Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

1 August 2025 *

(Reference for a preliminary ruling – Rule of law – Effective judicial protection in fields covered by EU law – Second subparagraph of Article 19(1) TEU – Principles of the irremovability and independence of judges – Non-consensual designation of a judge of a supreme court to sit, for a specified period, in another chamber of that court – Primacy of EU law – Public procurement – Directive 2004/17/EC – Procurement procedures – Application to an agreement for the transfer of ownership rights relating to green electricity certificates of origin – Directive 92/13/EEC – Article 2d(1) – Review procedures in relation to the award of public contracts – No effect of the contract – Contracting entity seeking the annulment of a contract concluded in breach of the public procurement rules – Abuse of rights – None)

In Joined Cases C-422/23, C-455/23, C-459/23, C-486/23 and C-493/23 [Daka], [i]

FIVE REQUESTS for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Supreme Court, Poland), made by decisions of 3 and 21 April 2023 and of 13 June 2023, received at the Court on 10, 20, 21 and 31 July 2023 and 3 August 2023, in the proceedings

T.B.

v

C.B.,

in the presence of:

D.B. (C-422/23),

and

G.T.

v

T. S.A. (C-455/23),

and

E. S.A.

* Language of the case: Polish.

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

v

W. sp. z o.o.,

Bank S.A. (C-459/23),

and

S. sp. z o.o.

v

V. sp. z o.o. (C-486/23),

and

Miasto W.

v

M.T.,

E.T.,

A.W. (C-493/23),

in the presence of:

Prokurator Prokuratury Okręgowej Warszawa-Praga w Warszawie,

THE COURT (Second Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Second Chamber, M. Gavalec, Z. Csehi and M. Condinanzi, Judges,

Advocate General: T. Ćapeta,

Registrar: M. Siekierzyńska, Administrator,

having regard to the written procedure and further to the hearing on 8 January 2025,

after considering the observations submitted on behalf of:

– E. S.A., by P. Łącki, adwokat,

– the Prokuratura Okręgowa Warszawa-Praga w Warszawie, by D. Winiarek, Zastępca Prokuratora Okręgowego Warszawa-Praga w Warszawie,

– the Polish Government, by A. Bodnar, B. Majczyna, M. Rzotkiewicz, M. Taborowski and S. Żyrek, acting as Agents,

– the European Commission, by K. Herrmann, P.J.O. Van Nuffel and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') (Cases C-422/23, C-455/23, C-459/23, C-486/23 and C-493/23), the principle of primacy of EU law (Cases C-455/23, C-459/23 and C-486/23), Article 1(2)(c) and (4), Article 2(1)(b), Article 3(3)(b), Article 14, Article 16(a) and Article 20 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64) ('Directive 2004/17'), Article 2d(1)(a) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 92/13'), and the general principle of the prohibition of abuse of rights (Case C-459/23).

2 The requests have been made in five sets of proceedings between, respectively, T.B. and C.B. concerning the distribution of a joint estate and an inheritance (Case C-422/23), G.T. and T. S.A. concerning the release of a guarantee and the enforcement of shares held by a company (Case C-455/23), E. S.A. ('company E.') and W. sp. z o.o. ('company W.') and Bank S.A. concerning the legal non-existence of a contractual relationship (Case C-459/23), S. sp. z o.o. and V. sp. z o.o. concerning a claim for payment (Case C-486/23), and Miasto W. and M.T., E.T. and A.W. concerning an obligation to file a declaration of intent (Case C-493/23).

The legal framework

European Union law

Directive 2003/88/EC

3 Article 6(b) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9) provides:

'Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

…

(b) the average working time for each seven-day period, including overtime, does not exceed 48 hours.'

Directive 92/13

4 Under Article 2d(1)(a) and (2) of Directive 92/13:

'1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting entity has awarded a contract without prior publication of a notice in the *Official Journal of the European Union* without this being permissible in accordance with [Directive 2004/17];

…

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).'

5 Article 2d(1)(a) and (2) of Directive 92/13 were inserted into Directive 92/13 by Directive 2007/66. Recitals 2, 13, 14 and 20 of the latter read as follows:

'(2) … According to the case-law of the Court …, the Member States should ensure that effective and rapid remedies are available against decisions taken by contracting authorities and contracting entities as to whether a particular contract falls within the personal and material scope of Directives 2004/18/EC [of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114),] and [2004/17].

…

(13) In order to combat the illegal direct award of contracts, which the Court … has called the most serious breach of Community law in the field of public procurement on the part of a contracting authority or contracting entity, there should be provision for effective, proportionate and dissuasive sanctions. Therefore a contract resulting from an illegal direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body.

(14) Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete. Direct awards within the meaning of this Directive should include all contract awards made without prior publication of a contract notice in the

Official Journal of the European Union within the meaning of Directive [2004/18]. This corresponds to a procedure without prior call for competition within the meaning of Directive [2004/17].

…

(20) This Directive should not exclude the application of stricter sanctions in accordance with national law.'

Directive 2004/17

6 Recitals 2, 3 and 9 of Directive 2004/17 read as follows:

'(2) One major reason for the introduction of rules coordinating procedures for the award of contracts in these sectors is the variety of ways in which national authorities can influence the behaviour of these entities …

(3) Another main reason why it is necessary to coordinate procurement procedures applied by the entities operating in these sectors is the closed nature of the markets in which they operate …

…

(9) In order to guarantee the opening up to competition of public procurement contracts awarded by entities operating in the water, energy, transport and postal services sectors, it is advisable to draw up provisions for Community coordination of contracts above a certain value. …'

7 According to Article 1 of that directive:

'1. For the purposes of this Directive, the definitions set out in this Article shall apply.

2. …

(c) "Supply contracts" are contracts other than those referred to in (b) having as their object the purchase, lease, rental or hire-purchase, with or without the option to buy, of products.

A contract having as its object the supply of products, which also covers, as an incidental matter, siting and installation operations shall be considered to be a "supply contract";

…

4. A "framework agreement" is an agreement between one or more contracting entities referred to in Article 2(2) and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged.'

8 Article 2(1) and (2) of that directive provided:

'1. For the purposes of this Directive,

…

(b) a "public undertaking" is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

– hold the majority of the undertaking's subscribed capital …

…

2. This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

…'

9 Article 3(3) of that directive provided:

'As far as electricity is concerned, this Directive shall apply to the following activities:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity; or

(b) the supply of electricity to such networks.'

10 Article 14 of Directive 2004/17 provided:

'1. Contracting entities may regard a framework agreement as a contract within the meaning of Article 1(2) and award it in accordance with this Directive.

2. Where contracting entities have awarded a framework agreement in accordance with this Directive, they may avail themselves of Article 40(3)(i) when awarding contracts based on that framework agreement.

3. Where a framework agreement has not been awarded in accordance with this Directive, contracting entities may not avail themselves of Article 40(3)(i).

4. Contracting entities may not misuse framework agreements in order to hinder, limit or distort competition.'

11 Under Article 16(a) of that directive:

‘Save where they are ruled out by the exclusions in Articles 19 to 26 or pursuant to Article 30, concerning the pursuit of the activity in question, this Directive shall apply to contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds:

(a) EUR 387 000 in the case of supply and service contracts’.

12 Article 17 of that directive read as follows:

‘1. The calculation of the estimated value of a contract shall be based on the total amount payable, net of VAT, as estimated by the contracting entity. This calculation shall take account of the estimated total amount, including any form of option and any renewals of the contract.

…

2. Contracting entities may not circumvent this Directive by splitting works projects or proposed purchases of a certain quantity of supplies and/or services or by using special methods for calculating the estimated value of contracts.

3. With regard to framework agreements and dynamic purchasing systems, the estimated value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the agreement or system.

…

7. In the case of supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:

(a) either the total actual value of the successive contracts of the same type awarded during the preceding twelve months or financial year adjusted, if possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;

(b) or the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year if that is longer than 12 months.’

13 Article 20(1) of that directive provided:

‘This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 3 to 7 or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the [European] Community.’

14 Article 40(3)(i) of Directive 2004/17 provided:

‘Contracting entities may use a procedure without prior call for competition in the following cases:

…

(i) for contracts to be awarded on the basis of a framework agreement, provided that the condition referred to in Article 14(2) is fulfilled’.

Directive 2014/25/EU

15 According to recital 23 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17 (OJ 2014 L 94, p. 243):

‘Without in any way extending the scope of this Directive, it should be clarified that production, wholesale and retail sale of electricity are covered when this Directive refers to the supply of electricity.’

16 The first paragraph of Article 7 of that directive provides:

‘For the purposes of Articles 8, 9 and 10, “supply” shall include generation/production, wholesale and retail sale.’

17 Article 9(1) of that directive provides:

‘As far as electricity is concerned, this Directive shall apply to the following activities:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity;

(b) the supply of electricity to such networks.’

Directive 2009/28/EC

18 Points (k) and (l) of the second paragraph of Article 2 of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16) contained the following definitions:

‘(k) “support scheme” means any instrument, scheme or mechanism applied by a Member State or a group of Member States, that promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased. This includes, but is not restricted to, investment aid, tax exemptions or reductions, tax refunds, renewable energy obligation support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and premium payments;

(l) "renewable energy obligation" means a national support scheme requiring energy producers to include a given proportion of energy from renewable sources in their production, requiring energy suppliers to include a given proportion of energy from renewable sources in their supply, or requiring energy consumers to include a given proportion of energy from renewable sources in their consumption. This includes schemes under which such requirements may be fulfilled by using green certificates'.

Polish law

The Law on the Supreme Court

19 Under Article 23 of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5), as amended (Dz. U. of 2021, item 1904), in the version applicable to the disputes in the main proceedings ('the Law on the Supreme Court'):

'The Civil Chamber has jurisdiction to hear cases concerning civil law, commercial law, intellectual property law, family law and guardianship, as well as cases concerning the registration of companies and securities.'

20 Article 25 of that law provides:

'The Labour and Social Insurance Chamber is competent for hearing cases relating to labour law and social insurance.'

21 Article 35(3) of that law provides:

'A judge may be designated by the First President of the Sąd Najwyższy (Supreme Court, Poland) to participate in the consideration of a particular case in another chamber and, with his or her consent, to sit for a specified period of time in another chamber. A judge may be appointed to sit in another chamber, without his or her consent, for a maximum period of six months per year. At the end of the period for which the judge has been appointed to sit in another chamber, the judge concerned shall deal with the cases assigned to him or her in that chamber until their conclusion.'

The Law on public procurement

22 Article 132(1) of the ustawa – Prawo zamówień publicznych (Law on public procurement) of 29 January 2004 (Dz. U. No 19, item 177), in the version applicable to the dispute in the main proceedings relating to Case C-459/23, provided:

'The provisions of this chapter shall apply to contracts awarded by the contracting authorities referred to in Article 3(1)(3) and their associations and by the contracting authorities referred to in Article 3(1)(4) … subject to Article 3(1)(5), where the contract is awarded for the pursuit of one of the following activities:

…

(3) the creation of networks for the provision of public services relating to the production, transport or distribution of electricity, gas or heat, or the supply of electricity, gas or heat to such networks, or the management of such networks …'

23 Article 146 of that law, in the version applicable to the dispute in the main proceedings in Case C-459/23, provided:

‘1. The contract must be cancelled if the contracting authority:

…

(2) has not published a contract notice in the *Biuletynie Zamówień Publicznych* [*Public Procurement Bulletin*] or sent a contract notice to the Publications Office [of the European Union];

…

4. On the grounds referred to in paragraphs 1 and 6, the nullity of a contract may not be claimed on the basis of Article 189 of the ustawa – Kodeks postępowania cywilnego [(Code of Civil Procedure Act), of 17 November 1964 (Dz. U. No 43, item 296), as amended].’

The disputes in the main proceedings and the questions referred for a preliminary ruling

The circumstances and issues common to all the cases

24 Five appeals on points of law are pending before the Civil Chamber of the Sąd Najwyższy (Supreme Court) (‘the Civil Chamber’), which is the referring court.

25 The President of the Civil Chamber issued orders designating panels of three judges to hear each of the five cases and appointed a judge-rapporteur for each case.

26 In addition to a judge of the Civil Chamber, each of the three-judge panels thus designated includes two judges assigned to the Labour and Social Insurance Chamber of the Sąd Najwyższy (Supreme Court). The latter two judges were appointed, by orders of the First President of that court, based on Article 35(3) of the Law on the Supreme Court, to sit in the Civil Chamber for a period of three months from 1 April to 30 June 2023. In three of those five cases, those appointments were accompanied by a change of judge-rapporteur, to the benefit of some of the judges thus appointed.

27 The referring court has doubts about the independence and impartiality of the panels thus constituted, owing to a number of circumstances.

28 First, that court points out that the judges concerned were appointed to sit in the Civil Chamber for a specified period without their consent. Moreover, they had not even been consulted beforehand.

29 Secondly, that court observed that no reasons were given for those appointments. Referring to reasons reported in the press concerning the appointment of a large number of judges to sit, for a fixed period, in the Civil Chamber, it stated that the workload and substantial backlog of that chamber were due to its recent management and could not justify such appointments.

30 Thirdly, under Polish law, the judges appointed do not enjoy any judicial protection. A decision appointing a judge to sit, for a specified period, in another chamber could only be reviewed by the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland). Such a review does not constitute a remedy before an independent and impartial tribunal established by law, given the current composition of that council.

31 In that regard, the referring court draws a parallel between the non-consensual appointment of a judge to sit, for a specified period, in a chamber other than that to which he or she has been assigned and the non-consensual transfer of a judge. In paragraph 118 of the judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798), the Court held that such measures of transfer are liable to undermine the principles of security of tenure and independence of judges and that they should be subject to judicial review.

32 Fourthly, both the President of the Civil Chamber and the First President of the Sąd Najwyższy (Supreme Court), who adopted the orders at issue in the main proceedings, were allegedly appointed judges of the Sąd Najwyższy (Supreme Court) in the same irregular circumstances as those examined by the Court of Justice in the case which gave rise to the judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798). Judicial proceedings in which such persons participate are invalid because they are contrary to the right of individuals to a fair trial.

33 Fifthly, the judges appointed to sit for a fixed term in the Civil Chamber were not exempt from exercising their judicial activities in their chamber of origin. They therefore have to cope with a double workload.

34 First of all, that double workload has no legal basis in Polish law. Article 35(3) of the Law on the Supreme Court allows a non-consensual appointment to sit in another chamber only for a specific case or for a limited period of time. In the latter case, the judge concerned would have to sit only in that other chamber, and not simultaneously in that chamber and in his or her chamber of origin.

35 Next, that double workload poses problems in terms of the quality of justice rendered, given the material specialisation of the judges of the Sąd Najwyższy (Supreme Court) which is necessary for the proper functioning of that court. Appointment in order to sit in another chamber would lead the judge concerned to rule in fields of law in which he or she is not specialised.

36 Finally, the referring court points out, in some of its references for a preliminary ruling, that the same double workload is liable to be contrary to Article 6(b) of Directive 2003/88. It cannot be accepted, in its view, that the president of a court enjoys a discretionary power enabling him or her to assign additional tasks to a judge in the absence of any dialogue, even though the addition of those tasks leads to the maximum European and national working time standards being exceeded.

37 In the light of those considerations, the referring court entertains doubts as to the compatibility of the panels called upon to rule on the five appeals on a point of law with the requirements of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter. In Cases C-455/23, C-459/23 and C-486/23, it also asks whether, in the event of incompatibility with EU law, those panels must refuse to give judgment.

38 In those circumstances the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling in Cases C-422/23 and C-493/23:

'(1) In a situation in which national law provides that a judge of the court ruling at final instance [a judge of the Sąd Najwyższy (Supreme Court)] may, by a discretionary decision of the President of that Court (First President of the [Sąd Najwyższy] Supreme Court), be appointed, without his or her consent, to sit for a fixed period per year in another chamber of that Court having jurisdiction to hear cases the nature of which differs from those with which that judge has hitherto dealt, instead of in a chamber of that Court in which, in accordance with his or her training and areas of competence, he or she normally sits, should the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the [Charter], be interpreted as requiring that such a judge should, for the purpose of protecting his or her independence and autonomy, have an effective remedy against that decision before an independent and impartial tribunal in a procedure which satisfies the requirements of Articles 47 and 48 of the Charter?

(2) Should [the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter] be construed as meaning that a court of final instance of a Member State ([Sąd Najwyższy] Supreme Court), whose collegial three-member composition includes two judges who, without their consent, have been appointed by the President of that Court to sit on that Court away from their home chamber and to sit in a chamber competent for hearing the case in question, and who have not previously had the opportunity to challenge their appointment before an impartial and independent tribunal in a procedure which satisfies the requirements of Articles 47 and 48 of the Charter, is not an independent, impartial tribunal previously established by law and giving individuals effective access to justice in areas covered by EU law?'

39 In Cases C-455/23, C-459/23 and C-486/23, the Sąd Najwyższy (Supreme Court) formulated its questions as follows, it being specified that, in Case C-459/23, they are the first to third of the seven questions referred:

'(1) Must the second subparagraph of Article 19(1) TEU, in the light of the interpretation given by the Court of Justice in its judgment [of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798)], be interpreted as meaning that designating a judge of the Sąd Najwyższy (Supreme Court), without his or her consent, to adjudicate temporarily in another chamber of the Sąd Najwyższy is, like transferring a judge of an ordinary court between two chambers of that ordinary court, in breach of the principle of the irremovability and independence of judges, where:

– the judge is designated to adjudicate in cases whose subject matter does not coincide with the substantive jurisdiction of the chamber to which the judge of the Sąd Najwyższy was appointed to adjudicate;

– the judge has no judicial remedy against the decision regarding that designation which meets the requirements laid down in paragraph 118 of the judgment [of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment*) (C-487/19, EU:C:2021:798)];

– the order of the First President of the Sąd Najwyższy [(Supreme Court)] regarding the designation to adjudicate in another chamber and the order of the President who directs the work of the Civil Chamber … regarding the allocation of specific cases have been issued by persons appointed to the position of judge of the Sąd Najwyższy [(Supreme Court)] in the same circumstances as in [the case giving rise to the judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798)] and, in the light of previous case-law, judicial proceedings involving such persons are either invalid or infringe a party's right to a fair trial under Article 6 [of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR')];

– designating a judge, without his or her consent, to adjudicate for a fixed period in a chamber of the Sąd Najwyższy [(Supreme Court)] other than that in which he or she performs his or her duties, while maintaining the obligation to adjudicate in his or her home chamber, has no basis in national law;

– designating a judge, without his or her consent, to adjudicate for a fixed period in a chamber of the Sąd Najwyższy other than that in which he or she performs his or her duties results in an infringement of Article 6(b) of Directive [2003/88]?

(2) Regardless of the answer to the first question, must the second subparagraph of Article 19(1) TEU be interpreted as meaning that a court in a formation constituted as a result of an order of the First President of the Sąd Najwyższy [(Supreme Court)] regarding designation to adjudicate in another chamber of the Sąd Najwyższy [(Supreme Court)] and an order of the President who directs the work of the Civil Chamber … regarding allocation of specific cases, issued by persons appointed to the position of judge of the Sąd Najwyższy [(Supreme Court)] in the same circumstances as in [the case giving rise to the judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798)], does not constitute a tribunal "established by law" where, according to previous case-law, judicial proceedings involving persons so appointed are invalid or infringe a party's right to a fair trial under Article 6 ECHR?

(3) In the event that the first question is answered in the affirmative or the second question is answered to the effect that a court thus established does not constitute a court or tribunal "established by law", must the second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law be interpreted as meaning that judges appointed to a formation of a court established in the manner described in Questions 1 and 2 may refuse to act in the case allocated to them (which includes refusing to adjudicate), regarding as non-existent the orders regarding designation to adjudicate in another chamber of the Sąd Najwyższy [(Supreme Court)] and allocation of specific cases, or are they to deliver their ruling, leaving it to the parties to decide whether to contest it on the grounds that it infringes a party's right to have a case heard by a tribunal which meets the requirements laid down in the second subparagraph of Article 19(1) TEU and Article 47 of the [Charter]?'

The circumstances and issues specific to Case C-459/23

40 Company E., the applicant in the main proceedings in Case C-459/23, carries on an electricity trading business. The Polish State Treasury holds more than 50% of its shares. Company W., one of the defendants in the main proceedings in this case, is active in the production, transmission and distribution of electricity.

41 On 24 February 2011, companies E. and W. concluded a contract for the sale of property rights ('the contract at issue in the main proceedings'). That contract set out the conditions for the sale of all the property rights resulting from green certificates, namely certificates of origin for electricity produced from a renewable energy source. Company W. undertook to transfer to company E. the ownership of all the property rights resulting from these certificates. Company E. undertook to acquire those certificates through over-the-counter transactions on the Polish energy exchange. That contract also set out the terms of remuneration for the sale of those certificates by defining a price formula.

42 After unsuccessful attempts to renegotiate the price conditions stipulated in the contract at issue in the main proceedings, in September 2017 company E. put an end to the execution of the sale orders presented to it by company W.

43 Subsequently, company E. brought an action seeking to establish that there was no contractual link arising from the conclusion of the contract at issue in the main proceedings, arguing that there had been a failure to comply with the rules on the award of public contracts. It was dismissed both at first instance, by a judgment of the Sąd Okregowy w Gdańsku (Regional Court, Gdańsk, Poland) of 6 December 2018, and at the appeal stage, by a judgment of the Sąd Apelacyjny w Gdańsku (Court of Appeal, Gdańsk, Poland) of 13 August 2019. Those courts considered, in essence, that that contract did not fall within the scope of public procurement law.

44 Company E. then appealed on a point of law to the referring court against the judgment of 13 August 2019. That court questions the validity of the assessments made by the lower courts as to the applicability of public procurement law to the contract at issue in the main proceedings. Those questions would be relevant if it were to follow from the answers to its first to third questions, reproduced in paragraph 39 of the present judgment, that it must address the substance of the appeal on a point of law brought before it.

45 First, that court seeks to determine whether the activity of electricity trading falls within the scope of public procurement law. In that regard, it seeks an interpretation of Article 3(3)(b) of Directive 2004/17 in order to ascertain whether the terms 'the supply of electricity to … networks' include the sale of electricity. Moreover, having regard to Article 20 of Directive 2004/17, it should be determined whether the purchase of green certificates takes place for the purpose of carrying out the activity of supplying electricity and must be subject to the public procurement procedure. If that purchase were a legal obligation and thus a consequence of carrying on the business of supplying electricity, it would not, by contrast, be necessary in order to carry on the business of selling electricity.

46 Secondly, the referring court considers it necessary to obtain clarification on the interpretation of Article 1(4) of Directive 2004/17, read in conjunction with Article 14 thereof, in order to determine whether a contract which obliges the parties to conclude performance contracts on specified price and quantity terms constitutes a framework agreement, within the meaning of that directive, and is subject to the public procurement procedure. In the present case, the total annual

value of the transactions concluded between companies E. and W. under those performance contracts would exceed the EU thresholds for sectoral public contracts. By contrast, taken individually, those transactions would not reach those thresholds. In those circumstances, that court considers that it could be held that the contract at issue in the main proceedings does not constitute a framework agreement and does not fall within the scope of EU law on public contracts. It points out, however, that Article 17(2) of Directive 2004/17 prohibits the splitting of a contract in order to circumvent those thresholds. From that point of view, it would be appropriate to determine whether the total value of the performance transactions should be assessed *ex ante* or *ex post*.

47 Thirdly, the referring court asks what sanction should be applied in respect of the direct award of the contract in total disregard of the rules on the award of public contracts and envisages two possibilities. On the one hand, it would be possible to hold that such an award constitutes a case of failure to publish a contract notice falling within the scope of Article 2d(1)(a) of Directive 92/13 and, accordingly, to annul the contract at issue in the main proceedings. On the other hand, company E. suggests that a distinction should be drawn between a failure to publish a contract notice and a total failure to apply public procurement procedures. The latter would not be covered by this provision, but by the more severe penalties provided for under Polish civil law.

48 Fourthly, the referring court seeks to ascertain whether the general principle of the prohibition of abuse of rights precludes the annulment of a contract on the ground of infringement of the provisions of EU law on public contracts, where the allegation of such infringement is merely a pretext for achieving objectives which are entirely different from those pursued by the EU legislature, such as that of not having to perform a contract whose profitability has diminished for the applicant.

49 In those circumstances, in addition to the three questions set out in paragraph 39 of the present judgment, the Sąd Najwyższy (Supreme Court) referred the following questions specific to Case C-459/23 for a preliminary ruling:

‘(4) In the event that the above questions are answered to the effect that the referring court is a tribunal established by law within the meaning of the second paragraph of Article 19(1) TEU, must Article 3(3)(b) of Directive [2004/17], in conjunction with Article 20 and Article 1(2)(c) thereof, be interpreted as meaning that a public undertaking, as referred to in Article 2(1)(b) of the directive, carrying on [an] activity relating to the wholesale and retail sale of electricity, is obliged to acquire, through a public procurement procedure, green certificates, as referred to in [the second paragraph of] Article 2(k) to (l) of Directive [2009/28]?

(5) In the event that Question 4 is answered in the affirmative, must Article 14 of Directive 2004/17, in conjunction with Article 1(4) thereof, be interpreted as meaning that a framework agreement between such an undertaking and a renewable energy producer is to be concluded through a public procurement procedure where the estimated (albeit not specified in the agreement) total value of the green certificates acquired in performance of that agreement exceeds the threshold laid down in Article 16(a) of that directive, but the value of the individual transactions concluded in performance of the agreement does not exceed that threshold?

(6) In the event that … Questions 4 and 5 are answered in the affirmative, does the conclusion of a contract in complete disregard of the rules on public procurement constitute a case referred to in Article 2d(1)(a) of [Directive 92/13] or is it a different case of infringement of EU public procurement law which allows a contract to be declared null and void outside the procedure laid down in national law implementing [that] directive?

(7) In the event that Questions 4 to 6 are answered in the affirmative, must the general principle which prohibits any abuse of rights be interpreted as meaning that a contracting undertaking, as referred to in Article 2(1)(b) of Directive 2004/17, cannot seek cancellation of a contract which it concluded with a supplier in breach of national provisions implementing EU directives on public procurement where the actual reason for seeking cancellation of the contract is not compliance with EU law but a loss of profitability of performance thereof by the contracting authority?'

50 By decision of the President of the Court of 10 October 2023, Cases C-422/23, C-455/23, C-459/23, C-486/23 and C-493/23 were joined for the purposes of the written and oral phases of the proceedings and of the judgment.

Admissibility of the references for a preliminary ruling

51 It should be borne in mind that, according to settled case-law, the Court itself must examine the circumstances in which cases are referred to it by the national court in order to assess whether it has jurisdiction or whether the request submitted to it is admissible (judgment of 11 July 2024, *Hann-Invest and Others*, C-554/21, C-622/21 and C-727/21, EU:C:2024:594, paragraph 29 and the case-law cited).

52 Since the references for a preliminary ruling come from different judicial panels of the Civil Chamber, it is necessary to ascertain whether the referring body, which expresses doubts about its own independence, has the character of a 'court or tribunal' within the meaning of Article 267 TFEU.

53 In that regard, it is settled case-law that, in order to assess whether a referring body has the character of a 'court or tribunal' within the meaning of Article 267 TFEU, a question which arises solely under EU law, and, consequently, whether the reference for a preliminary ruling is admissible, the Court takes account of a number of factors, such as the legal origin of that body, its permanence, the compulsory nature of its jurisdiction, the adversarial nature of its procedure, the application by the body in question of the rules of law and its independence (see, to that effect, judgments of 30 June 1966, *Vaassen-Göbbels*, 61/65, EU:C:1966:39, p. 272; of 21 December 2023, *Krajowa Rada Sądownictwa (Continued holding of a judicial office)*, C-718/21, EU:C:2023:1015, paragraph 40 and the case-law cited; and of 7 May 2024, *NADA and Others*, C-115/22, EU:C:2024:384, paragraph 35).

54 The Court has already held that the Sąd Najwyższy (Supreme Court) as such meets the requirements set out above and specified that, in so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed that it meets those requirements, irrespective of its actual composition (judgments of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraphs 68 and 69, and of 21 December 2023, *Krajowa Rada Sądownictwa (Continued holding of a judicial office)*, C-718/21, EU:C:2023:1015, paragraph 41).

55 That presumption may, however, be rebutted where a final judgment given by a court of a Member State or an international court would lead to the conclusion that the court constituting the referring court does not have the status of an independent and impartial tribunal previously established by law within the meaning of the second subparagraph of Article 19(1) TEU, read in conjunction with the second paragraph of Article 47 of the Charter (judgments of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 72, and of 21 December 2023, *Krajowa Rada Sądownictwa (Continued holding of a judicial office)*, C-718/21, EU:C:2023:1015, paragraph 44).

56 Before a single-judge formation of the Civil Chamber, the Court of Justice held that, having regard to its own case-law relating to the second subparagraph of Article 19(1) TEU, read in conjunction with the second paragraph of Article 47 of the Charter, various findings and assessments made, first, by the European Court of Human Rights in the judgment of 3 February 2022, *Advance Pharma sp. z o.o. v. Poland* (CE:ECHR:2022:0203JUD00146920) and, secondly, by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) in a judgment of 6 May 2021, led to the conclusion that such a judicial panel did not, by virtue of the arrangements governing the appointment of the judge sitting on it, have the status of an independent and impartial tribunal, previously established by law, within the meaning of those provisions of EU law. Consequently, the presumption referred to in paragraph 54 of the present judgment had to be held to be rebutted (see, to that effect, judgment of 7 November 2024, *Prezes Urzędu Ochrony Konkurencji i Konsumentów*, C-326/23, EU:C:2024:940, paragraphs 29 to 37).

57 In the present cases, it is not apparent from any of the material before the Court that the judges constituting the panels making the references for a preliminary ruling were appointed to the Civil Chamber following a procedure identical to that followed for the appointment of the single judge making the reference for a preliminary ruling in the case which gave rise to the judgment of 7 November 2024, *Prezes Urzędu Ochrony Konkurencji i Konsumentów* (C-326/23, EU:C:2024:940). Nor does it follow from the case file that the appointments of those judges were at issue in the cases giving rise to the judgments of the European Court of Human Rights and the Naczelny Sąd Administracyjny (Supreme Administrative Court) referred to in the preceding paragraph.

58 In those circumstances, the referring court's doubts as to its own independence are not sufficient to rebut the presumption referred to in paragraph 54 of the present judgment.

The questions referred for a preliminary ruling

The questions in Cases C-422/23 and C-493/23 and the first and second questions in Cases C-455/23, C-459/23 and C-486/23

Admissibility

59 The European Commission considers that the first question in Cases C-422/23 and C-493/23 and the second question in Cases C-455/23, C-459/23 and C-486/23 are inadmissible. Those questions are not necessary for the resolution of the disputes in the main proceedings, since they do not concern either the decision of the First President of the Sąd Najwyższy (Supreme Court) to designate a judge to sit in another chamber of that court or the regularity of the procedure for appointing that First President and the President of the Civil Chamber to posts as judges.

60 In this instance, in the five cases in the main proceedings, the referring court must, as is apparent from the references for a preliminary ruling, determine *in limine litis* whether it constitutes an independent and impartial tribunal previously established by law within the meaning of the second subparagraph of Article 19(1) TEU, read in conjunction with the second paragraph of Article 47 of the Charter, given that several of the members of the panels of the Civil Chamber which gave rise to the references for a preliminary ruling were appointed to sit there temporarily and that they are unable to challenge their appointment to that Civil Chamber.

61 It follows from the Court's case-law that questions for a preliminary ruling which seek to enable a referring court to determine *in limine litis* procedural difficulties such as those relating to its own jurisdiction to hear a case pending before it or, alternatively, to the legal effects which should or should not be given to a judicial decision potentially precluding that court from continuing to examine such a case are admissible under Article 267 TFEU (judgments of 13 July 2023, *YP and Others (Lifting of a judge's immunity and his or her suspension from duties)*, C-615/20 and C-671/20, EU:C:2023:562, paragraph 47 and the case-law cited, and of 6 March 2025, *D.K. (Withdrawal of cases from a judge)*, C-647/21 and C-648/21, EU:C:2025:143, paragraph 53).

62 In those circumstances, the first question in Cases C-422/23 and C-493/23 and the second question in Cases C-455/23, C-459/23 and C-486/23 are admissible.

The substance

– *Preliminary remarks*

63 Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and the judicial protection that individuals derive from EU law to national courts and tribunals and to the Court of Justice (judgments of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 108, and of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraph 59).

64 In that regard, in accordance with the second subparagraph of Article 19(1) TEU, it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law. The principle of the effective judicial protection of individuals' rights under EU law is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR and which is now affirmed in Article 47 of the Charter. The latter provision must therefore be duly taken into account for the purposes of interpreting the second subparagraph of Article 19(1) TEU (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 102 and the case-law cited).

65 As to the scope *ratione materiae* of the second subparagraph of Article 19(1) TEU, that provision refers to 'the fields covered by Union law', irrespective of the situation in which the Member States implement that law, within the meaning of Article 51(1) of the Charter (see, to that effect, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 29, and of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraph 62).

66 The second subparagraph of Article 19(1) TEU is intended, inter alia, to apply to any national body which can rule, as a court or tribunal, on questions concerning the interpretation or application of EU law and which therefore fall within the fields covered by that law (judgments of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 34 and the case-law cited, and of 11 July 2024, *Hann-Invest and Others*, C-554/21, C-622/21 and C-727/21, EU:C:2024:594, paragraph 36).

67 That is the case with the referring court, which may be called upon to rule on questions relating to the application or interpretation of EU law and, as a 'court or tribunal' within the meaning of that law, is subject to the Polish system of legal remedies in the 'fields covered by Union law' within the meaning of the second subparagraph of Article 19(1) TEU, so that that court or tribunal must satisfy the requirements of effective judicial protection.

68 In addition, the national court also refers to Article 47 of the Charter in some of its references for a preliminary ruling. In that regard, it should be recalled that, in accordance with Article 51(1) thereof, the provisions of the Charter are addressed to the Member States when they are implementing EU law. That provision confirms settled case-law, which states that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations (judgments of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 78 and the case-law cited, and of 11 July 2024, *Hann-Invest and Others*, C-554/21, C-622/21 and C-727/21, EU:C:2024:594, paragraph 31).

69 In the present cases, the referring court has not provided any indication that the dispute in the main proceedings in Cases C-422/23, C-455/23, C-486/23 and C-493/23 concern the interpretation or application of a rule of EU law implemented at national level. In those circumstances, in the light of the evidence before the Court, Article 47 of the Charter does not appear to be applicable in those cases. Nevertheless, although not applicable to the dispute in the main proceedings, Article 47 of the Charter must be duly taken into consideration for the purpose of interpreting the second subparagraph of Article 19(1) TEU (judgments of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraphs 44 and 45, and of 25 February 2025, *Sąd Rejonowy w Białymstoku and Adoreikė*, C-146/23 and C-374/23, EU:C:2025:109, paragraph 43).

70 By contrast, it is apparent from the reference for a preliminary ruling in Case C-459/23 that, in the main proceedings, company E. alleges infringement of the EU rules governing the award of public contracts, in particular Directive 2004/17. By its questions specific to that case, the referring court asks the Court, in particular, to interpret the scope of that directive. Accordingly, it must be held that the dispute in the main proceedings in that case concerns the application of a rule of EU law implemented at national level, it being specified that it will be for the referring court to determine, in the light of the Court's answers to the questions in Case C-459/23, whether Directive 2004/17 is in fact applicable to the main proceedings, in which case Article 47 of the Charter would also be applicable.

71 In those circumstances, it is necessary to rule on the interpretation of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter.

– *The questions*

72 By its first and second questions in Cases C-422/23 and C-493/23 and by its first and second questions in Cases C-455/23, C-459/23 and C-486/23, the referring court seeks, in essence, to ascertain whether the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, must be interpreted as precluding measures taken by the president of a national court which consist in designating judges assigned to one chamber of that court to sit temporarily in another chamber of that court, while continuing to sit in their chamber of origin, even though those judges have not consented to that appointment, they have no judicial remedy to challenge it, that appointment entails an increase in the workload of the judges concerned and requires their involvement in matters outside their area of specialisation, and that president has been appointed to the same court under conditions which are incompatible with the requirements arising from the second subparagraph of Article 19(1) TEU.

73 In that regard, it should be borne in mind, in the first place, that every Member State must, by virtue of the second subparagraph of Article 19(1) TEU, ensure that the courts and tribunals which are called upon, as a 'court or tribunal' within the meaning of EU law, to rule on questions relating to the application or interpretation of EU law and which thus come within its judicial system in the fields covered by EU law, meet the requirements of effective judicial protection, including that of independence (judgments of 11 July 2024, *Hann-Invest and Others*, C-554/21, C-622/21 and C-727/21, EU:C:2024:594, paragraph 47 and the case-law cited, and of 6 March 2025, *D.K. (Withdrawal of cases from a judge)*, C-647/21 and C-648/21, EU:C:2025:143, paragraph 65).

74 That requirement of the independence of the courts, which is inherent in the task of passing judgment, forms part of the essential content of the right to effective judicial protection and of the fundamental right to a fair trial, which are of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (judgments of 11 July 2024, *Hann-Invest and Others*, C-554/21, C-622/21 and C-727/21, EU:C:2024:594, paragraph 49 and the case-law cited, and of 6 March 2025, *D.K. (Withdrawal of cases from a judge)*, C-647/21 and C-648/21, EU:C:2025:143, paragraph 66).

75 That requirement of independence has two aspects. The first aspect, which is external, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, being thus protected against external interventions or pressure liable to impair the independent judgement of its members and to influence their decisions. The second aspect, which is internal in nature, is linked to 'impartiality' and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgments of 11 July 2024, *Hann-Invest and Others*, C-554/21, C-622/21 and C-727/21, EU:C:2024:594, paragraphs 50 and 51 and the case-law cited, and of 6 March 2025, *D.K. (Withdrawal of cases from a judge)*, C-647/21 and C-648/21, EU:C:2025:143, paragraph 67).

76 While the 'external' component of independence is essentially aimed at preserving the independence of the courts from the legislative and executive powers in accordance with the principle of the separation of powers that characterises the functioning of a State governed by

the rule of law, it also seeks to protect judges from undue influence from within the court concerned (see, to that effect, judgments of 11 July 2024, *Hann-Invest and Others*, C-554/21, C-622/21 and C-727/21, EU:C:2024:594, paragraph 54 and the case-law cited, and of 6 March 2025, *D.K. (Withdrawal of cases from a judge)*, C-647/21 and C-648/21, EU:C:2025:143, paragraph 68).

77 It should also be emphasised that the exercise of the function of judge must be protected not only from any direct influence, in the form of instructions, but also from more indirect forms of influence capable of guiding judicial decisions (see, to that effect, judgments of 11 July 2024, *Hann-Invest and Others*, C-554/21, C-622/21 and C-727/21, EU:C:2024:594, paragraph 53 and the case-law cited, and of 14 November 2024, *S. (Modification of the formation of the court)*, C-197/23, EU:C:2024:956, paragraph 62 and the case-law cited).

78 Those guarantees of independence and impartiality require rules as regards, inter alia, the composition of the body concerned, in order to dispel 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 (judgments of 11 July 2024, *Hann-Invest and Others*, C-554/21, C-622/21 and C-727/21, EU:C:2024:594, paragraph 52, and of 6 March 2025, *D.K. (Withdrawal of cases from a judge)*, C-647/21 and C-648/21, EU:C:2025:143, paragraph 70).

79 In the second place, the second subparagraph of Article 19(1) TEU also requires the existence of a court or tribunal 'previously established by law', having regard to the inextricable links between access to such a court or tribunal and guarantees of the independence and impartiality of judges (see, to that effect, judgments of 11 July 2024, *Hann-Invest and Others*, C-554/21, C-622/21 and C-727/21, EU:C:2024:594, paragraph 55 and the case-law cited, and of 14 November 2024, *S. (Modification of the formation of the court)*, C-197/23, EU:C:2024:956, paragraph 63 and the case-law cited).

80 The concept of a 'tribunal previously established by law', which also appears in the second paragraph of Article 47 of the Charter and reflects in particular the principle of the rule of law, concerns not only the legal basis for the very existence of the court or tribunal, but also the composition of the judicial panel in each case and any other provision of domestic law, non-compliance with which renders the participation of one or more judges in the consideration of the case irregular. That concept thus encompasses the rules governing the assignment and reassignment of cases (see, to that effect, judgment of 6 March 2025, *D.K. (Withdrawal of cases from a judge)*, C-647/21 and C-648/21, EU:C:2025:143, paragraphs 73 and 74 and the case-law cited).

81 Consequently, the second subparagraph of Article 19(1) TEU also requires that the rules governing the composition of judicial panels are such as to preclude any undue interference in the decision-making process relating to a given case by persons from outside the judicial panel responsible for that case and before whom the parties have not been able to present their arguments (see, to that effect, judgments of 11 July 2024, *Hann-Invest and Others*, C-554/21, C-622/21 and C-727/21, EU:C:2024:594, paragraph 59, and of 6 March 2025, *D.K. (Withdrawal of cases from a judge)*, C-647/21 and C-648/21, EU:C:2025:143, paragraph 75).

82 In the present cases, the referring court questions whether measures by which the First President of the Sąd Najwyższy (Supreme Court) appointed judges from the Labour and Social Insurance Chamber to sit, for a fixed period of three months, in the Civil Chamber, while continuing to sit during that period in their original chamber, are compatible with the requirements referred to in paragraphs 73 to 81 of the present judgment.

83 In that regard, it should be noted, as a first step, that it is legitimate for the Member States to lay down, in their national law, the conditions in which the president of a court is empowered to take measures temporarily requiring judges of that court to be assigned to both their chamber of origin and another chamber of that court. Such measures may be essential for the purposes of the internal organisation of the work of a court, having regard to the imperatives connected with the need to ensure the proper administration of justice and compliance with the reasonable time principle.

84 With regard, as a second step, to the conditions in which such measures may be taken, in the first place, the referring court asks what effect it has that the First President of the Sąd Najwyższy (Supreme Court), who appointed the judges concerned to sit temporarily in the Civil Chamber, and, moreover, the President of that chamber, who assigned the cases concerning the disputes in the main proceedings to that formation, were appointed to the office of judge at that court under conditions which were incompatible with the second subparagraph of Article 19(1) TEU.

85 In that regard, it is true that, as the referring court points out, the Court held, in paragraphs 155 and 160 of its judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798), that a national court must, in accordance with the principle of the primacy of EU law, treat as void an order made by a body which does not constitute an independent and impartial tribunal previously established by law within the meaning of EU law.

86 It does not follow, however, that any measure of internal organisation of the work of a court, such as a measure consisting in designating judges to sit, temporarily, in a chamber other than that to which they are assigned or in assigning cases to them, must be held to be null and void where it has been taken by the president of that court or a president of a judicial panel, who do not constitute an independent and impartial tribunal previously established by law within the meaning of EU law. The case which gave rise to the case-law cited in the previous paragraph concerned, unlike the present cases, the existence of judicial decisions putting an end to proceedings.

87 It follows that the fact that the President of the Sąd Najwyższy (Supreme Court) and the President of the Civil Chamber who, respectively, appointed the judges concerned to sit in that chamber and assigned cases relating to the disputes in the main proceedings to the judicial panels, were, according to the findings of the referring court, appointed under conditions incompatible with the requirements of the second subparagraph of Article 19(1) TEU is not, in itself, sufficient to justify the conclusion that the judicial panels thus constituted and hearing those cases must also be regarded as not constituting an independent and impartial tribunal previously established by law within the meaning of EU law.

88 In the second place, in order to ensure the compatibility with the principles of independence and impartiality, and with the requirement of a tribunal previously established by law, of measures temporarily imposing on judges of a tribunal double assignment to their chamber of origin and to another chamber of that tribunal, care should be taken to ensure that such measures do not constitute a means of exercising control over the content of judicial decisions.

89 That could be the case if such measures were likely not only to affect the scope of the powers of the judges concerned and the handling of the cases entrusted to them on a lasting basis, but also to have significant consequences for their lives and careers in so far as, for example, they would entail a demotion of those judges or a deterioration in their professional situation. Similarly, such measures could be such as to give rise to legitimate doubts in the minds of litigants as to the independence and impartiality of those judges, if they fell within the purely discretionary power of the president of the national court and if they targeted certain judges by reason of the positions which they had taken in the past, in particular against recent reforms of the Polish judiciary, or if they were adopted in reaction to judicial decisions delivered by those judges (see, by analogy, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraphs 115 and 119).

90 By contrast, that is not the case with measures consisting in designating judges to sit in a chamber, which are based on legitimate reasons relating in particular to the proper administration of justice, which are taken on the basis of the national rules governing the court in question, which are temporary and strictly limited in time, without prejudice to their possible renewal, which do not call into question the assignment of the judges concerned to their chamber of origin and which do not entail any removal of those judges from the cases before them or any demotion of those judges. Such a conclusion is all the more necessary where such measures, which are purely organisational, concern a large number of judges of the national court concerned and have neither the object nor the effect of targeting certain judges by reason of positions which they may have taken in the past. The fact that such measures may entail, on a temporary basis, an increase, albeit a significant one, in the workload of the judges concerned and that they require them to deal with matters outside their area of specialisation is irrelevant in that regard.

91 In the present cases, it is apparent from the material before the Court that the measures at issue in the main proceedings correspond to those referred to in the preceding paragraph.

92 First, the measures by which the First President of the Sąd Najwyższy (Supreme Court) appointed judges from the Labour and Social Insurance Chamber to sit in the Civil Chamber for a specified period of three months were taken on the basis of Article 35(3) of the Law on the Supreme Court. That long-standing provision expressly sets a maximum period of six months per year for the application of such measures taken without the consent of the judges concerned. The second sentence of that provision does not appear to prohibit the retention of those judges in their chamber of origin.

93 The referring court points out, however, that Article 35(3) of the Law on the Supreme Court does not allow such an appointment to be made without the consent of the judge concerned, nor does it provide for the judge concerned to remain in his or her chamber of origin for that period. In that regard, it should be borne in mind that it is not for the Court to call into question the interpretation of national law made by the referring court. That being so, even supposing that the same provision did not authorise the appointments concerned, that circumstance alone would not be sufficient to call into question the compatibility of the judicial panels of the referring court with the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter.

94 Secondly, it is apparent from the material in the case file before the Court that, although no reasons were given, those measures appear to have been taken to deal with an increase in the number of cases before the Civil Chamber and to remedy a significant backlog in that chamber. They therefore pursue a legitimate aim, irrespective of the circumstances which caused that significant backlog.

95 Thirdly, the measures at issue in the main proceedings are temporary, the judges concerned being appointed to sit in the Civil Chamber for a period of three months, whereas Article 35(3) of the Law on the Supreme Court provides for a maximum period of six months per year. In that context, the possibility of an extension or renewal of those appointments, making the assignment to the Civil Chamber virtually permanent, is, in the light of the evidence before the Court, a hypothetical event.

96 Fourthly, according to the information available to the Court, those measures do not appear to have resulted in any demotion of the judges concerned or any deterioration in their professional situation, it being understood that those judges continue to deal with appeals on a point of law under the jurisdiction of the Sąd Najwyższy (Supreme Court). They did not entail any relinquishment by those judges of the cases previously under their jurisdiction, it being specified that those judges continue to sit in their original chambers throughout the period covered by those measures. As noted in paragraph 90 of the present judgment, the fact that those measures entail a temporary increase in the workload of the judges concerned or require them to deal with matters outside their area of specialisation is irrelevant in this context.

97 Fifthly, the measures at issue in the main proceedings concerned a total of around 20 judges. In the light of the evidence before the Court, those measures do not appear to have targeted specific judges, for example in so far as they criticised the reforms of the Polish judiciary.

98 In those circumstances, the fact that the measures at issue in the main proceedings were adopted without the consent of the judges concerned and that those judges have no legal remedy to challenge them cannot constitute a breach of the principles of independence and impartiality or of the requirement of a tribunal established in advance by law. In the absence of any indication that those measures might have effects analogous to a disciplinary sanction, such circumstances are not such as to give rise to legitimate doubts in the minds of litigants as to the independence and impartiality of those judges.

99 In addition, and in any event, it must be added that the regularity of the composition of the judicial panels making up the referring court under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, must, in accordance with the case-law of the Court, be capable of judicial review (see, by analogy, judgment of 14 November 2024, *S. (Modification of the formation of the court)*, C-197/23, EU:C:2024:956, paragraph 67). In this instance, the cases in the main proceedings illustrate precisely that national law allows the referring court to review the regularity of its own composition.

100 Having regard to all the foregoing reasons, the answer to the two questions in Cases C-422/23 and C-493/23 and to the first and second questions in Cases C-455/23, C-459/23 and C-486/23 is that the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, must be interpreted as meaning that it does not preclude measures taken by the president of a national court which consist in designating judges assigned to one chamber of that court to sit temporarily in another chamber of that court, while continuing to sit in their chamber of origin, even though those judges have not consented to that appointment, they have no judicial remedy to challenge it, that appointment entails an increase in the workload of the judges concerned and requires their involvement in matters outside their area of specialisation, and that president has been appointed to the same court under conditions which are incompatible with the requirements arising from the second subparagraph of Article 19(1) TEU, provided that such measures are based on legitimate reasons relating in particular to the proper administration of justice, they are taken on the basis of the national rules governing the court in question, they are

temporary and strictly limited in time, they do not call into question the assignment of the judges concerned to their chamber of origin and they do not result in any demotion or removal of those judges from the cases for which they are responsible.

The third question in Cases C-455/23, C-459/23 and C-486/23

101 The third question in Cases C-455/23, C-459/23 and C-486/23 is raised on the assumption that it follows, in essence, from the answer to the first and second questions in those cases that a court composed under conditions such as those of the referring court does not constitute an independent and impartial tribunal previously established by law within the meaning of the second subparagraph of Article 19(1) TEU. In view of the answer given to the latter questions, it is no longer necessary to rule on the third question raised in those cases.

The fourth question in Case C-459/23

102 By its fourth question in Case C-459/23, the referring court seeks, in essence, to ascertain whether Article 3(3)(b) of Directive 2004/17, read in conjunction with Article 20(1) of that directive, must be interpreted as meaning that the purchase, by a public electricity trading undertaking, of green certificates, within the meaning of points (k) and (l) of the second paragraph of Article 2 of Directive 2009/28, constitutes an activity pursued for the purpose of supplying electricity to fixed networks intended to provide a service to the public in the field of electricity production, transport or distribution.

103 As a preliminary point, it should first of all be noted that the applicable directive is, in principle, that in force at the time when the contracting authority chooses the type of procedure which it is going to follow and definitively settles the question whether or not there is an obligation to proceed to a prior call for competition for the award of a public contract (see, to that effect, judgments of 5 October 2000, *Commission* v *France*, C-337/98, EU:C:2000:543, paragraph 37; of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 31; and of 14 September 2017, *Casertana Costruzioni*, C-223/16, EU:C:2017:685, paragraph 21). In the present cases, as the contract at issue in the main proceedings was concluded in 2011, Directive 2004/17 is therefore applicable *ratione temporis*.

104 Next, it is important to emphasise that, in accordance with Article 2(2)(a) of that directive, the latter applies to contracting entities which are, inter alia, public undertakings engaged in one of the activities referred to in Articles 3 to 7 of that directive. In that regard, Article 2(1)(b) of Directive 2004/17 establishes a presumption that an undertaking in which the contracting authorities hold, directly or indirectly, the majority of the capital is a 'public undertaking' within the meaning of that provision.

105 In the present cases, it is clear from the findings of the referring court that company E. constitutes such a public undertaking, since more than 50% of its capital is held by the Polish State.

106 It therefore remains to be determined, as called for by the fourth question in Case C-459/23, whether that undertaking may be regarded as carrying on one of the activities referred to in Article 3(3) of Directive 2004/17.

107 In that regard, in the first place, it should be noted that, in accordance with Article 3(3)(b) of Directive 2004/17, that directive applies, as regards electricity, to the supply of electricity to fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity.

108 Neither that provision nor any other provision of Directive 2004/17 defines what is to be understood by the term 'supply of electricity' to those networks, which appears in that provision.

109 Accordingly, it is settled case-law that, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgments of 17 November 1983, *Merck*, 292/82, EU:C:1983:335, paragraph 12, and of 13 February 2025, *Latvijas Sabiedriskais Autobuss*, C-684/23, EU:C:2025:90, paragraph 48).

110 First, in its usual sense, the concept of 'supply' is understood as the action of feeding, supplying, providing or refuelling. Supplying electricity to networks therefore refers to the supply of electricity to them. To that end, the concept of 'supply of electricity' may cover not only the production of electricity, but also the wholesale or retail sale of electricity.

111 Secondly, it follows from recitals 2 and 3 of Directive 2004/17 that that directive lays down rules for the coordination of procedures for the award of contracts 'in [the] sectors' referred to in that directive, including the energy sector, and 'by entities operating in these sectors'. With those recitals, the EU legislature has thus clearly expressed its intention to cover, with regard to the electricity sector, not only the activities of production or supply of electricity, but also those of electricity trading.

112 Thirdly, that interpretation is also consistent with the objectives of EU procurement rules, namely to open up competition as widely as possible (see, to that effect, judgments of 23 December 2009, *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 37 and the case-law cited, and of 26 September 2024, *Luxone and Sofein*, C-403/23 and C-404/23, EU:C:2024:805, paragraph 50 and the case-law cited).

113 Fourthly, that interpretation is further corroborated by Directive 2014/25, which repealed Directive 2004/17 and by which, inter alia, the EU legislature clarified, in accordance with settled law, the concept of 'supply of electricity'. Thus, it follows from the first paragraph of Article 7 of Directive 2014/25, read in the light of recital 23 thereof, that, for the purposes of that directive, the concept of 'supply' includes generation, wholesale and retail. By inserting that definition into Directive 2014/25, while specifying, in recital 23, that it is provided 'without in any way extending the scope of [that] Directive', the EU legislature confirmed that Directive 2004/17 already included in the concept of 'supply of electricity', in addition to its generation, its wholesale or retail sale.

114 Consequently, an electricity trading activity, such as that carried on by company E., falls within an activity referred to in Article 3(3)(b) of Directive 2004/17. Company E. must therefore be regarded as a contracting entity within the meaning of Article 2(2)(a) of that directive.

115 That being so, in the second place, it should also be observed that Article 20(1) of Directive 2004/17 provides that that directive does not apply to contracts awarded by contracting entities for purposes other than the pursuit of their activities in the sectors referred to in Articles 3 to 7 of that directive.

116 The only contracts falling within the scope of Directive 2004/17 are those which a contracting entity, within the meaning of that directive, awards in connection with and for the pursuit of activities in the sectors listed in Articles 3 to 7 of that directive (judgment of 10 April 2008, *Ing. Aigner*, C-393/06, EU:C:2008:213, paragraph 33).

117 In the present cases, it is apparent from the evidence before the Court that company E. is required to purchase green certificates, within the meaning of points (k) and (l) of the second paragraph of Article 2 of Directive 2009/28, in order to comply with its legal obligation to promote renewable energy sources. It follows that the purchase of those certificates is closely linked to the pursuit by that company of the activity of electricity trading, which constitutes an activity referred to in Article 3(3)(b) of Directive 2004/17.

118 Where there is such a close link, the purchase of green certificates must be regarded as having been made for the purpose of pursuing that activity, so that it cannot be regarded as having been made 'for purposes other than' the pursuit of that activity, within the meaning of Article 20(1) of Directive 2004/17.

119 Having regard to all the foregoing reasons, the answer to the fourth question in Case C-459/23 is that Article 3(3)(b) of Directive 2004/17, read in conjunction with Article 20(1) of that directive, must be interpreted as meaning that the purchase, by a public electricity trading undertaking, of green certificates, within the meaning of points (k) and (l) of the second paragraph of Article 2 of Directive 2009/28, constitutes an activity pursued for the purpose of supplying electricity to fixed networks intended to provide a service to the public in the field of electricity production, transport or distribution.

The fifth question in Case C-459/23

Admissibility

120 Company E. considers that the fifth question in Case C-459/23 is not relevant to the resolution of the dispute in the main proceedings. First of all, before the referring court, it submitted that the contract at issue in the main proceedings is absolutely null and void because its purpose is to require the parties to conclude contracts in disregard of the rules governing public contracts. By contrast, it did not allege that, as such, that contract should have been concluded in accordance with the procedures for the award of public contracts. Next, that contract was not a framework agreement within the meaning of Article 1(4) of Directive 2004/17, since it absolutely obliged the contracting entity to award the contract to the co-contracting economic operator. Finally, it follows from Article 14(2) and (3) of that directive that the conclusion of a framework agreement in accordance with the procedure laid down for public contracts is not mandatory.

121 In that regard, it should be noted that, according to settled case-law, Article 267 TFEU establishes a procedure for direct cooperation between the Court of Justice and the courts of the Member States. Under that procedure, which is based on a clear separation of functions between the national courts and the Court, any assessment of the facts of the case falls within the jurisdiction of the national court, which is responsible for assessing, in the light of the particular features of the case, the need for a preliminary ruling in order to be able to give judgment and the relevance of the questions which it puts to the Court, whilst the Court is empowered to give rulings on the interpretation or the validity of an EU provision only on the basis of the facts which the national

court puts before it (see, to that effect, judgments of 16 March 1978, *Oehlschläger*, 104/77, EU:C:1978:69, paragraph 4, and of 4 October 2024, *Schrems (Disclosure of data to the general public)*, C-446/21, EU:C:2024:834, paragraph 42 and the case-law cited).

122 First, by its arguments challenging the admissibility of the fifth question in Case C-459/23, company E. is ultimately seeking to call into question the way in which the referring court presented the arguments put before it and its assessment of the nature of the contract at issue in the main proceedings. In accordance with the case-law cited in the preceding paragraph, such arguments cannot lead to the conclusion that a question referred for a preliminary ruling is inadmissible.

123 Secondly, by addressing the definition of the concept of 'framework agreement' and arguing that a framework agreement does not necessarily have to be concluded in compliance with the rules on the award of public contracts, company E. is addressing the substantive answer and not the admissibility of that question.

124 The fifth question in Case C-459/23 is therefore admissible.

The substance

125 By its fifth question in Case C-459/23, the referring court seeks, in essence, to ascertain whether Article 1(4) of Directive 2004/17, read in conjunction with Article 14 and Article 17(2) of that directive, must be interpreted as meaning that a contract, which obliges the parties to conclude performance contracts subject to certain price and quantity conditions, falls within the concept of a 'framework agreement' within the meaning of Article 1(4) of that directive and must be concluded in accordance with the rules on the award of public contracts.

126 In the first place, under Article 1(4) of Directive 2004/17, a framework agreement is an agreement between one or more contracting entities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged.

127 First, it follows from the very wording of that provision that the framework agreement must specify the period during which it is applicable and govern the terms of the contracts to be awarded.

128 Secondly, having regard to the case-law of the Court, the concept of 'framework agreement' in Article 1(4) of Directive 2004/17 must be interpreted in the light, in particular, of Article 17(2) and (3) of that directive, the fundamental principles of EU law, such as equal treatment and transparency, applicable when a framework agreement is concluded, as follows from Article 14(1) of that directive, and from the prohibition, laid down in Article 14(4) of that directive, on the misuse of framework agreements in order to hinder, limit or distort competition. It follows from an overall reading of those provisions and principles that the framework agreement must, from the outset, determine the maximum volume of supplies which may be the subject of subsequent contracts by specifying their maximum quantity and/or value (see, by analogy, judgments of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice*, C-216/17, EU:C:2018:1034, paragraphs 60, 62 to 67 and 69, and of 17 June 2021, *Simonsen & Weel*, C-23/20, EU:C:2021:490, paragraphs 54 to 58, 61 to 65, 67, 68 and 74).

129 It will be for the referring court to ascertain whether those conditions are met in relation to the contract at issue in the main proceedings. In that regard, first, it must ascertain whether that contract defined the period during which the green certificate purchase contracts could be taken out in performance of that contract. Secondly, it should be pointed out that the mere indication of a price formula applicable for the purposes of calculating the sale price of the green certificates and the obligation on the part of the contracting entity to purchase all of the green certificates obtained, without specifying a specific quantity, are not sufficient to consider that that contract determines the maximum volume of supplies which may be the subject of subsequent contracts.

130 In the second place, and without prejudice to the foregoing, it should be borne in mind that, in accordance with Article 16(a) of Directive 2004/17, that directive applies, subject to the exclusions referred to in that provision, to supply and service contracts the estimated value of which, net of VAT, is equal to or greater than EUR 387 000.

131 As regards the methods for calculating the estimated value of contracts and framework agreements, it follows from the first sentence of the first subparagraph of Article 17(1) of Directive 2004/17 that the calculation of the estimated value of a contract is to be based on the total amount payable, net of VAT, as estimated by the contracting entity. In accordance with Article 17(2) of that directive, contracting entities may not circumvent that directive by splitting works projects or proposed purchases of a certain quantity of supplies and/or services or by using special methods for calculating the estimated value of contracts. Under Article 17(3) of that directive, with regard to framework agreements, the estimated value to be taken into consideration is to be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the agreement. Finally, pursuant to Article 17(7) of Directive 2004/17, in the case of supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value is to be based either on the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year, or on the total estimated value of the successive contracts awarded during the 12 months following the first delivery or during the financial year if that is longer than 12 months.

132 It follows from those provisions that, both in the case of a framework agreement, as referred to in Article 17(3) of Directive 2004/17, and in the case of a supply or service contract which is regular in nature or intended to be renewed during a given period, as referred to in Article 17(7) of that directive, it is the ‘estimated value’ of the framework agreement or contract which is taken into account. That value is, in the first case, the total estimated value of the framework agreement and, in the second case, the estimated value, in accordance with the alternative procedure set out in that provision, for a period of 12 months.

133 In the present cases, the referring court states that the value of each of the monthly performance contracts concluded on the basis of the contract at issue in the main proceedings remains below the threshold of EUR 387 000 laid down in Article 16(a) of Directive 2004/17. By contrast, the annual value of the performance contracts taken together exceed that threshold.

134 It follows from the foregoing that, in such a case, the contracting entity cannot rely on the unit value of each of the contracts for the performance of the contract concerned in order to conclude those contracts without a prior call for competition. To do so would be contrary to the prohibition, laid down in Article 17(2) of Directive 2004/17, on circumventing that directive by splitting projects.

135 In order to comply with that prohibition and with the prohibition, laid down in Article 14(4) of Directive 2004/17, on misuse of framework agreements in order to hinder, limit or distort competition, the contracting entity has, in such a case, a choice between two possibilities.

136 The first possibility is to award successive contracts in accordance with the procedures laid down in that directive for each of those contracts.

137 The second possibility consists in the award, in accordance with Directive 2004/17, of a framework agreement, within the meaning of and in compliance with the conditions set out in Article 1(4) of that directive and noted in paragraphs 126 to 128 of the present judgment. In accordance with Article 40(3)(i) of Directive 2004/17, read in conjunction with Article 14(2) of that directive, that then allows the contracting entity to use a procedure without a prior call for competition for subsequent contracts (see, to that effect, judgment of 23 April 2009, *Commission* v *Belgium*, C-287/07, EU:C:2009:245, paragraph 104).

138 It follows from the foregoing that, in a case such as that of the dispute in the main proceedings, the contracting entity had to comply with the rules governing the award of public contracts either at the time of conclusion of each of the successive performance contracts or at the time of conclusion of the contract concerned as a framework agreement in compliance with the conditions set out in paragraphs 126 to 128 of the present judgment.

139 Having regard to all the foregoing reasons, the answer to the fifth question in Case C-459/23 is that Article 1(4) of Directive 2004/17, read in conjunction with Article 14 and Article 17(2) of that directive, must be interpreted as meaning that:

– in order to fall within the concept of a ‘framework agreement’ within the meaning of Article 1(4) of that directive, a contract which obliges the parties to conclude performance contracts under certain price and quantity conditions must indicate the period during which it is applicable and determine the maximum volume of supplies which may be the subject of subsequent contracts by specifying their maximum quantity and/or value, it being specified that the mere indication of a price formula applicable for the purposes of calculating the value of the contracts to be concluded and of a non-quantified obligation to conclude performance contracts is not sufficient for that purpose;

– where the estimated value of the contracts to be concluded during a given period under a framework agreement or in the context of contracts which are regular in nature or which are intended to be renewed, as calculated on the basis of Article 17(3) and (5) respectively of Directive 2004/17, exceeds the threshold laid down in Article 16(a) of that directive, the contracting entity must either award each of the successive contracts in accordance with the procedures laid down in that directive, or award, in accordance with the latter, a framework agreement, within the meaning of and in compliance with the conditions set out in Article 1(4) of that directive.

The sixth question in Case C-459/23

Admissibility

140 Company E. considers that the sixth question in Case C-459/23 is inadmissible on the ground that it is irrelevant to the dispute in the main proceedings. Contrary to the premiss on which that question is based, the contract at issue in the main proceedings is not a contract but a contract requiring the award of a contract. It could not therefore be concluded in disregard of the rules on the award of public contracts.

141 In the light of the case-law cited in paragraph 121 of the present judgment and for the reason set out in paragraph 122 above, that objection must be rejected. The sixth question in Case C-459/23 is therefore admissible.

The substance

142 By its sixth question in Case C-459/23, the referring court seeks, in essence, to ascertain whether Article 2d(1)(a) of Directive 92/13 must be interpreted as meaning that the conclusion of a contract in disregard of the rules on the award of public contracts is subject to the penalty provided for in that provision.

143 Article 2d(1) of Directive 92/13 provides that the absence of prior publication of a contract notice in the *Official Journal of the European Union*, without this being permissible under the provisions of Directive 2004/17, renders the contract concerned ineffective.

144 Article 2d of Directive 92/13 was inserted into the initial version of that directive by Directive 2007/66. The EU legislature clarified the amendments made by stating, in recital 13 of Directive 2007/66, that, in order to combat the illegal award of direct agreement contracts, which the Court of Justice, in its judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraphs 36 and 37), referred to as the most serious infringement of EU law in the field of public procurement by a contracting authority or entity, it was appropriate to provide for an effective, proportionate and dissuasive sanction and to consider on that basis that a contract resulting from an unlawful direct agreement should in principle be ineffective. In recital 14 of Directive 2007/66, it stated that ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete and that direct contracts, within the meaning of Directive 2007/66, should include all contract awards made without prior publication of a contract notice in the *Official Journal of the European Union*, which corresponds to a procedure without a call for competition within the meaning of Directive 2004/17 (see, by analogy, judgment of 17 June 2021, *Simonsen & Weel*, C-23/20, EU:C:2021:490, paragraph 85).

145 It thus follows from Article 2d(1)(a) of Directive 92/13, read in the light of recitals 13 and 14 of Directive 2007/66, that, when Directive 2007/66 was adopted, the EU legislature intended to introduce into the applicable law a severe penalty, the application of which should, however, be confined to the most serious cases of infringement of EU law on public contracts, namely those in which a contract is awarded directly without having been the subject of any prior publication of a contract notice in the *Official Journal of the European Union* (see, by analogy, judgment of 17 June 2021, *Simonsen & Weel*, C-23/20, EU:C:2021:490, paragraph 86).

146 It follows that Article 2d(1)(a) of Directive 92/13 applies to any situation in which the contracting entity has improperly awarded a contract without having first published a notice in the *Official Journal of the European Union*.

147 Admittedly, in accordance with the first subparagraph of Article 2d(2) of Directive 92/13, the consequences of a contract being considered ineffective are to be provided for by national law. The fact remains that that provision in no way envisages the maintenance or continuity of a contract awarded without adequate prior advertising.

148 Having regard to all the foregoing reasons, the answer to the sixth question in Case C-459/23 is that Article 2d(1)(a) of Directive 92/13 must be interpreted as meaning that the conclusion of a contract in disregard of the rules on the award of public contracts is subject to the penalty provided for in that provision.

The seventh question in Case C-459/23

Admissibility

149 Company E. argues that the seventh question in Case C-459/23 is irrelevant to the dispute in the main proceedings. First, it reiterates the reason already set out in paragraph 140 of the present judgment. Secondly, abuse of rights could be established only where a party seeks a declaration that the contract in question is relatively null and void. Before the referring court, company E. seeks a declaration that the contract at issue in the main proceedings is absolutely null and void, that is to say, a declaration of its non-existence.

150 That argument must be rejected in accordance with the case-law referred to in paragraph 121 of the present judgment and for the reasons set out in paragraphs 122 and 123 thereof. The seventh question in Case C-459/23 is therefore admissible.

The substance

151 By its seventh question in Case C-459/23, the referring court seeks, in essence, to ascertain whether the principle of the prohibition of abuse of rights must be interpreted as precluding a contracting entity from seeking the annulment of a contract which it has concluded with a supplier on the ground that that contract was concluded in breach of the rules on the award of public contracts, even though the real reason for that claim is a reduction in the profitability of the performance of that contract.

152 In accordance with the Court's case-law, individuals cannot fraudulently or improperly rely on EU rules, since the principle of the prohibition of fraud and abuse of rights constitutes a general principle of EU law with which individuals must comply. The application of EU rules cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law (judgments of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraphs 48 and 49 and the case-law cited, and of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99).

153 A finding of an abusive practice requires a combination of objective and subjective elements (judgments of 13 March 2014, *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 31, and of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraph 38).

154 First, with regard to the objective element, such a finding requires that it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the purpose of those rules has not been achieved (judgments of 14 December 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraph 52, and of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraph 39).

155 Secondly, such a finding requires a subjective element, namely that it must be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain an undue advantage. The prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of an advantage (judgments of 14 December 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraph 53, and of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraph 40).

156 It is for the referring court to determine, in accordance with the rules of evidence under national law, provided the effectiveness of EU law is not undermined, whether the factors constituting an abusive practice are present in the case before it (see, to that effect, judgments of 14 December 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraph 54 and the case-law cited, and of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraph 42).

157 In order to provide the referring court with a useful response, it is nevertheless important to clarify that, in the event that a contract is awarded without a prior call for competition, in breach of the requirements of Directive 2004/17, the objective element is lacking. In such a case, it cannot be held that the conditions laid down by the EU rules have been formally complied with.

158 Consequently, since the conditions relating to the existence of an objective element and a subjective element are cumulative, abuse cannot be characterised in the case referred to in paragraph 151 of the present judgment, which is the subject of the seventh question in Case C-459/23.

159 Having regard to all the foregoing reasons, the answer to the seventh question in Case C-459/23 is that the principle of the prohibition of abuse of rights must be interpreted as meaning that it does not preclude a contracting entity from seeking the annulment of a contract which it has concluded with a supplier on the ground that that contract was concluded in breach of the rules on the award of public contracts, even though the real reason for that claim is a reduction in the profitability of the performance of that contract.

Costs

160 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds the Court (Second Chamber) hereby rules:

1. **The second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union,**

   must be interpreted as meaning that it does not preclude measures taken by the president of a national court which consist in designating judges assigned to one chamber of that court to sit temporarily in another chamber of that court, while continuing to sit in their chamber of origin, even though those judges have not consented to that appointment, they have no judicial remedy to challenge it, that appointment entails an increase in the workload of the judges concerned and requires their involvement in matters outside their area of specialisation, and that president has been appointed to the same court under conditions which are incompatible with the requirements arising from the second subparagraph of Article 19(1) TEU, provided that such measures are based on legitimate reasons relating in particular to the proper administration of justice, they are taken on the basis of the national rules governing the court in question, they are temporary and strictly limited in time, they do not call into question the assignment of the judges concerned to their chamber of origin and they do not result in any demotion or removal of those judges from the cases for which they are responsible.

2. **Article 3(3)(b) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009, read in conjunction with Article 20(1) of Directive 2004/17, as amended,**

   must be interpreted as meaning that the purchase, by a public electricity trading undertaking, of green certificates, within the meaning of points (k) and (l) of the second paragraph of Article 2 of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009, on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, constitutes an activity pursued for the purpose of supplying electricity to fixed networks intended to provide a service to the public in the field of electricity production, transport or distribution.

3. **Article 1(4) of Directive 2004/17, as amended by Regulation No 1177/2009, read in conjunction with Article 14 and Article 17(2) of Directive 2004/17, as amended,**

   must be interpreted as meaning that:

   – **in order to fall within the concept of a 'framework agreement' within the meaning of Article 1(4) of Directive 2004/17, as amended, a contract which obliges the parties to conclude performance contracts under certain price and quantity conditions must indicate the period during which it is applicable and determine the maximum volume of supplies which may be the subject of subsequent contracts by specifying their maximum quantity and/or value, it being specified that the mere indication of a price formula applicable for the purposes of calculating the value of the contracts to be concluded and of a non-quantified obligation to conclude performance contracts is not sufficient for that purpose;**

– **where the estimated value of the contracts to be concluded during a given period under a framework agreement or in the context of contracts which are regular in nature or which are intended to be renewed, as calculated on the basis of Article 17(3) and (5) respectively of Directive 2004/17, as amended, exceeds the threshold laid down in Article 16(a) of Directive 2004/17, as amended, the contracting entity must either award each of the successive contracts in accordance with the procedures laid down in Directive 2004/17, as amended, or award, in accordance with the latter, a framework agreement, within the meaning of and in compliance with the conditions set out in Article 1(4) of Directive 2004/17, as amended.**

4. **Article 2d(1)(a) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007,**

   must be interpreted as meaning that the conclusion of a contract in disregard of the rules on the award of public contracts is subject to the penalty provided for in that provision.

5. **The principle of the prohibition of abuse of rights**

   must be interpreted as meaning that it does not preclude a contracting entity from seeking the annulment of a contract which it has concluded with a supplier on the ground that that contract was concluded in breach of the rules on the award of public contracts, even though the real reason for that claim is a reduction in the profitability of the performance of that contract.

[Signatures]