyer, R.G., in which the Disciplinary Agent had also discontinued a disciplinary inquiry and where the Minister for Justice and the National Prosecutor also lodged an appeal against his decision in that matter. In that case, the Disciplinary Court upheld the contested decision but its decision was challenged by the Minister for Justice/General Prosecutor by way of an appeal on a point of law.

115. Although I do not claim to grasp fully all the national procedural details, I understand the bottom line to be that, following a departure from the previous line of case-law, the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court) effectively gave the right to introduce an appeal to the Minister for Justice/General Prosecutor and, indirectly, itself, the competence to hear appeals on points of law against decisions of the Disciplinary Agent to discontinue disciplinary proceedings.

116. Third, when the two previous elements are combined, a seemingly mundane procedural change in national law takes on an entirely new dimension. By systematically or repeatedly appealing the decisions not to launch disciplinary proceedings, the Minister for Justice/General Prosecutor (or a national prosecutor acting under his instructions) might effectively be able to push for disciplinary proceedings being instigated, or for them to be (possibly endlessly) continued against certain members of the Bar. Such appeals would ultimately be brought before a body that was previously found to be lacking independence precisely because the executive, and in particular the Minister for Justice, was exercising undue influence on its composition.[59]

2. Admissibility

117. The National Prosecutor, the Polish Government and the Commission consider Questions 2 and 3 to be inadmissible. According to the Polish Government in particular, those questions are hypothetical since they are premature. Should an appeal on a point of law against the incoming decision of the Disciplinary Court occur, that appeal should be lodged within the Sąd Najwyższy (Supreme Court), which would then allocate the case to the chamber having jurisdiction to hear

[58] Case No II DSI 67/18.

[59] Judgment 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).

it and transfer the file thereto. For its part, the Commission is of the view that the Court should not answer purely hypothetical questions which concern future procedural questions to be examined after the referring court has handed down its decision.

118. All the interested parties are of the view that Question 4 is also inadmissible. For the Polish Government in particular, the right to an effective remedy under Article 47 of the Charter should not be interpreted as setting aside or disabling legal remedies before courts for the alleged purpose of assuring the parties that their cause is heard by an independent court. The referring body would find itself in the position of protecting the interests of one party at the expense of another, thereby breaching the very essence of Article 47 of the Charter.

119. I must admit that the way in which the referring court formulated the questions referred poses some issues as regards the admissibility of Questions 2 to 4.

120. On the one hand, an answer to Questions 2 to 4 may indeed seem superfluous for the purposes of settling the case pending before the referring court. By those questions, the referring court appears to be concerned with the subsequent and potentially last step in the national judicial procedure. That is, nonetheless, conditional upon its impending decision in the present case being subsequently appealed on a point of law before the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court).

121. To that extent, Questions 2 to 4 appear premature. The fact that that court has to examine for the third time, within the same proceedings, a decision of the Disciplinary Agent regarding R.G. does not alter the previous conclusion. In the present case, the referring court is not faced with the problem of the Disciplinary Agent being unwilling to abide by its judicial decision after the case has been remitted back to the latter. The referring court is in fact concerned with whether the (future) prospect of the case will eventually arrive before a *third actor* in the form of the Sąd Najwyższy (Supreme Court) (more specifically, the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court)), should the referring court decide this time to uphold the contested decision of the Disciplinary Agent.

122. Thus, while it is apparent that the referring court finds itself in a sort of recurring loop, Questions 2 to 4 in fact relate to a different type of loop, which has not yet materialised. [60]

123. On the other hand, the referring court has nonetheless established certain relevant links between Questions 2 to 4 *and* the case pending before it.

124. As regards Questions 2 and 3, the referring court stated that it considers an answer from the Court to be necessary so that it is able to clarify which body will have jurisdiction to hear a potential appeal on a point of law against its own rulings (or an objection to a refusal to accept such an appeal on a point of law) because of *the contents of the instruction* which the referring court is obliged to give when delivering its ruling to the parties. By process of national law, the referring court is obliged, in its final decision, to instruct the parties to the proceedings on the time limit for, and manner of, lodging an appeal or to notify them that there is no right of appeal at all. In that respect, the referring court contemplates the possibility to take into account the judgment of the Sąd Najwyższy (Supreme Court) of 5 December 2019 and, accordingly, instruct

[60] Contrast, in this regard, for example, the *Torubarov* case where, following the successive exchanges between the same actors, the national proceedings were in a deadlock due to the apparent unwillingness of the administrative authority to apply the previous judicial decision. However, there, the referring court raised a question specific to the deadlock that had already materialised – see judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626, paragraphs 23 to 32).

the parties that appeals should be brought before the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court), and not the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court).

125. As regards Question 4, the referring court has suggested that, as an effect of Article 47 of the Charter, it could *itself* refrain from examining the case currently pending before it in order to block the potential subsequent appeal on a point of law to the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), thereby excluding any possible interference from the latter.

126. It follows that the answers of the Court to Questions 2 to 4 may admittedly have *some* impact on the disposal of the case pending before the referring court. I acknowledge that a number of elements remain unclear, however. For instance, it is not immediately obvious how, in practical terms, the referring court could prevent appeals on points of law from being lodged before the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court); or, indeed, in view of the Polish Government's observations regarding the allocation of cases within the Sąd Najwyższy (Supreme Court), how the referring court would manage to channel a case specifically to the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court).

127. Finally, one cannot overlook the fact that Questions 2 to 4 are, from a certain perspective, questions relating to the interpretation of the practical consequence(s) of a judgment previously delivered by this Court, namely *A. K. and Others*. Indeed, in that judgment, the Court concluded that EU law precludes 'cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal'.[61] Since, as has been established above, this case falls within the scope of EU law by virtue of the Services Directive, it is legitimate for the referring court to ask essentially: all right, how exactly am I then supposed to go about that? How, in specific and practical terms, can I assure compliance with EU law and follow a previous judgment of the Court?

128. Therefore, to the extent that the scope of Questions 2 to 4 indeed concerns matters that are pending and are relevant for the forthcoming decision of the referring court, then, indeed *to that extent*, those questions are admissible. However, the following characteristics of the preliminary ruling procedure ought to guide the rephrasing of those questions.

129. First, the procedure provided for in Article 267 TFEU is an instrument of cooperation between this Court and the national courts, through which the Court provides the national courts with points of interpretation of EU law needed in order to rule on disputes before them. The preliminary ruling procedure does not allow for advisory opinions to be given in response to general or hypothetical questions. Rather, the answers to the questions referred must be *necessary* for the effective resolution of a dispute, which the national court must be *able to take into account* in the main proceedings.[62]

130. It follows, logically, that the scope of any potential answers that the Court may provide is limited to what the national court might do in a case pending before it. It cannot extend to what other courts or institutions ought to do in the future. That precludes guidance on the *future* potential acts or course of action of *other courts*.

[61] Judgment 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, paragraph171).

[62] See judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraphs 44 and 46 and the case-law cited), or order of 2 July 2020, *S.A.D. Maler und Anstreicher* (C-256/19, EU:C:2020:523, paragraphs 42 to 44).

131. Second, any guidance that this Court may provide by way of a preliminary ruling is strictly limited to matters of *interpretation of EU law*, not national law. It is not for this Court to interpret national law, a fortiori to arbitrate between different strands of interpretation of national law that emerge at national level. In particular, it is not for this Court to suggest which of the opposing interpretations of national procedural rules is correct, and which exact rule or route available under national law a referring court must take in order to ensure compliance with EU law.

132. With these limits in mind, I am of the opinion that Questions 2 to 4 are admissible. That said, those questions must be approached from a much higher level of abstraction and one ought to engage only with the EU law side of those questions, an endeavour to which I now turn.

3. The powers of national courts in securing compliance with EU law

133. Through Questions 2 to 4, the referring court is essentially asking whether it has the power, under EU law, to disregard, in order to secure compliance with EU law: (i) national legislation on the attribution of jurisdiction (Question 2); (ii) a (normally binding) legal interpretation of national law handed down by a superior court (Question 3); (iii) the appeal or the submissions made by the Minister for Justice (being at the same time the General Prosecutor) (Question 4).

134. On the first and second points, there in fact is already a rich line of case-law of the Court. First, according to the Court, by virtue of the principle of primacy, a national court must apply EU law in its entirety and protect rights which the latter confers on individuals. Accordingly, it is obliged to set aside any *provision of national law* which may conflict with it, whether introduced prior or subsequent to the EU rule. In other words, any national legal provision 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 that may prevent EU rules from having full force and effect, are incompatible with those requirements which represent the very essence of EU law.[63] In order to secure such compliance, the referring court may either interpret national rules in conformity with EU law or, where necessary, disapply the national provisions which prevent it from ensuring compliance.[64]

135. Second, as far as legal opinions or judgments of higher courts are concerned, it is indeed also established case-law that national courts must, if necessary, disregard the rulings of a higher court if it considers that they are not consistent with EU law.[65] In a way, the logic and consequence in both scenarios is the same: if the referring court, or any court for that matter,[66] is prevented from

[63] See, for example, judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraphs 21 and 22); of 19 June 1990, *Factortame and Others* (C-213/89, EU:C:1990:257, paragraph 20); and of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 44).

[64] See, with further references, judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraphs 50 et seq).

[65] See, for example, judgments of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraph 30), and of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 69).

[66] The Court has repeatedly recalled that a national court is naturally entitled to find an incompatibility of national law with EU law and draw the appropriate consequences from that finding also without a request for a preliminary ruling under Article 267 TFEU being necessary – see judgments of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraphs 53 to 55); of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraph 28); and order of 3 September 2020, *Vikingo Fővállalkozó* (C-610/19, EU:C:2020:673, paragraph 75).

ensuring full compliance with EU law, the sources of potential incompatibility, whether they be of legislative origin or of individual judicial origin, may be disregarded, provided of course that the departure from such sources is duly reasoned and explained. [67]

136. Both strands of case-law outlined above have been developed within the context of cases of individual incompatibility, without such cases necessarily having broader structural implications. However, there is no doubt that the same approach is applicable, perhaps even a fortiori, with regard to structural issues, such as those relating to legislation attributing jurisdiction to bodies which structurally lack independence altogether. The most recent case-law of the Court confirms that – indeed, entirely logical – extension.

137. First, in its judgment in *A. K. and Others*, the Court found that Article 47 of the Charter precludes cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, *in casu* the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), subject to the national court's verification. Accordingly, the principle of primacy of EU law requires national courts to disapply the provision of national law which reserves jurisdiction to rule on cases to such a court, so that those cases may be examined by a court which meets the requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field. [68]

138. Second, most recently, in *A.B. and Others*, [69] the Court was seised of the question of compatibility with EU law of amendments of national law which deprived the referring court of its jurisdiction. The Court held that, where it is proven that the second subparagraph of Article 19(1) TEU has been breached, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply the amendments at issue, whether they are of a legislative or constitutional origin, and, consequently, to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made. [70]

139. It would thus indeed follow from the outlined case-law of the Court, as confirmed by the most recent judgments regarding specifically the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), that the referring court must, by virtue of the primacy of EU law, disapply national law, including the case-law of the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), and apply instead the previous national law on jurisdiction. Although, in both *A. K. and Others* and in *A.B. and Others*, the referring court was not a lower court, [71] I do not think that that difference is of any relevance. The judgment in *A. K. and Others* is equally relevant to the referring court in the present case.

140. In summary, EU law clearly empowers a national court, under the conditions outlined above, to set aside and disregard national legislation or a judicial opinion of a superior court, if that is the only way of securing compliance with EU law.

[67] See, in greater detail, my Opinion in *Ministerul Public – Parchetul de pe lângă Înalta Curte de Casație și Justiție – Direcția Națională Anticorupție and Others* (C-357/19 and C-547/19, EU:C:2021:170, points 235 to 243).

[68] Judgment 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, paragraph 171).

[69] Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153).

[70] Ibid., paragraphs 142 to 150.

[71] But by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) and the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour and Social Insurance Chamber)), respectively.

141. What is indeed novel is the third issue raised by the referring court in Question 4, whereby the referring court appears to be asking whether it could simply ignore the appeal pending before it. I understand that the motive underpinning that proposition is the creation of a certain legal void. Indeed, if there is no decision then nothing can be appealed. Therefore, there is nothing that may potentially progress to a court that is *not* independent.

142. Despite the alluring, radical simplicity of that idea, similarly to the Polish Government in fact, I cannot but suggest a negative answer. Article 47 of the Charter (and, for that purpose, Article 19(1) TEU) safeguards the right to an effective legal remedy. Even if the 'next level' within a judicial hierarchy no longer lives up to that standard, that provision can hardly be interpreted as having a knock-on effect at the lower level, preventing it from making a decision at all.

143. In my view, the reason for that is rather simple, but very onerous: the prohibition of *denegatio iustitiae*. Since the introduction of Article 4 of the French Civil Code, 'a judge who refuses to adjudicate, on the pretext that the law is silent, obscure or defective, may be prosecuted on a charge of denial of justice'. [72]

144. Although originally established in the context of civil law, and to my knowledge never proclaimed to be part of EU law, that prohibition is such a fundamental aspect of modern judicial function that even the primacy of EU law cannot alter it. It cannot be the case that a court simply remains intentionally inactive, refusing to hand down any decision, not only because the law is defective, but also because a higher court is apparently defective. Instead, the system already permits a court to express its disagreement by allowing a court to decide on a case and, if need be, not to apply national legislation or the guidance from a superior court, albeit, always by way of a duly reasoned decision.

145. In my view, this is as far as this Court can possibly go in providing (at least) some useful guidance to the referring court, while remaining within the parameters of the preliminary ruling procedure set out above. [73] To reiterate, the role of this Court is to interpret EU law and not national law. Moreover, even if examining the compatibility of certain national rules with EU law in practice, that assessment has also been traditionally limited to negative statements of incompatibility, but without positive statements as to how compatibility is to be achieved in specific terms. The latter is indeed the exclusive power of the referring court or other competent authorities of the Member State concerned.

146. I acknowledge that such a division of competences within the preliminary ruling procedure might not be ideal for dealing with what essentially are pathological situations in a Member State, within which normal rules of legal engagement and fair play appear to be breaking down. However, in realistic terms, the preliminary ruling procedure has inherent limits in terms of its potential for settling institutional stand-offs in such a specific context, wherein one or more actors refuse to follow the guidance issued by the Court. In such cases, a third-party intervention and external enforcement of the judgments of the Court, such as the one provided for in Articles 258 to 260 TFEU, remain a more appropriate, if not the only, remedy.

[72] Portalis, J.E.M., 'Discours préliminaire sur le projet de Code Civil présenté le 1er pluviôse an IX' (p. 12), in Portalis, J.E.M., *Discours et rapports sur le Code civil*, Caen, Fontes & Paginae, 2010, p. 70.

[73] See above, points 128 to 131 of this Opinion.

V. Conclusion

147. I propose that the Court answer the questions referred for a preliminary ruling by the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Court of the Bar Association in Warsaw, Poland) as follows:

– Chapter III of Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market applies, as part of an authorisation scheme governing the exercise of the activity of lawyers, to disciplinary proceedings initiated against lawyers, the result of which may affect the ongoing ability of those lawyers to provide legal services under that directive. As a result, Article 47 of the Charter of Fundamental Rights of the European Union and, as the case may be, Article 19(1) TEU also apply to such proceedings.

– On the basis of the primacy of EU law:

  – A national court is required to set aside the provisions of national law which reserve jurisdiction to rule on cases to a court which is not an independent and impartial tribunal, so that those cases may be examined by a court which meets the requirements of independence and impartiality and which, were it not for those provisions, would have jurisdiction.

  – A national court must, if necessary, disregard the rulings of a higher court if it considers that they are incompatible with EU law, including situations in which incompatibility derives from the lack of independence and impartiality of that higher court.