Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 24 February 2022 [1]

Case C-110/21 P

Universität Bremen
v

European Research Executive Agency (REA)

(Appeal – Article 19 of the Statute of the Court of Justice of the European Union – Representation of non-privileged applicants in direct actions – Connections between the legal representative and the represented party which have a manifestly detrimental effect on the representative's capacity to represent that party before the Courts of the European Union – Representation by a university teacher – University teacher at the applicant university who has been involved in the matter which is the subject of litigation – Possibility of remedying a defect in legal representation – Right of access to a court – Limitations)

I. Introduction

1. The Universität Bremen (University of Bremen, Bremen, Germany) has sought, before the General Court, the annulment of a decision whereby the European Research Executive Agency (REA) rejected its application for the funding of a project. The General Court dismissed its action as inadmissible, having found that that university's legal representative, a professor at the University of Bremen with specific responsibilities regarding the implementation of the project in question, did not satisfy the duty of independence required of legal representatives of non-privileged applicants. [2]

2. In the present appeal, the University of Bremen seeks the annulment of the General Court's decision, claiming that that court erred in law in applying the duty of independence to its legal representative and, in any event, in not permitting the appellant to appoint a different representative.

3. The issue of independence of legal representatives in proceedings before the Court of Justice or the General Court is not new. The duty of independence has been developed in the case-law of the Courts of the European Union as applicable to *lawyers* acting before them. In this context, the

[1] Original language: English.

[2] Order of 16 December 2020, *Universität Bremen* v *REA* (T-660/19, not published, EU:T:2020:633) ('the order under appeal').

Court of Justice has recently specified, in essence, that the lawyer's duty of independence requires the absence of connections with the represented party which have a *manifestly detrimental effect* on the lawyer's capacity to act in the applicant's best interests. [3]

4. In the order under appeal, the General Court has applied the duty of independence to a *university teacher*. On a narrow reading, the present case relates to the question whether a university teacher may represent his or her university before the Courts of the European Union, and in particular, while he or she was involved as a coordinator and the head of the scientific project that the REA rejected. From a broader perspective, the present case invites the Court to clarify, once more, the constraints attached to the mandatory legal representation of non-privileged applicants before the Courts of the European Union.

II. Legal framework

5. Article 19 of the Statute of the Court of Justice of the European Union ('the Statute') provides as follows:

'The Member States and the institutions of the Union shall be represented before the Court of Justice by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer.

…

Other parties must be represented by a lawyer.

Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.

…

As regards such advisers and lawyers who appear before it, the Court shall have the powers normally accorded to courts of law, under conditions laid down in the Rules of Procedure.

University teachers being nationals of a Member State whose law accords them a right of audience shall have the same rights before the Court as are accorded by this Article to lawyers.'

6. According to the second paragraph of Article 21 of the Statute 'the application shall be accompanied, where appropriate, by the measure the annulment of which is sought or, in the circumstances referred to in Article 265 of the Treaty on the Functioning of the European Union, by documentary evidence of the date on which an institution was, in accordance with those Articles, requested to act. If the documents are not submitted with the application, the Registrar shall ask the party concerned to produce them within a reasonable period, but in that event the rights of the party shall not lapse even if such documents are produced after the time limit for bringing proceedings'.

7. Pursuant to Article 53 of the Statute, 'the procedure before the General Court shall be governed by Title III …'. That title includes Article 19 of the Statute.

[3] Judgment of 4 February 2020, *Uniwersytet Wrocławski and Poland* v *REA* (C-515/17 P and C-561/17 P, EU:C:2020:73, paragraph 64) ('*Uniwersytet Wrocławski*').

8. Article 51 of the Rules of Procedure of the General Court concerns the 'Obligation to be represented' and reads as follows:

'1. A party must be represented by an agent or a lawyer in accordance with the provisions of Article 19 of the Statute.

2. The lawyer representing or assisting a party must lodge at the Registry a certificate that he is authorised to practise before a court of a Member State or of another State which is a party to the EEA Agreement.

3. Where the party represented by the lawyer is a legal person governed by private law, the lawyer must lodge at the Registry an authority to act given by that person.

4. If the documents referred to in paragraphs 2 and 3 are not lodged, the Registrar shall prescribe a reasonable time limit within which the party concerned is to produce them. If the party concerned fails to produce the required documents within the time limit prescribed, the General Court shall decide whether the non-compliance with that procedural requirement renders the application or written pleadings formally inadmissible.'

9. Section 2 of Chapter 1 of Title III of the Rules of Procedure of the General Court deals with the 'Rights and obligations of parties' representatives'. That section contains Articles 52 to 56.

10. Article 55 of those Rules of Procedure concerns 'Exclusion from the proceedings'. It reads as follows:

'1. If the General Court considers that the conduct of an agent, adviser or lawyer before the General Court, the President, a Judge or the Registrar is incompatible with the dignity of the General Court or with the requirements of the proper administration of justice, or that such agent, adviser or lawyer is using his rights for purposes other than those for which they were granted, it shall inform the person concerned. The General Court may inform the competent authorities to whom the person concerned is answerable. A copy of the letter sent to those authorities shall be forwarded to the person concerned.

2. On the same grounds, the General Court may at any time, having heard the person concerned, decide to exclude an agent, adviser or lawyer from the proceedings by reasoned order. That order shall have immediate effect.

3. Where an agent, adviser or lawyer is excluded from the proceedings, the proceedings shall be suspended for a period fixed by the President in order to allow the party concerned to appoint another agent, adviser or lawyer.

4. Decisions taken under this Article may be rescinded.'

11. Article 56 of the General Court's Rules of Procedure makes Section 2 of Chapter 1 of Title III of those rules applicable to 'the university teachers referred to in the seventh paragraph of Article 19 of the Statute'.

III. The order under appeal

12. On 25 September 2019, the University of Bremen brought an action before the General Court seeking the annulment of the decision Ares(2019) 4590599 of the REA of 16 July 2019, to reject the proposal that that university had presented in response to the call for proposals H2020-SC6-Governance-2019 ('the contested decision').

13. The REA raised a plea of inadmissibility, stating, in essence, that the appellant's legal representative was not an independent third party given that he was employed at the University of Bremen as a professor. In the REA's view, there was a clear lack of detachment from the dispute since that representative had prepared and presented the application for the funding at issue, was going to coordinate and head the project in question, and was also going to be entrusted with essential tasks in that context.

14. The University of Bremen submitted that its legal representative had no personal economic interest in the matter and that no relationship of subordination existed between him and the university. The appellant also explained that the legal representation undertaken by its legal representative was carried out by the latter as an ancillary activity. Furthermore, according to the University of Bremen, there was nothing to suggest that the connection between the university and its legal representative had a manifestly detrimental effect on the latter's capacity to represent it. The fact that the legal representative was the coordinator of the project in question simply revealed that he had the same scientific interest in the project as the appellant. The University of Bremen submits that, even if its legal representative were not permitted to represent it, a finding of inadmissibility of its action as a direct consequence was incompatible with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

15. By application of Article 126 of its Rules of Procedure, the General Court upheld the plea of inadmissibility raised by the REA, and dismissed the action as manifestly inadmissible for failure to comply with the third and fourth paragraphs of Article 19 of the Statute as well as with Article 51(1) of its Rules of Procedure. It also ordered the University of Bremen to bear its own costs and to pay those incurred by the REA.

16. In the order under appeal, the General Court recalled the case- law related to the conditions under which lawyers may represent non-privileged parties before the Courts of the European Union. By reference to that case-law, it referred to the duty of independence, implied in the autonomous concept of 'lawyer' within the meaning of the third paragraph of Article 19 of the Statute, that duty being determined not only positively (by reference to professional ethical obligations), but also negatively (by the absence of an employment relationship). It also reiterated the various scenarios in which the representation of a legal person before those courts has been found to be inadmissible due to extensive administrative and financial powers exercised by the legal representative within the represented party.[4]

17. *In casu*, the General Court noted that besides being employed by the appellant, on the basis of a public-law statutory relationship, the University of Bremen's legal representative prepared and presented the application for the funding at issue, was the coordinator and the head of the related project, and was entrusted with essential tasks in that context. The General Court concluded therefrom that he had a close personal link with the case, and a direct interest in its outcome, thus compromising his capacity to provide the legal assistance required by the client, in full

[4] Order under appeal, paragraphs 18 to 24.

independence and in the overriding interests of justice.[5] The General Court added that the extensive powers exercised by the legal representative at the University of Bremen compromised his status as an independent third party and constituted a link which had a manifestly detrimental effect on that representative's capacity to represent the applicant.[6]

18. As regards the argument that the University of Bremen should have been given an opportunity to rectify the defect in its legal representation, the General Court stated that such a defect is not amongst those that may be remedied.[7]

IV. The proceedings before the Court

19. In the present appeal, the University of Bremen asks the Court of Justice to annul the order under appeal, to remit the case back to the General Court for a decision on the merits, to find that the legal representation by the university teacher at issue is valid and, on a subsidiary basis, to conclude that the University of Bremen is entitled to pursue the proceedings with a lawyer satisfying the conditions of the third and fourth paragraphs of Article 19 of the Statute. Furthermore, the appellant requests that the Court of Justice reserve the decision on the costs and argues, in essence, that it should not have to bear the costs, or at least the REA's costs, incurred up to the present stage of the proceedings. Moreover, it submits that the amount paid by the appellant to the REA in relation to the proceedings before the General Court should be reimbursed to it. The University of Bremen also invites the Court of Justice to help in finding a settlement between both parties.

20. In its reply, the REA asks the Court of Justice to dismiss the appeal and to order the University of Bremen to pay the costs both in the proceedings related to the present appeal and the proceedings before the General Court.

21. In its appeal, the University of Bremen relies on two grounds, based respectively, on the one hand, on the breach of Article 19 of the Statute and, on the other hand, on the breach of Article 47 of the Charter, as well as of Article 6(1) of the European Convention on Human Rights (ECHR).

22. By its first ground of appeal, the University of Bremen states that the General Court misinterpreted Article 19 of the Statute. That ground raises three main pleas which can be summarised as follows.

23. First, the appellant submits, in essence, that because it is a public university, it constitutes an emanation of a Member State which is a privileged applicant pursuant to the first paragraph of Article 19 of the Statute. The appellant adds that as a public university, the representation by one of its teachers who is familiar with the subject matter of the dispute constitutes an advantage.

24. Second, the appellant argues essentially that university teachers are not subject to the duty of independence implied in the autonomous concept of 'lawyer' within the meaning of the third paragraph of Article 19 of the Statute. This is because university teachers display *de lege* the necessary guarantees otherwise required of lawyers. Legal representation is not among the obligatory tasks performed by them and they do not depend financially on it. Thus, such

5 Order under appeal, paragraph 25.

6 Order under appeal, paragraph 26.

7 Order under appeal, paragraph 40.

representation constitutes an ancillary activity and, as a result, it is far less likely that a conflict of interest will arise. At the same time, the appellant argues that, pursuant to the seventh paragraph of Article 19 of the Statute, their capacity to represent is to be assessed solely in the light of national law, including the issue of conflicts of interest. By reference to Paragraph 67 of the Verwaltungsgerichtsordnung (German Code of Administrative Court Procedure), the appellant alleges that its legal representative was authorised to represent it since he was not precluded by any serious conflict of interest, which, in any event, can affect only his professional liability but not his capacity to represent it or the admissibility of the action.

25. Finally, should the Court conclude that the duty of independence applies to the university teacher at issue, the appellant submits that the Court should allow him to represent the University of Bremen on an exceptional basis. It argues that it is entitled to rely on its legitimate expectations in view of the clear wording of the seventh paragraph of Article 19 of the Statute which makes the application of the duty of independence to university teachers very unexpected.

26. In response, the REA states that the fact that the University of Bremen makes up part of the Land of Bremen does not mean that it should be equated to the Federal Republic of Germany, as the case-law of the Court of Justice precludes considering regions as privileged applicants.

27. The REA further alleges that university teachers do not enjoy a privileged position in comparison to lawyers. The arguments of the University of Bremen fail to take into account the fact that under the first and second paragraphs of Article 19 of the Statute, only privileged applicants can be represented by their own employees or officials.

28. The REA submits in that context that the case-law developed under the third paragraph of Article 19 of the Statute applies to university teachers who, when acting before the Courts of the European Union, are in the same situation as lawyers. Compliance with national law is thus not a sufficient condition to conclude that a university teacher may represent a party before those courts, because a university teacher, like a lawyer, must also be independent. Furthermore, the fact that the university teacher at issue is not financially dependent on the legal representation is irrelevant because the General Court concluded that he is personally involved in the project.

29. Moreover, the arguments raised to show that the legal representative at issue has the capacity to act under German law are, according to the REA, irrelevant factual elements presented for the first time at the stage of the appeal.

30. Finally, the REA considers that the University of Bremen cannot rely on legitimate expectations because it failed to show the existence of exceptional circumstances under which such protection applies.

31. By its second ground of appeal, made on a subsidiary basis, the University of Bremen submits that the General Court infringed its right to be heard, enshrined in Article 47 of the Charter and Article 6(1) ECHR, when it did not inform it of the fact that the alleged defect in its legal representation would result in the action being declared inadmissible and also when it did not provide the appellant with the possibility of appointing a different legal representative. The appellant states that the General Court should have examined the matter not only in the light of its Rules of Procedure but also with due consideration to the fundamental right to be heard. In that context, the appellant refers to the Opinion of Advocate General Bobek in Joined Cases

Uniwersytet Wrocławski and Poland v *REA*.[8]

32. The University of Bremen adds that declaring the action inadmissible for lack of proper legal representation breaches the principle of proportionality, since the objective of the sound administration of justice could be attained by less onerous means. The University of Bremen points to the detrimental effects of that decision for both the appellant and its legal representative. It states that it has been ordered to pay the REA's costs amounting to EUR 12 000 while its legal representative risks facing a recourse claim from the university.

33. Finally, the appellant argues that, if it is not authorised to rely on its legitimate expectations on the basis of the wording of the seventh paragraph of Article 19 of the Statute, the principle of the rule of law requires that the appellant be given a warning that the provision will be interpreted contrary to its wording and an opportunity to resume the proceedings with a lawyer who satisfies the duty of independence.

34. In response, the REA contests the alleged infringement of Article 47 of the Charter and of Article 6(1) ECHR. It states that the General Court concluded that it was not necessary to warn the appellant because the defect in the representation in question could not be remedied. According to the REA, that therefore precludes a finding of infringement of the right to an effective judicial remedy.

35. The REA also argues that the University of Bremen failed to establish that the restriction at issue does not pursue a legitimate aim, is disproportionate or affects the very essence of the right to an effective remedy.

V. Assessment

36. With regard to the heads of claim put forward by the University of Bremen, as summarised in point 19 above, I note that pursuant to the first paragraph of Article 61 of the Statute, when deciding on an appeal, the Court of Justice can exercise its jurisdiction by quashing the respective decision of the General Court, where the appeal is well founded, and by referring the case back to the General Court or, where the state of the proceedings so permits, by itself giving final judgment in the matter. As the REA correctly stated, the Court of Justice cannot issue a declaratory judgment sought by the appellant concerning its legal representation. As regards the appellant's claim vis-à-vis the facilitation of a settlement, and without prejudice to the question whether the Court could rule on it,[9] I note that the REA rejects, in any event, that such a settlement could be concluded. Accordingly, the assessment must focus on the head of claim seeking the annulment of the order under appeal.

37. I recall that, by its first ground of appeal, the University of Bremen contends, in essence, that the General Court erred in its interpretation of Article 19 of the Statute. By its second ground of appeal, it alleges a breach of the right of access to a court, laid down in Article 47 of the Charter.

38. For the reasons set out in this Opinion, I consider that the first ground of the appeal is, in part, well founded. Indeed, in the order under appeal, the General Court erred in law when it failed to construe correctly the duty of independence that legal representatives acting before the Courts of

[8] C-515/17 P and C-561/17 P, EU:C:2019:774 ('Opinion in *Uniwersytet Wrocławski*').

[9] See, by analogy, judgment of 11 July 2019, *Commission* v *Italy (Own resources – Recovery of a customs debt)* (C-304/18, not published, EU:C:2019:601, paragraph 75).

the European Union must satisfy (A). If the Court of Justice were to disagree on this point and proceed with the examination of the second ground of the appeal, I am of the view that that ground is also well founded. Declaring the action to be inadmissible as an automatic consequence of the finding that the legal representation did not satisfy the requirements of Article 19 of the Statute constitutes a restriction of the right of access to those courts, which does not meet the test of proportionality (B).

A. First ground of the appeal: the alleged misinterpretation of Article 19 of the Statute

39. To address the first ground of the appeal, I will start by considering the appellant's argument that, in essence, it has to be regarded as a privileged applicant within the meaning of the first paragraph of Article 19 of the Statute (1). I will then address the core issue of that ground relating to the applicability of the duty of independence to the appellant's legal representative to conclude that, while that duty indeed applies to him, the General Court construed it incorrectly (2). For the sake of completeness, I will address the third part of the first ground of the appeal whereby the appellant asks the Court of Justice, should the duty of independence apply to the university teacher at issue (and should he fail to meet it), to allow him to represent it on an exceptional basis in the present case (3).

1. Can the University of Bremen be considered as a privileged applicant?

40. The University of Bremen claims that a public university constitutes an emanation of a Member State which is a privileged applicant. I understand that argument as claiming, in essence, that the appellant should itself be considered as a privileged applicant under the first paragraph of Article 19 of the Statute.

41. If follows from this provision that privileged applicants may be represented by their agents. Thus, if the appellant were considered to be a privileged applicant, the obligation to be represented by an independent lawyer flowing from the third paragraph of Article 19 of the Statute (or by a university teacher as provided for under the seventh paragraph of that same article) would not apply to it.

42. However, as the REA observes, even if it were established that the University of Bremen constitutes part of the Land of Bremen, that does not allow it to be regarded as a privileged applicant because, in accordance with the settled case-law of the Court of Justice, sub-national entities are not considered to be privileged applicants [10] and, therefore, the obligation to be represented applies to them. [11]

43. Accordingly, I consider the first part of the first ground of the appeal to be manifestly unfounded.

[10] See judgment of 3 December 2020, *Région de Bruxelles-Capitale* v *Commission* (C-352/19 P, EU:C:2020:978, paragraph 18 and the case-law cited).

[11] See orders of the Court of Justice of 20 February 2008, *Comunidad Autónoma de Valencia – Generalidad Valenciana* v *Commission* (C-363/06 P, not published, EU:C:2008:99), and of the General Court of 14 November 2016, *Dimos Athinaion* v *Commission* (T-360/16, not published, EU:T:2016:694).

2. The applicability and the scope of the duty of independence

44. In addressing the core of the first ground of appeal, I will recall the clarifications provided by the Court of Justice in *Uniwersytet Wrocławski* as regards situations in which the representation of non-privileged applicants by a *lawyer* may be regarded as not complying with the duty of independence flowing from the *third* paragraph of Article 19 of the Statute (a). To the extent that that duty is aimed at preserving the sound administration of justice and, above all, of guaranteeing respect for the represented parties' interests, I will conclude that it should also apply, as the General Court held in the order under appeal, to representation of non-privileged applicants by a *university teacher* pursuant to the *seventh* paragraph of the same provision (b). I will then observe that the situations in which the applicant's choice of legal representative has to be limited should be restricted, as the Court of Justice has held, to cases in which the legal representation *manifestly* has a *detrimental effect* on the represented party's interests (c). At this point, I will conclude that the General Court has erred in applying that test to the order under appeal (d).

(a) The judgment in Uniwersytet Wrocławski

45. The judgment in *Uniwersytet Wrocławski* follows on from a rather long line of case-law concerned with the interpretation of the third and fourth paragraphs of Article 19 of the Statute, which set out the obligation for non-privileged applicants to be represented in proceedings before the Courts of the European Union by a 'lawyer'. [12]

46. It follows from that case-law that such a 'lawyer' must satisfy two conditions. On the one hand, under the fourth paragraph of Article 19 of the Statute, he or she must be 'authorised to practise before a court of a Member State …'. Fulfilment of that condition is to be verified in the light of national law. On the other hand, the concept of 'lawyer' appearing in the third paragraph of Article 19 of the Statute is to be understood as an autonomous concept of EU law which implies a duty of independence on the part of that lawyer, as the General Court correctly recalled in the order under appeal. [13]

47. The duty of independence emerged in the case-law of the Courts of the European Union, first, in order to define the scope of legal professional privilege and, by the same token, to identify the documents seized by the Commission which must benefit from that privilege. [14] It was subsequently transposed into the context of Article 19 of the Statute in order to assess the admissibility of the legal representation of non-privileged applicants and the admissibility of their actions. [15]

48. In its judgment in *Uniwersytet Wrocławski*, the Court of Justice clarified the scope of the review that the Courts of the European Union should carry out when assessing whether a given legal representative fulfils the duty of independence.

49. While the Court recalled, in that context, its previous case-law, according to which, essentially, the lawyer's duty of independence excludes the possibility for non-privileged applicants to be represented by lawyers who are linked to them in a certain way, it added that the

[12] That obligation does not apply in the preliminary ruling proceedings by application of Article 97(3) of the Rules of Procedure of the Court of Justice.

[13] Order under appeal, paragraphs 18 and 19. See also *Uniwersytet Wrocławski*, paragraphs 55 to 57 and the case-law cited.

[14] Judgments of 18 May 1982, *AM & S Europe* v *Commission* (155/79, EU:C:1982:157), and of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (C-550/07 P, EU:C:2010:512).

[15] The different lines of the relevant case-law have been analysed in Opinion in *Uniwersytet Wrocławski*, point 37 et seq.

lawyer's independence is not hindered by the existence of 'any connection whatsoever' between the lawyer and his or her client, but rather only by those connections 'which have a manifestly detrimental effect on his or her capacity to carry out the task of defending his or her client while acting in that client's interests to the greatest possible extent'. [16]

50. On that basis, the Court of Justice concluded in *Uniwersytet Wrocławski* that, contrary to what the General Court had ruled in that case, [17] such a detrimental effect was not manifest where the applicant university was represented by a lawyer who was also giving classes at that university on the basis of a contract for the provision of lecturing services. In that respect, the Court emphasised that that legal representative was not representing the University of Wrocław in the context of a hierarchical relationship. [18]

(b) Does the duty of independence apply to university teachers?

51. Assessing the arguments raised in the context of the first ground of appeal requires one to ascertain whether the duty of independence, as it has emerged from case-law on the concept of '*lawyer*', within the meaning of the third paragraph of Article 19 of the Statute, also applies to *university teachers* whose right of audience is governed by the seventh paragraph of that same provision.

52. While the REA argues that the duty of independence is also applicable to university teachers acting as legal representatives, the University of Bremen contests this and claims that the capacity to act as a representative in proceedings before the Courts of the European Union should be assessed, as far as university teachers are concerned, solely in the light of national law. It explains, in essence, that the specific status enjoyed by university teachers under German law makes the criterion of independence irrelevant.

53. In order to assess this argument, it is important to clarify what is meant by the duty of independence of lawyers in general and, more importantly, in the particular context of legal representation before the Courts of the European Union.

54. The term 'independence' is often referred as a key characteristic of the profession of lawyers as such. [19] Although its precise content may be understood differently in different legal orders, depending particularly on the perception of lawyer's role in the broader context of the administration of justice, it appears to be viewed as a fundamental feature underlying the exercise of this self-regulated profession which requires that the provision of legal advice respect certain professional standards and be free of any external pressure or bias arising from the lawyer's personal interests or those of third parties. [20] It is a common understanding that any legal advice

[16] *Uniwersytet Wrocławski*, paragraph 64.

[17] Order of 13 June 2017, *Uniwersytet Wrocławski* v *REA* (T-137/16, not published, EU:T:2017:407).

[18] *Uniwersytet Wrocławski*, paragraph 66.

[19] Opinion in *Uniwersytet Wrocławski*, point 35.

[20] See *Charter of core principles of the European legal profession & Code of conduct for European lawyers*, Council of Bars & Law Societies of Europe, 2019, p. 12, point 2.1.

should be provided in the best interests of the represented party.[21] However, the lawyer's duty of independence implies also an obligation upon the lawyer to refuse to follow certain instructions, where to do so would be contrary to statutory or ethical rules.

55. Those are not considerations that would be relevant to university teachers when they act as such, for the very simple reason that their profession is, for rather obvious reasons, quite different to that of lawyers.

56. For that reason, when it comes to university teachers, it may seem tempting to dismiss the relevance of the Court's case-law relating to the duty of independence placed upon lawyers, within the meaning of the third paragraph of Article 19 of the Statute.

57. However, in my view, this is not the correct way to approach the problem because, in circumstances where a university teacher presents himself or herself before the Courts of the European Union, that teacher is not there to give a class, but rather to represent a client in the same way as a lawyer does.

58. Thus, once they are called upon to act as legal representatives before the Courts of the European Union, the position of university teachers becomes the same as the position of lawyers to the extent that both fulfil the same role, that being to represent non-privileged parties. That is reflected, as the REA argues, in the wording of the seventh paragraph of Article 19 of the Statute according to which university teachers have the same rights (and, it should be added, by implication, the same duties) as are granted in that context to 'lawyers' within the meaning of the third paragraph of Article 19 thereof.

59. I fully acknowledge that the possibility for a university teacher to actually step into the role of legal representative may constitute the expression of a special status that he or she may enjoy under national law. It is perhaps not very common, but national law may indeed endow university teachers with a simplified access to the membership of the bar,[22] or it may even confer upon them an outright possibility to represent parties, as appears to be the case in Germany. However, such national-law specificity as regards the possibility to act as legal representative is irrelevant for the assessment of the duty of independence that legal representatives, including university teachers authorised to act as such under national law, must abide by when acting before the Courts of the European Union. As already stated above, this is because that duty is specifically attached to the role performed by them before those courts.

60. As I will explain in more detail below, in verifying whether a legal representative fulfils his or her duty of independence, the Courts of the European Union carry out a residual and exceptional review which is intended to preserve sound administration of justice and, especially, respect for the rights of applicants flowing from Article 47 of the Charter. Since that review is focused precisely on the rights of the represented parties in proceedings before those courts, I do not see any reason, in principle, why that review should not be carried out in respect of university teachers acting as legal representatives.

[21] Ibid., p. 13, point 2.7. See, nevertheless, judgment of 10 March 2021, *An Bord Pleanála* (C-739/19, EU:C:2021:185, paragraph 29 read in conjunction with paragraph 16) highlighting the special role of lawyers acting before the Irish courts 'to carry out the bulk of the legal research necessary for the proper course of the procedure', which may also involve identification of 'elements [that] are unfavourable to the cause defended by the lawyer in question'.

[22] That seems to be the case of the French legislation, discussed, however, from a different angle, in the judgment of 17 December 2020, Onofrei (C-218/19, EU:C:2020:1034). See Opinion of Advocate General Bobek in Conseil de l'ordre des avocats au barreau de Paris and Bâtonnier de l'ordre des avocats au barreau de Paris, C-218/19 (EU:C:2020:716, point 4).

61. The key question which remains, however, is what should be the exact scope of such a review. This is the issue to which I will now turn.

(c) The test of a manifestly detrimental effect

62. As noted above in point 48 of the present Opinion, in *Uniwersytet Wrocławski*, the Court clarified that the duty of independence should be understood as the absence of connections 'which have a manifestly detrimental effect on [the legal representative's] capacity to carry out the task of defending his or her client while acting in that client's interests to the greatest possible extent'.[23]

63. There are various kinds of harm that one may suffer as a result of the choice of a specific legal representative. It follows from the judgment in *Uniwersytet Wrocławski* that the harm relevant for the assessment of the duty of independence, developed under the third paragraph of Article 19 of the Statute, is not simply any harm that one may suffer as a consequence of a (possibly poor) choice of lawyer, but an obvious harm that is caused, or may be caused, by certain links between the legal representative and the represented party.

64. More specifically, the Court has confirmed that in-house lawyers cannot fulfil the duty of independence[24] because, as it follows from the relevant case-law, their professional opinion can be 'at least partly, influenced by their working environment'.[25] That scenario thus addresses one of the aspects of the legal representative's independence, noted above in point 54 of this Opinion, which relates to the possible duty to refuse to follow certain instructions, if they are contrary to the applicable statutory or ethical rules. The existence of parallel obligations on the part of the legal representative, such as those arising from an employment relationship, may indeed prevent the legal representative from effectively satisfying such a duty, thus affecting the quality of the legal advice which he or she provides.

65. That being said, the failure to comply with the duty of independence may also occur in other situations. That would be typically the case where, with regard to the subject matter of the dispute, there exists, between the legal representative and the represented party, such a link that makes the defence of the represented party's rights in fact illusory, because the legal representative pursues interests other than those of the client.

66. In my view, such considerations led the Court of Justice to disapprove, in *Trasta Komercbanka*,[26] of the overly lenient approach adopted by the General Court,[27] when the latter accepted the national-law effects attached to a revocation of a power of attorney even though that revocation was brought about by the applicant bank's liquidator, acting in a situation where there was a conflict of interest. The Court pointed to the fact that the liquidator had been appointed by a national body that had participated in the procedure leading to the withdrawal of the bank's authorisation to operate and thus to its liquidation. Having considered the link between the national body that had appointed the liquidator and the latter, the Court concluded that there

[23] *Uniwersytet Wrocławski*, paragraph 64.

[24] *Uniwersytet Wrocławski*, paragraph 63.

[25] Judgment of 6 September 2012, *Prezes Urzędu Komunikacji Elektronicznej and Poland* v *Commission* (C-422/11 P and C-423/11 P, EU:C:2012:553, paragraph 25) ('*Prezes Urzędu Komunikacji Elektronicznej*').

[26] Judgment of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923).

[27] Order of 12 September 2017, *Fursin and Others* v *ECB* (T-247/16, not published, EU:T:2017:623).

was a risk that the liquidator could avoid challenging, before the Courts of the European Union, the act that caused the represented party's liquidation, given that the possible annulment of that act could lead to the liquidator being relieved of its duties. [28]

67. Similarly, when the Court referred in *Uniwersytet Wrocławski* to the concept of a manifestly detrimental effect of the legal representation, it meant obvious situations in which there is no doubt that the legal representative may not act in the best interests of the client but *against* those interests or, in any case, when in reality he or she may defend other interests. That would typically be the case where the lawyer, based on his or her relationship with the client, is in a position to enrich himself or herself at the client's expense, to act otherwise to the client's loss, or where the lawyer can use information about the client for the benefit of third parties. That said, absent such clear scenarios, the default premiss is, and ought to be, that the choice of a lawyer is above all a matter of contractual freedom and trust.

68. To illustrate the distinction to be made in this context, the legal representation by a close relative, who happens to be a lawyer, is likely to be prevented due to a conflict of interest in inheritance proceedings in which both the lawyer and the represented party are possible heirs. By contrast, it may be unproblematic in a dispute with a neighbour over the demarcation of the border between the neighbour's and the family's land. To take another example, a lawyer who is also a close friend may be a sensible choice vis-à-vis inheritance proceedings, but such representation in a dispute over land will be a problem if that close friend also happens to be the owner of the piece of land concerned. Finally, a lawyer with a minority shareholding in a company requiring representation is unlikely to be a possible choice in a squeeze-out litigation between that company and its minority shareholders, whereas legal representation by that lawyer on behalf of that company is unlikely to be problematic in product liability proceedings brought by a third party.

69. While the assessment of those situations may differ depending on the national legal order concerned, what matters in all of them is not only the identification of a certain link between the legal representative and the represented party but also an assessment as to whether, with the subject matter of the dispute in mind, that link leads to the conclusion that the legal representative will not act, or will not act necessarily, in the best interests of the represented party.

(d) Application of the test to the present case

70. Turning to the present case, the General Court relied on two elements in finding that the appellant's legal representative failed to satisfy the duty of independence. Those two elements relate respectively to two different facets of the duty of independence referred to in points 64 and 65 of this Opinion. First, the General Court noted in paragraph 25 of the order under appeal that the legal representative is employed by the University of Bremen on the basis of a public-law statutory relationship (1). Second, in the same point, the General Court noted, in essence, that he was personally involved in the litigated matter (2).

[28] Judgment of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraphs 60 to 62).

(1) The legal representative's status as university teacher at the University of Bremen

71. As already stated, the General Court observed that the appellant's legal representative was employed by the appellant based on a public-law statutory relationship.[29] To the extent that that observation follows directly from the reference to the Court of Justice's judgment in *Prezes Urzędu Komunikacji Elektronicznej* contained in the preceding paragraph of the order under appeal, and in the absence of further reasons, it would appear that the General Court subsumed the situation of the university teacher at issue under the category of employed (in-house) lawyers whose independence the Court of Justice had indeed excluded due to the risk of their professional opinion being 'at least partly, influenced by their working environment',[30] as has already been recalled.

72. Regardless of the differences that may exist between the public-law status of the position of appellant's legal representative as a university teacher and the employment of an in-house lawyer, I am of the view that in the order under appeal, the General Court failed to take into account the fact that, as the University of Bremen argued before it (and as was argued in the present proceedings), legal representation is not among the tasks that the appellant's legal representative performs in his capacity as a university teacher. The University of Bremen further argued that the legal representation was thus unrelated to the legal representative's capacity as a university teacher (the latter being limited to research and teaching) and was performed outside of any relationship of subordination.

73. I therefore understand that when he agreed to act as the appellant's legal representative, the university teacher concerned did not do so out of any obligation that he had vis-à-vis the University of Bremen as one of its teachers, but based on his decision to undertake that representation outside of his role of university teacher. In this respect, therefore, his situation differs fundamentally from the situation of in-house lawyers when they represent their employers in the sense that, in such a case, legal representation forms part of their job description and can be decided upon by the employer.

74. For that reason, the present case can, in my view, be compared to the situation which led to the judgment in *Uniwersytet Wrocławski*. That case also involved a legal representative who was giving classes at the university which he represented before the Courts of the European Union. It is true that he was not giving those classes on a full-time basis, but rather under a contract for the provision of lecturing services. However, the reason relied upon by the Court to exclude failure to comply with the duty of independence was the fact that he 'was not defending the interests of the University of Wroclaw in the context of a hierarchical relationship with that university'.[31]

75. Indeed, and in accordance with what has been noted above in point 64 of the present Opinion, the key question in the present context is whether the legal representation could be hindered by the obligations that bind the legal representative due to specific links with the represented party, such as those based on an employment contract. To the extent that the duty of independence implies the duty to refuse instructions where such instructions conflict with deontological obligations, the effective performance of that duty may be impaired by the obligation to perform the legal representation in a certain way or with a specific content, as required, for instance, by the employer.

[29] Order under appeal, paragraph 25.

[30] *Prezes Urzędu Komunikacji Elektronicznej*, paragraph 25.

[31] *Uniwersytet Wrocławski*, paragraph 66.

76. It follows from the arguments put forward by the University of Bremen, in the proceedings before the General Court and again in the present appeal, that the university teacher at issue was not acting as its in-house lawyer, that is to say a member of its legal department, but as someone whose status entitles him to represent parties before the courts and who decided to step into that role, independently of his position as a university teacher. It also follows from those arguments that the legal representation at issue was not carried out as part of a relationship of subordination, nor was it otherwise affected by any other obligations of the legal representative towards the appellant, other than those arising from the legal representation itself.

(2) The legal representative's personal involvement in the litigated matter

77. The second reason for which the General Court concluded, in the order under appeal, that the legal representative of the University of Bremen failed to satisfy the duty of independence was related to his position as coordinator and head of the project in question, in the context of which 'he is entrusted with essential tasks'.[32] The General Court also added that the university teacher in question prepared and submitted the application for the funding in question. In the General Court's view, that meant that that representative had a direct interest in the outcome of the dispute, which compromised his capacity to provide the legal assistance required by the client, in full independence and in the overriding interests of justice.[33]

78. By those statements, the General Court addressed the aspect of the duty of independence discussed above in point 65 of the present Opinion which relates to the situation in which the legal representative fails genuinely to pursue the interests of the represented party and, instead, actually pursues other interests such as his own.

79. I understand that if the action for annulment of the contested decision succeeds, the University of Bremen could be in a position to undertake the scientific project at issue and, by the same token, its legal representative could be able to act in that context, inter alia, as the head of the research team. In other words, the possible success of the annulment action will affect the appellant's chance to obtain the funding it applied for, which is, in turn, of interest to its legal representative in his position as university teacher, since it affects his capacity to pursue and head the research project in question.

80. That shows, as the appellant itself made clear, that the legal representative has an interest converging with that pursued by the appellant. That being said, and contrary to what the General Court concluded in the order under appeal, I fail to see how such a commonality of interests flowing from the legal representative's involvement in the project in question may, in the absence of other elements, lead to the conclusion that the legal representation would be manifestly detrimental to the University of Bremen's interests. Indeed, I do not perceive anything in the description of the legal representative's involvement in the project in question that would show that by representing the University of Bremen, he was in reality pursuing his own or other interests to the appellant's detriment.

[32] Order under appeal, paragraph 25.

[33] Order under appeal, paragraphs 25 and 26.

81. I do not exclude, as a matter of principle, that an apparent commonality of interests may in reality hide a fundamental flaw. That being said, while the General Court states in paragraph 26 of the order under appeal that the link between the legal representative and the appellant had a manifestly detrimental effect for that legal representative's capacity to defend the appellant's best interests, it simply does not state any element attesting to such a scenario.

3. Have the appellant's legitimate expectations been infringed?

82. By the third part of the first ground of the appeal, the University of Bremen argues that its legal representative should be allowed to represent it on an exceptional basis if, in essence, the Court of Justice were to conclude that the duty of independence applies to that representative (with, I understand, the consequence for the latter of not being able to represent the appellant in the present case). The appellant explains that it should be able to rely on its legitimate expectations based on the clear wording of the seventh paragraph of Article 19 of the Statute from which it follows, according to the appellant, that the duty of independence, as developed in the case-law of the Court, does not apply to university teachers.

83. I consider that there is no need to address that plea at great length given my suggestion above from which it follows that, even though the duty of independence applies to university teachers acting under the conditions laid down in the seventh paragraph of Article 19 of the Statute, its proper interpretation means that, in the present case, the legal representative must be allowed to represent the appellant.

84. However, if the Court were to hold otherwise, I will briefly, and on a subsidiary basis, explain the reasons why the third part of the first ground of the appeal must, in my view, be considered to be unfounded.

85. As I understand it, by that part the appellant requests a derogation from the 'incidental retrospectivity'[34] of the decision to be handed down in this case, or, in other words, from the rule according to which the interpretation that the Court gives to a rule of EU law (*in casu* the seventh paragraph of Article 19 of the Statute) 'clarifies and defines, where necessary, the meaning and scope of that law as it must be, or ought to have been understood and applied from the date of its entry into force'.[35] Indeed, by the third part of the first ground of its appeal, the University of Bremen argues, by reference to the Court's judgment in *Defrenne*,[36] that if the interpretation of the seventh paragraph of Article 19 of the Statute prevents its legal representative from representing it, such an interpretation is unexpected and thus should not apply to the present case (but rather to future cases).

86. In this context, I note that when interpreting EU law in preliminary ruling proceedings, the Courts of the European Union have exceptionally accepted to limit the temporal effects of their decision,[37] when that was required in the interests of legal certainty and subject to two conditions: first, the person concerned must have acted in good faith; second, without the temporal limitations, the decision of the Court would trigger 'serious difficulties'.[38]

[34] Opinion of Advocate General Bobek in *Cussens and Other*s (C-251/16, EU:C:2017:648, point 35).

[35] See, for example, judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 41 and the case-law cited).

[36] Judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56).

[37] See, for example, judgments of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraphs 72 to 75); of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209, paragraphs 44 and 45); or of 16 July 1992, *Legros and Others* (C-163/90, EU:C:1992:326, paragraphs 34 to 36).

[38] See, for example, judgment of 29 September 2015, *Gmina Wrocław* (C-276/14, EU:C:2015:635, paragraph 45).

87. In that context, I agree with the REA that the appellant has failed to demonstrate that a risk of any specific difficulties may result from an interpretation of the seventh paragraph of Article 19 of the Statute that would effectively prevent the legal representative at issue from representing the appellant. [39] The University of Bremen simply raises the following issues: the fact that the merits of its action have not been examined, the obligation to bear the costs of the proceedings and a recourse action that the appellant may initiate against its legal representative.

88. In those circumstances, I am of the view that the third part of the first ground of the appeal must be considered to be unfounded.

4. Conclusion on the first ground of the appeal

89. In the light of the above, I conclude that, by holding that the position of the legal representative at issue at the University of Bremen as well as his personal involvement in the litigated matter had a manifestly detrimental effect on that representative's capacity to represent the appellant to the best of its interests, the General Court failed to construe correctly the duty of independence that legal representatives acting before the Courts of the European Union must fulfil and, therefore, erred in law. To that extent, the first ground of the appeal is thus well founded.

B. Second ground of the appeal: procedural consequences of the failure to comply with the duty of independence

90. By the second ground of its appeal, raised by the University of Bremen on a subsidiary basis, the appellant claims, in essence, that the procedural consequences which the General Court drew from the conclusion that its legal representative did not meet the requisite standards of independence infringes Article 47 of the Charter. [40]

91. I am of the view that the Court will not have to address that issue because, as explained above, the first ground of the appeal is in part well founded.

92. However, for the sake of completeness, I will outline why, in my view, the University of Bremen is correct when it argues that not being given the opportunity to appoint a new legal representative to replace the one considered by the General Court in the order under appeal not to be complying with the duty of independence, infringes that university's right of access to a court, granted under the first paragraph of Article 47 of the Charter.

93. To that end, I will consider first what is, in my view, the main issue in this context, namely the automatic inadmissibility of the action (1). I shall then turn to the ancillary issue of the legal basis for the appointment of a new lawyer (2).

[39] In those circumstances, I do not consider it necessary to enter into the analysis of the question whether the test applied by the Court in preliminary ruling proceedings, in response to requests to limit temporal effects of its judgments, is to apply as such in the present context.

[40] The University of Bremen also invokes an infringement of Article 6(1) ECHR. As the Court has repeatedly held, the latter instrument does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law. Therefore, the judicial review of the order under appeal must be conducted in the light of Article 47 of the Charter. That being said, by application of Article 52(3) of the Charter, according to which the meaning and scope of the rights set out in the Charter which correspond to rights guaranteed by the ECHR must be the same, if not more extensive, as those laid down by the ECHR, due regard must be paid to Article 6(1) ECHR (and also to Article 13 ECHR) as well as to the case-law of the European Court of Human Rights related to those provisions.

1. Automatic inadmissibility of the action

94. I agree with the REA that the procedural rules are silent on the issue of the appointment of a new lawyer where the lawyer initially appointed does not meet the duty of independence.

95. However, the silence of the procedural rules does not mean that providing the appellant with an opportunity to replace a legal representative who does not satisfy the duty of independence would automatically run counter to those rules. In any case, what must be assessed in the present case are the arguments raised by the University of Bremen to the effect that the interpretation of the Rules of Procedure of the General Court adopted in the order under appeal infringed the appellant's right of access to a court.

96. I would begin in that context by noting that the obligation to be represented by an independent legal representative constitutes a condition of admissibility of the action and, therefore, by the same token, a limitation to the right of access to a court.

97. I certainly agree with the General Court that, as a matter of principle, 'the right of access to a court is not an absolute right'.[41] However, any limitation to that right can be accepted only if it satisfies the conditions laid down in Article 52(1) of the Charter.

98. According to the first sentence of that provision, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Its second sentence provides that, subject to the principle of proportionality, limitations to those rights and freedoms may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

99. Given that those four conditions apply cumulatively, I consider it sufficient to focus the analysis in the present case on the existence of objectives of general interest recognised by the European Union, and on the compliance with the principle of proportionality.

100. It follows from the judgment in *Uniwersytet Wrocławski* that the obligation of representation of non-privileged applicants pursues two objectives, namely the sound administration of justice and 'above all' the protection and defence of the applicant's interests to the greatest possible extent.[42] Although the Court made that statement in respect of the legal representation ensured by a lawyer under the conditions set out in the third paragraph of Article 19 of the Statute, I do not see any reason, in principle, why the same objectives should not also apply in the context of legal representation provided by a university teacher under the seventh paragraph of that provision. This is because both types of legal representation ensure, and make effectively possible, the access of non-privileged parties to the Courts of the European Union; moreover the status of university teachers has been assimilated to the status of lawyers, as I have already noted above.[43]

[41] Order under appeal, paragraph 35. A similar statement was also made repeatedly by the ECtHR. See, for example, ECtHR, 11 February 2014, *Maširević v. Serbia*, (CE:ECHR:2014:0211JUD003067108, § 46 and the case-law cited).

[42] *Uniwersytet Wrocławski*, paragraph 62.

[43] See above, points 58 to 60 of the present Opinion.

101. The objectives of the sound administration of justice, as well as the protection of the applicant's interests, may in certain situations require that a legal representative does not act (or ceases to act) as a legal representative where he or she is, for whatever reason, not in a position to deal with a case appropriately or unable genuinely to defend the represented party's best interests.

102. Thus, I admit that pursuing those objectives may require the action to be effectively declared inadmissible, even if such a consequence would prevent the same case from ever being examined again, since, due to the time limits within which the action for annulment must be brought, the introduction of a new action would in fact become impossible. That may be the case, in particular, if the represented party were to oppose or ignore the instruction of the Courts of the European Union to appoint a different legal representative, thus significantly delaying or actually preventing the course of the proceedings, in circumstances where the initial legal representation would manifestly fail to act in genuine defence of the represented party's interests. To the extent that the obligation to be represented constitutes a condition of admissibility of actions introduced by non-privileged applicants, a declaration of inadmissibility constitutes indeed a logical consequence of the failure to fulfil that obligation.

103. That being said, while declaring the action inadmissible may be an appropriate way of addressing situations that threaten the sound administration of justice or the protection of the applicant's interests, I am of the view that the outcome, in the form of an *automatic* declaration of inadmissibility of the action, goes beyond what is necessary to attain both of those objectives.

104. The fact that less onerous means exist in this context is borne out by the possibility, under Article 55(3) of the Rules of Procedure of the General Court, of appointing a new legal representative when the General Court decides to exclude the representative appointed initially because it considers that his or her conduct is, as provided by Article 55(1) of those rules, 'incompatible with the dignity of the General Court or with the requirements of the proper administration of justice'. In such a situation, Article 55(3) of the Rules of Procedure of the General Court provides for a suspension of the proceedings in order to allow the party concerned to appoint another legal representative. The rule in question thus allows for protection of the requisite conditions under which justice can be delivered, by excluding a legal representative who, by his or her behaviour, undermines those conditions, while maintaining the possibility for the case to be examined unless the applicant fails to appoint another legal representative.

105. On the basis of the above analysis, I consider that the University of Bremen is correct to maintain that the *automatic* inadmissibility of its action – as a consequence of its legal representative's failure to fulfil the duty of independence – constitutes a disproportionate restriction on its right of access to a court. It goes beyond what is necessary since the objectives of sound administration of justice and protection of the appellant's interests can be attained by less onerous means if the appellant is given an opportunity to appoint a different lawyer.

2. The (non-) issue of the lack of an express procedural basis to allow for the appointment of a new legal representative

106. In paragraph 40 of the order under appeal, the General Court relied on the second paragraph of Article 21 of the Statute and on Article 51(4) of its Rules of Procedure to support the conclusion that its procedural rules do not provide the appellant with a possibility to appoint a new legal representative, contrary to the open possibility provided in the abovementioned provisions to rectify the failure to submit certain documents.

107. The appellant challenges this conclusion and refers to that end to the Opinion in *Uniwersytet Wrocławski* in which Advocate General Bobek relied, by analogy, on Article 51(4) of the Rules of Procedure of the General Court and also on Article 47 of the Charter to support his argument that the applicant in that case should be given an opportunity to change a lawyer found not to be complying with the duty of independence. [44]

108. In response, the REA claims that Article 51 of the Rules of Procedure of the General Court concerns solely the issue of a missing certificate attesting to the lawyer's membership of the respective bar, or the issue of the missing authority to act. In its view, the interpretation suggested by Advocate General Bobek goes against its wording and would necessitate a legislative change beyond the powers of the General Court.

109. I note that the absence of an express rule providing for the appointment of a new lawyer in a situation where the initial lawyer does not fulfil the duty of independence must be placed in its proper normative context. The duty of independence has emerged from case-law. It is thus rather unsurprising that the authors of the Statute and of the Rules of Procedure of the General Court did not include a provision governing specifically the possibility or impossibility of rectifying a failure to fulfil that duty. Under those circumstances, the argument pointing to the silence of the Rules of Procedure of the General Court on the subject to explain that there is simply no other option than to declare the action inadmissible is hardly convincing.

110. Since the requirement of the duty of independence of a 'lawyer' has emerged from case-law, the ideal response to the consequences of a failure to comply with that requirement should be made under the conditions provided for in the fifth paragraph of Article 254 TFEU. In that regard, I agree with the REA.

111. I note that, in the past, the Court of Justice endorsed the General Court's decision not to provide a non-privileged applicant with the possibility of appointing a new lawyer when the lawyer initially appointed was found to be in breach of the duty of independence. [45] That being said, the analysis was conducted in the light of Article 44 of the Rules of Procedure of the General Court, as in force at that time, corresponding in principle to Article 51 of those rules as currently in force. By contrast, in the present appeal, the Court of Justice is invited to consider the issue specifically in the light of the implications of Article 47 of the Charter.

112. Having considered those implications, I concluded in points 94 to 105 of this Opinion that the automatic declaration of inadmissibility of the action on the ground that the legal representative does not fulfil the duty of independence limits the right of access to a court in a disproportionate way. In consequence, and because the procedural rules must be construed in compliance with Article 47 of the Charter, I am of the view that the non-privileged applicants whose legal representative is considered not to fulfil the duty of independence must be allowed an opportunity to appoint another legal representative.

113. In that respect, an appropriate 'gateway' could be found in the third paragraph of Article 55 of the Rules of Procedure of the General Court. Indeed, as noted above, that provision, read in combination with Article 55(1) of those rules, governs situations in which a legal representative fails to respect, inter alia, the 'requirements of the proper administration of justice'. The decision by a legal representative to take up legal representation in a situation in which such legal

[44] Opinion in *Uniwersytet Wrocławski*, points 151 to 157.

[45] Order of 5 September 2013, *ClientEarth* v *Council* (C-573/11 P, not published, EU:C:2013:564, paragraph 23).

representation can have a manifestly detrimental effect upon the represented party can be considered as an example of such a failure to the extent that both scenarios are concerned with non-compliance, by the legal representative, with certain professional standards.

114. Thus, in order to ensure effective enjoyment of the right of access to a court by non-privileged applicants, and before an express legal basis is provided to that end, I suggest that the General Court rely on the third paragraph of Article 55 of its Rules of Procedure in order to provide non-privileged applicants with an opportunity to appoint a new legal representative, should it be established that the legal representative initially appointed does not fulfil the duty of independence.

115. Finally, and as it has already been stated elsewhere,[46] the change in the legal representation does not mean that the party concerned would be able to resubmit a new set of pleadings. The change in the legal representation means that the new representative takes over the matters where they have been left by the previous representative, each of them assuming responsibility for their respective performance.

3. Conclusion on the second ground of the appeal

116. In the light of the above, I conclude that by holding that its Rules of Procedure do not provide the appellant with a possibility to appoint a new legal representative, after concluding that the appellant's initial legal representative does not satisfy the duty of independence, the General Court infringed the appellant's right of access to a court enshrined in the first paragraph of Article 47 of the Charter. The second ground of the appeal is thus well founded.

VI. Consequence of the conclusion on the appeal

117. In accordance with the first paragraph of Article 61 of the Statute, if the appeal is well founded, the Court of Justice, when setting aside the decision of the General Court, may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

118. In the present case, the General Court has not given a ruling on the substance. It is therefore appropriate to refer the case back to the General Court.

VII. Costs

119. Given that I propose that the case on appeal be referred back to the General Court, the decision on the costs of the parties relating to the appeal proceedings should be reserved, in accordance with Article 137 of the Rules of Procedure of the Court of Justice, applicable to appeal proceedings by virtue of Article 184(1) of those rules.

[46] Opinion in *Uniwersytet Wrocławski*, point 158.

VIII. Conclusion

120. In the light of the above consideration, I suggest that the Court of Justice should:

– set aside the order of the General Court of the European Union of 16 December 2020, *Universität Bremen* v *REA* (T-660/19, not published, EU:T:2020:633),

– refer Case T-660/19 back to the General Court,

– reserve the costs.