Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 8 July 2021 [1]

Case C-132/20

BN,
DM,
EN
v
Getin Noble Bank S.A.,
joined parties:
Rzecznik Praw Obywatelskich

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

(Reference for a preliminary ruling – Article 267 TFEU – Concept of 'court or tribunal' – Concept of 'established by law' – Judicial independence – Relevance of the questions – Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Type of assessment – Procedure for the appointment of a national judge – Lustration measures – Irremovability of judges)

I. Introduction

1. '*Hang all judges*!' This is the advice that the former Governor of the Czech National Bank recalls from an English philosopher and political scientist when asked about what should be done first following the fall of the Communist regimes in order to bring about a legal and judicial transformation in central and eastern Europe. [2]

2. The situational black humour compressed in that quip is perhaps best understood by those who have witnessed first-hand large-scale societal transformation within the former Communist Bloc. Those persons might be better placed to visualise the comical contrast whereby a group of freshly-minted politicians, about to become the next societal transformers, gather around an advisor recently arrived from the West. They are all impatient to learn of the miraculous remedy which ought to be adopted with regard to the laws and judges. How could one carry the (Velvet) Revolution equally into the ranks of the Communist judiciary? However, the only advice received is a vaguely amusing quip. Even stripped of its connotations of violence and taken simply as a

[1] Original language: English.

[2] Tůma, Z., 'Soudce nelze novelizovat' [Judges Cannot be Amended], in: Kokeš, M., and Pospíšil, I., (eds.), *In dubio pro libertate: Úvahy nad ústavními hodnotami a právem. Pocta Elišce Wagnerové u příležitosti životního jubilea*, Masarykova Univerzita, Brno, 2009, p. 247.

suggestion for a complete overhaul of judicial personnel, it remains, in the complex reality of a European country in the late 20th century on the brink of a peaceful societal transition, little more than a barely helpful joke.

3. '*Vet all judges*!' Hearing such a proposition coming from a Member State of the European Union some 30 years later, and about 16 years after the accession of that Member State to the European Union, gives a rather intriguing sense of *déjà vu*. However, in contrast to the personal musings of a former senior civil servant on the past periods of transition, mentioned as a way of providing a more engaging introduction to his contribution to a *Festschrift* honouring an illustrious judge who partook in those events, the proposed vetting of members of the judiciary is apparently not meant as black humour. It seemsto be a serious enquiry about the present and future approaches of (at least some members of) the Sąd Najwyższy (Supreme Court, Poland), the referring court in the present case.

4. In the present case, that referring court wonders whether circumstances pertaining to the first judicial appointment of a judge in a Member State, at a time when that State was still governed by an undemocratic regime and prior to that State's accession to the European Union, and the ongoing retention of such a judge within the judiciary of that State after the fall of the Communist regime, is capable of casting doubts on the independence and impartiality of that judge for the purposes of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') today. By its subsequent questions, that court, in essence, extends the same question also to subsequent judicial appointments in Poland, suggesting that there were other procedural issues that could have had an impact on those appointments. It would thus appear that the referring court is in fact asking whether it may start carrying out an indirect vetting process, with regard to the filtering of appeals on points of law to the national supreme court, of potentially all Polish judges appointed before 2018, in the name of judicial independence guaranteed under EU law.

5. That being said, there is a significant admissibility issue that precedes those matters. The order for reference in the present case was submitted by a judge whose own recent appointment to his judicial office is heavily contested. It is said to have been irregular and vitiated by a flagrant breach of national law. Is such a judge, who sits as a single judge in the Sąd Najwyższy (Supreme Court) and reviews the admissibility of appeals brought before that body, a 'court or tribunal' for the purposes of the autonomous definition of such a body under Article 267 TFEU?

II. Legal framework

A. EU law

6. Pursuant to the second subparagraph of Article 19(1) TEU, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

7. Under Article 267 TFEU, only a 'court or tribunal' of a Member State may submit to the Court of Justice of the European Union a request for a preliminary ruling.

8. Title VI of the Charter, under the heading 'Justice', includes Article 47 thereof, entitled 'Right to an effective remedy and to a fair trial', which states the following:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. …

…'

9. Article 7(1) and (2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts,[3] as amended, provides:

'1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.'

B. National law

10. In its order for reference, the referring court refers to a number of provisions of national law. For the purposes of this Opinion, the following provisions are of particular significance.

11. Article 379, point 4, of the Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (Law of 17 November 1964 – Code of Civil Procedure) provides that proceedings are invalid where, inter alia, the composition of the court of trial was not in accordance with relevant legal regulations or if a case was heard in the presence of a judge who was subject to exclusion.

12. In accordance with Article 398^{9}, point 3, of that code, an appeal on a point of law is accepted only if, inter alia, the challenged decision was issued in the proceedings that were invalid.

13. Under Article 398^{13} of that code, the Supreme Court examines the appeal on points of law within the scope of and grounds for the appeal. However, within the scope of the appeal, that court, of its own motion, takes into consideration the invalidity of the proceedings.

[3] OJ 1993 L 95, p. 29.

III. Facts, national proceedings and the questions referred

14. On 3 March 2017, the applicants in the main proceedings brought an action against the respondent, Getin Noble Bank S.A., before the Sąd Okręgowy w Świdnicy (Regional Court, Świdnica, Poland). The applicants claim that the respondent should be ordered to pay them jointly and severally the sum of 175 107.10 Polish zlotys (PLN), together with statutory default interest from the date of filing the claim until the date of payment. On 3 April 2008, the parties concluded a mortgage loan agreement indexed to a foreign currency (Swiss francs, 'CHF'). The applicants raised the unfair nature of the loan indexation mechanism contained in that agreement, as well as that of the package insurance clause in the event of a refusal to establish a mortgage during the first three months of the loan.

15. In its judgment of 21 August 2018, the Sąd Okręgowy w Świdnicy (Regional Court, Świdnica) partly upheld the applicants' claims. That court declared the contractual clauses of the disputed loan agreement, which allowed the bank arbitrarily to determine the CHF exchange rate, to be unlawful. It awarded an amount of PLN 16.120,12 to the applicants jointly and severally, together with statutory default interest.

16. That judgment was appealed before the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław, Poland). In its judgment of 28 February 2019, that court dismissed the appeals and upheld the factual findings and legal assessment made at first instance.

17. The applicants lodged an appeal on a point of law against the judgment on appeal ('the contested judgment') with the Sąd Najwyższy (Supreme Court), where the proceedings are currently pending. The referring court is, at the current stage of the proceedings before it, charged with the task of determining the admissibility of the appeal.

18. The referring court notes that, pursuant to Article 7(1) and (2) of Directive 93/13, Member States must provide for the possibility of bringing proceedings (before an administrative authority or a judicial authority) to determine whether contractual terms are unfair. In Poland, the national legislature has provided for judicial proceedings in that respect. Consequently, a national body examining cases under Directive 93/13 should – in the view of the referring court – comply with the standards of the European Union in order to be considered 'a court', as developed in the case-law of the Court of Justice.

19. The referring court notes that some judges, whose independence could, in its view, be questioned, were part of the composition that delivered the contested judgment. Three of them (Judge FO, Judge GP and Judge HK) were appointed to the position of judge of the Court of Appeal by orders of the President of the Republic of Poland of 23 January 1998, 12 March 2015 and 16 April 2012, respectively. Those appointments were made on the basis of a resolution of the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland, 'the KRS') in compositions subsequently deemed unconstitutional by the Trybunał Konstytucyjny (Constitutional Court, Poland). In its judgment, the Trybunał Konstytucyjny (Constitutional Court) held that interpreting the term of office of the members of the KRS elected from among the judges of the common courts as being of an individual nature was incompatible with Article 187(3) of the Constitution of the Republic of Poland.[4] Another problem identified with that regime was, according to the referring court, the fact that the resolutions of the KRS did not need to be reasoned and were not subject to appeal.

[4] Judgment of 20 June 2017, K 5/17, OTK-A 2017.

20. Moreover, the referring court states that one of those three judges, Judge FO, was appointed, at least to that judge's first position, during the Communist regime. The way in which judges were appointed at that time, and the arrangements concerning their supervision and the possibility of dismissal, did not comply – in the view of the referring court – with the standards of a democratic State subject to the rule of law. The referring court is also of the view that the amendments introduced into Polish law after 1989 did not lead to the development of effective instruments for the verification of judicial appointments made during the Communist era or of potential breaches by judges of the principle of independence.

21. Against that background, the referring court wonders whether, in the light of the judgment of the Court in *A. K. and Others*, it is required to verify the independence of the judges referred to above and, if so, the standard that it should apply in that respect.

22. Accordingly, harbouring doubts as to how the principles laid down in the Court's case-law regarding the independence of the national judiciary should be interpreted and applied, 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:

'(1) Must Article 2, Article 4(3), Article 6(1) and (3) and the second subparagraph of Article 19(1) [TEU] in conjunction with the first and second paragraphs of Article 47 of the [Charter] and the third paragraph of Article 267 TFEU, Article 38 of the Charter and Article 7(1) and (2) of [Directive 93/13] be interpreted as meaning that a body which includes a person appointed to the position of judge for the first or a subsequent time (to a higher court) by a political body within the executive branch of a State characterised by a totalitarian, undemocratic and communist system of power (the Rada Państwa Polskiej Rzeczypospolitej Ludowej (the Council of State of the People's Republic of Poland)) at the request of the Minister for Justice of that State, is a duly qualified independent and impartial tribunal within the meaning of EU law, in particular given (1) the lack of transparency of the appointment criteria, (2) the possibility that the judge may be removed from office at any time, and the lack of participation in the appointment procedure of (3) judicial self-government or (4) suitable public authorities elected through democratic elections, all of which could undermine the confidence which the judiciary should inspire in a democratic society?

(2) Is it relevant for resolving the issue referred to in Question 1 that appointment to the position of judge in subsequent posts (in higher courts) could take place due to the acknowledgement of an appropriate period of work (length of service) and on the basis of an assessment of work in the post to which that person was appointed at least for the first time by the political body referred to in Question 1 and on the basis of the procedure described therein, which could undermine the confidence which the judiciary should inspire in a democratic society?

(3) Is it relevant for resolving the issue referred to in Question 1 that appointment to the position of judge in subsequent posts (in higher courts, not including the [Sąd Najwyższy (Supreme Court)] was not conditional upon taking a judicial oath to respect the values of a democratic society, and that when appointed for the first time the person concerned promised to uphold the political system of the communist State and the "praworządność ludowa" (people's rule of law), which could undermine the confidence which the judiciary should inspire in a democratic society?

(4) Must Article 2, Article 4(3), Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU in conjunction with the first and second paragraphs of Article 47 of the Charter and the third paragraph of Article 267 TFEU, Article 38 of the Charter and Article 7(1) and (2) of Directive 93/13 be interpreted as meaning that a body which includes a person appointed to the position of judge for the first or a subsequent time (to a higher court) in flagrant breach of the constitutional provisions of a Member State of the European Union, since the composition of the body selecting that person as a candidate for subsequent appointment to the position of judge (the Krajowa Rada Sądownictwa (National Council of the Judiciary)) does not comply with the constitution of the Member State, as established by the constitutional court of that Member State, and which could consequently undermine the confidence which the judiciary should inspire in a democratic society, is a duly qualified independent and impartial tribunal within the meaning of EU law?

(5) Must Article 2, Article 4(3), Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU in conjunction with the first and second paragraphs of Article 47 of the Charter and the third paragraph of Article 267 TFEU, Article 38 of the Charter and Article 7(1) and (2) of Directive 93/13 be interpreted as meaning that a body which includes a person appointed to the position of judge for the first or a subsequent time (to a higher court) who was selected as a candidate for appointment to that office in proceedings before the body which assesses candidates (the National Council of the Judiciary), where those proceedings did not fulfil the criteria of open and transparent rules for the selection of candidates, which could undermine the confidence which the judiciary should inspire in a democratic society, is a duly qualified independent and impartial tribunal within the meaning of EU law?

(6) Must Article 2, Article 4(3), Article 6(3) and the second subparagraph of Article 19(1) TEU in conjunction with the first and second paragraphs of Article 47 of the Charter and the third paragraph of Article 267 TFEU, Article 38 of the Charter and Article 7(1) and (2) of Directive 93/13 be interpreted as meaning that the court of last instance of a Member State of the European Union (the Supreme Court), in order to ensure effective judicial protection as a means of preventing the continued use of unfair terms in contracts concluded by sellers and suppliers with consumers, is obliged to assess *ex officio* at each stage of the proceedings:

   (a) whether the court referred to in Questions 1 and 4 fulfils the criteria of a duly qualified independent and impartial tribunal within the meaning of EU law, regardless of the impact the assessment of the criteria set out in those questions has on the substance of the decision as to whether a contractual term is unfair and, in addition,

   (b) whether the proceedings before the court referred to in Questions 1 and 4 are valid?

(7) Must Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU in conjunction with the first and second paragraphs of Article 47 of the Charter and the third paragraph of Article 267 TFEU, Article 38 of the Charter and Article 7(1) and (2) of Directive 93/13 be interpreted as meaning that the constitutional provisions of a Member State of the European Union concerning the organisation of courts or the appointment of judges which make it impossible to assess the effectiveness of a judicial appointment may, in accordance with EU law, prevent determination of the lack of independence of a court or the lack of independence of a judge sitting in that court by reason of the circumstances referred to in Questions 1 to 5?'

23. In its order for reference, the Sąd Najwyższy (Supreme Court) asked that the request for a preliminary ruling be dealt with under an expedited procedure, in accordance with Article 105 of the Rules of Procedure of the Court of Justice.

24. By order of the President of the Court of 8 February 2020, the referring court's request for an expedited procedure was refused.

25. Written observations have been submitted by the Rzecznik Praw Obywatelskich (Ombudsman, Poland), the Polish Government and the European Commission. Those parties also presented oral argument at the hearing which took place on 2 March 2021.

IV. Analysis

26. In the present case, the referring court has raised a number of questions relating to the interpretation of Article 19(1) TEU (read in conjunction with Article 2 TEU) and Article 47 of the Charter. In its view, some of the judges who participated in the delivery of the contested judgment may, because of the procedure by which they were first appointed to a judicial office, fail to meet the requirement of independence resulting from those provisions.

27. With an intriguing, almost Biblical,[5] twist, the Ombudsman, and, to a lesser extent, the Commission, question the independence of the referring judge himself who, in this case, sits in a single-judge formation of the national court. In particular, the Ombudsman argues that the appointment of the referring judge to a judicial office was vitiated by a flagrant breach of national law. Consequently, falling short of the requirement of independence, the referring judge cannot – in the view of the Ombudsman – be considered a 'court or tribunal' within the meaning of Article 267 TFEU.

28. There appears to be a common thread connecting the various legal issues that are directly (by the questions referred) or indirectly (due to the pleas of inadmissibility) raised by the present proceedings: judicial independence.

29. Therefore, I shall start this Opinion with some introductory remarks as to the concept of 'judicial independence' in the EU legal order (A). I shall then discuss the arguments concerning the alleged inadmissibility of the request for a preliminary ruling (B) and, having concluded in favour of admissibility, I shall finally turn to the examination of the merits of the questions referred (C).

A. The dimensions of judicial independence: Article 267 TFEU, Article 47 of the Charter, and Article 19(1) TEU

30. Judicial independence is – without doubt – a key component of the principle of the 'rule of law'. Article 2 TEU recognises that principle as being one of the 'founding values' of the European Union. The requirement of judicial independence is also enshrined, albeit impliedly, in no less than three provisions of EU primary law: Article 267 TFEU, Article 19(1) TEU, and Article 47 of the Charter.

[5] Matthew 7:12 – 'Therefore all things whatsoever ye would that men should do to you, do ye even so to them' (*King James Bible*) or, in a more modern translation, 'Do to others whatever you would have them do to you' (*New American Bible*). However, the same 'golden rule' of behaviour is also considered to be a basic teaching of a number of other religions.

31. All three provisions are invoked in the present proceedings. Indeed, they all appear prima facie applicable to the case at hand. While that certainly does not prevent other provisions from being simultaneously applicable, in particular sectoral secondary legislation also containing dedicated provisions on judicial protection,[6] or even secondary law instruments expressly relating to judicial independence,[7] the clarity on the interconnection between these three key Treaty provisions relating to judicial independence is indeed vital.

32. First, the present request was submitted under Article 267 TFEU, which enables any 'court or tribunal of a Member State' to send a request for a preliminary ruling to the Court of Justice. In that regard, the Court has consistently stated that, in order to determine whether a body making a reference is a 'court or tribunal' for the purposes of Article 267 TFEU, one criterion is whether that body is independent. This implies, in essence, that the body must be protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them.[8]

33. Second, the requirement that courts and tribunals be independent also follows from Article 47 of the Charter, a provision which enshrines a subjective right to an effective remedy and a fair trial for any party to proceedings. In the present case, it is undisputed that Directive 93/13, which is materially applicable in the case at hand, grants a subjective right to the applicants in the main proceedings, thereby triggering the application of Article 47 of the Charter.

34. Third, in a relatively recent, but by now well-established case-law, the Court held that it follows from the Member States' obligation to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law, provided for in Article 19(1) TEU, that the independence of any national court that may rule in those fields must be ensured. As the Court emphasised, the guarantee of independence is *inherent* in the task of adjudication.[9] In that respect, it suffices to point out that the national body which issued the contested judgment – the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław) – is unquestionably a court that may rule in fields covered by EU law.

35. This 'multiplication' of legal bases with respect to the principle of judicial independence reflects its constitutional significance and its transversal nature in a community based on the rule of law. However, it may also be the source of some confusion. One may wonder whether those provisions lay down different types of 'judicial independence', with the consequence being that, for example, a national court may be independent for the purposes of one of those provisions, while not independent enough for another.

36. As I explained in more detail in my Opinion in *WB and Others* that is not the case: under EU law, there is only one principle of judicial independence.[10] Nevertheless, in so far as the three provisions at issue (Article 267 TFEU, Article 47 of the Charter, and Article 19(1) TEU) are different in terms of their function and objective, the type of examination to be carried out in

6 Such as, in the present case, Article 7 of Directive 93/13, quoted above in point 9 of this Opinion.

7 With some regimes of secondary law even being applicable transversally, that is to say independent of any (substantive) sectoral legislation. Although evidently not applicable in the present case, see, for an example, Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56), explored in detail in my Opinion in *Asociația "Forumul Judecătorilor din România" and Others* (C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19, EU:C:2020:746, points 183 to 225).

8 See, inter alia, judgment of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, paragraphs 17 and 18 and the case-law cited).

9 See judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 37 to 42), and of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraph 51).

10 Joined Cases C-748/19 to C-754/19, EU:C:2021:403, points 161 and 162.

order to verify compliance with the principle of judicial independence may differ. In particular, the intensity of the Court's review with regard to compliance with that principle and the threshold for detecting an infringement thereto varies. [11]

37. Article 19(1) TFEU requires the Member States, inter alia, to 'provide remedies sufficient to ensure effective legal protection'. It is, therefore, a provision concerned mainly with the structural and systemic elements of the national legal frameworks: what is relevant, under Article 19(1) TEU, is whether a Member State's judicial system complies with the principle of the rule of law, enshrined in Article 2 TEU. In that context, it seem to me that the main elements for the Court's analysis are those concerning the overall institutional and constitutional structure of the national judiciary. Elements pertaining to the specific case may often be illustrative of a broader issue, but are not in themselves conclusive.

38. The threshold for a breach of this provision is rather high. Indeed, the issue is whether the problem(s) brought to the attention of the Court is (or are) likely to threaten the proper functioning of the national judicial system, thereby jeopardising the capacity of the Member State in question to provide sufficient remedies to individuals.

39. Article 19(1) TEU contains an extraordinary remedy for extraordinary situations. Its purpose is not to catch all possible issues that may arise with regard to the national judiciary, a fortiori isolated cases of error in the interpretation or application of national provisions in an otherwise healthy and EU law-compliant legal system. Article 19(1) TEU is infringed only by breaches of a certain seriousness and/or of a systemic nature, for which the internal legal system is unlikely to offer an adequate remedy.

40. Article 47 of the Charter is, conversely, a provision which embodies a subjective right of any party to proceedings – to an effective remedy and a fair trial – that comes into play when a case falls within the scope of EU law under Article 51(1) of the Charter. From this point of view, the verification of the 'independence' of a court, in the context of Article 47 of the Charter, requires a detailed assessment of all the circumstances that are specific to the case in question. Issues that relate to some structural or systemic feature of the national judicial system are relevant only in so far as they may have an impact on the individual proceedings.

41. The intensity of the Court's review in relation to the independence of the judicial body in question is, in this context, moderate: not all breaches of law amount to an infringement of Article 47 of the Charter. A certain gravity is required to that end. However, once the required standard of gravity is met, that is sufficient to give rise to an infringement of Article 47 of the Charter, since no other condition needs to be satisfied in order to uphold the individual right stemming from EU law. In particular, there is no need for the breach identified to be systemic in nature or to have implications beyond the specific case.

42. Finally, although also part of this landscape, Article 267 TFEU has a different aim and purpose, to which I shall turn in the following section. That said, the main point of this section of the present Opinion is that, although the concept of 'judicial independence' in EU law is one and the same, the precise factors, their relevance, significance and relative weight, which will be taken into account in the context of a specific case, is logically bound to differ in view of the EU provision under which the issue of independence is raised.

[11] Ibid., points 163 to 169.

B. Admissibility

43. A number of arguments have been raised in relation to the admissibility of the present request for a preliminary ruling. Some concern the issue of whether the body which sent the present request can be considered a 'court or tribunal' within the meaning of Article 267 TFEU (1), while others relate to the relevance of the questions referred (2). These arguments will be examined in turn.

1. Is the referring court a 'court or tribunal' for the purposes of Article 267 TFEU?

44. The Ombudsman raises an objection to the admissibility of the request for a preliminary ruling on the basis of the appointment of the judge who, sitting in a single-judge formation, submitted the questions referred. In particular, the Ombudsman points out that the referring judge was appointed by order of the President of the Republic, and that he accepted the appointment despite the fact that the relevant resolution of the KRS (of 28 August 2018) had been provisionally suspended by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) (orders of 27 September 2018 and 8 October 2018). In addition, the Ombudsman states that the referring judge was eventually appointed only after the Polish Minister for Justice/General Prosecutor – for whom that judge had previously worked and with whom he maintains very strong ties – personally and, in the Ombudsman's view, unlawfully, intervened in the process in order to support his appointment.

45. On that basis, the Ombudsman takes the view that the referring judge should not be considered a 'court or tribunal' within the meaning of Article 267 TFEU. In particular, the Ombudsman expresses doubts as to whether the referring body can, for the purposes of that provision, be considered to (i) be a court or tribunal *established by law*, and (ii) satisfy the requirement of *independence*.

46. The Commission also suggests that the referring judge was appointed in circumstances – which are the subject matter of a request for a preliminary ruling currently pending before the Court [12] – in which there seems to have been a flagrant breach of the laws of a Member State applicable to judicial appointments. However, the Commission appears to consider that, at this stage, it has not yet been fully established that the referring judge does not satisfy the conditions required to qualify as a 'court or tribunal' within the meaning of Article 267 TFEU.

47. I agree with the Commission as to the outcome – as regards the admissibility of the request – albeit for different reasons. Indeed, the reasons which underpin my conclusion on this point are not of a *circumstantial* nature, like those suggested by the Commission, but more of a *conceptual* nature. My proposed answer has very little to do with an assessment of whether or not the referring judge himself was properly appointed, an issue on which I harbour serious doubts. Rather, in my view, the analysis of whether the condition that there be a 'court or tribunal' has been satisfied has always been, and should continue to be, assessed in relation to the *body* itself, and not in relation to the *individuals* who sit in the body which made the request.

[12] Case C-487/19, *W.Ż.*, (OJ 2019 C 337, p. 4). In his Opinion in that case, Advocate General Tanchev concluded that judicial appointments carried out by the President of the Republic in disregard of the suspension of the appointment procedure by an order of the Naczelny Sąd Administracyjny (Supreme Administrative Court) constituted a manifest and deliberate violation of the national rules, amounting to a flagrant breach of the appointment procedure for judges (EU:C:2021:289, points 87 to 89).

48. In setting out my reasoning for that conclusion, I shall begin by identifying the Court's traditional approach to that examination (a), and then suggest why I believe it should be maintained even in the light of extraordinary cases such as the present one (b).

(a) A (independent) body (established by law)

49. The concept of 'court or tribunal' within the meaning of Article 267 TFEU is an autonomous concept of EU law and must be defined independently of denominations and qualifications under national law. To that end, the Court has traditionally used the so-called *Dorsch* criteria: checking whether the referring body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedures are *inter partes*, whether it applies rules of law, and whether it is independent and impartial. [13]

50. Within Article 267 TFEU, the concept of 'court or tribunal' has a *functional* nature: it serves to identify the national bodies which – in so far as they exercise judicial functions – can become the *interlocutors* of the Court in the context of a preliminary ruling procedure. That procedure constitutes the keystone of the judicial system established by the EU Treaties which, by setting up a dialogue between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniformity in the interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties. [14] That judicial dialogue is of constitutional significance since, as is evident from Article 19(1) TEU, the Court of Justice and the courts and tribunals of the Member States both act, each in their respective fields of jurisdiction, as the 'guardians' of the EU legal order. [15]

51. Accordingly, in so far as the purpose of the concept of 'court or tribunal' is to distinguish between bodies acting in a *judicial* capacity and bodies acting in another capacity, an analysis of whether a national body satisfies the *Dorsch* criteria must necessarily be focused on structural, institutional issues. What is crucial, in that respect, is the nature, position and functioning of *that body* within the Member States' institutional framework. [16]

52. Conversely, that analysis has never been employed to verify whether specific *individuals* (one or more) who belong to that institution and sit in the formation of the court which made the reference fulfil, each of them individually, the *Dorsch* criteria. The focus has always been on the body [17] making the reference, including in cases in which that body had been composed of just one person. [18]

[13] Judgment of 17 September 1997, *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 23). More recently, see, for instance, judgment of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535, paragraph 43 and the case-law cited).

[14] To that effect, see the recent judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 90 and the case-law cited).

[15] See, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System) (EU:C:2011:123, paragraph 66).

[16] See also my Opinion in *Pula Parking* (C-551/15, EU:C:2016:825, points 85 and 86), and Opinion of Advocate General Wahl in Joined Cases *Torresi* (C-58/13 and C-59/13, EU:C:2014:265, point 53).

[17] Starting already with cases such as judgment of 30 June 1966, *Vaassen-Göbbels* (61/65, EU:C:1966:39, at p. 273), it is no accident that the terminology employed has referred consistently to a 'body' ('organisme' in French; 'Einrichtung' in German), as being the relevant institution.

[18] Already, for instance, judgment of 11 June 1987, *X* (14/86, EU:C:1987:275, paragraphs 6 and 7), concerning a request for a preliminary ruling made by an Italian *Pretore*, as a single judge and acting, in essence, at that stage of the proceedings, as an investigating judge.

53. The same is true of the verification of the two specific *Dorsch* criteria singled out as being possibly problematic in the context of the present case: a court or tribunal established by law, as well as its independence.

54. First, as far as the *criterion* of a court or tribunal '*established by law*' is concerned, the (admittedly not particularly rich) case-law suggests that, to meet that criterion, it is the referring body to which the specific persons who made a referral belong that must be provided for in a Member State's law. The purpose of this criterion has been to exclude the admissibility of references from bodies which were established by virtue of contracts (especially certain forms of arbitration panels). [19]

55. For example, in the seminal *Nordsee* judgment, the Court focused its analysis on the legal basis for the referring body's activity (an arbitration tribunal set up by a contract between the parties), and considered it to have a non-judicial nature given the weak links between the arbitration procedure and the Member State's system of legal remedies through ordinary courts. [20] A similar approach has been followed in more recent cases where an issue relating to the actual nature of the functions exercised by the referring body was examined by the Court. [21]

56. It is true that the Court's assessment on the nature of the referring body has, over recent years, evolved and become more stringent. [22] Perhaps, it could no longer be stated, as Advocate General Ruiz-Jarabo Colomer famously did some years ago, that the 'case-law is casuistic, very elastic and not very scientific, with such vague outlines that a question referred for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted'. [23] At the same time, however, a certain flexibility has (rightly) been retained, in order to permit national bodies that *actually* exercise judicial functions to make use of the preliminary ruling procedure, whatever the name or label given to those bodies under national law. [24]

57. That approach seems to be all the more justified if one takes into account the fact that the 'established by law' criterion for the purposes of Article 267 TFEU is, in a number of languages, expressed with terms that refer to the 'legal origin' of the body making the reference. [25] This emphasises once again that the key issue is whether the body was *established* on the basis of national legislation, not whether the specific panel within that body in the individual case is acting in compliance with national law. The polysemic nature of the English word 'law' – which can refer to both legislation (a statute) and a system of rules [26] – may thus be misleading in this context.

[19] For a general overview, see, for instance, Broberg, M., and Fenger, N., *Preliminary References to the European Court of Justice*, 2nd edn, Oxford University Press, Oxford, 2014, pp. 61 and 62.

[20] Judgment of 23 March 1982 (102/81, EU:C:1982:107, paragraphs 7 to 16).

[21] See, inter alia, judgments of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraph 24); of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, paragraph 20); and of 6 October 2015, *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraph 18).

[22] See, in particular, judgments of 9 October 2014, *TDC* (C-222/13, EU:C:2014:2265, paragraphs 27 to 38), and of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17, in particular paragraph 55).

[23] Opinion of Advocate General Ruiz-Jarabo Colomer in *De Coster* (C-17/00, EU:C:2001:366, point 14).

[24] See, in particular, judgment of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, paragraphs 15 to 30), and order of 23 October 2018, *Conseil départemental de l'ordre des chirurgiens-dentistes de la Haute-Garonne* (C-296/18, not published, EU:C:2018:857, paragraph 6). More generally on this issue, and with further references, see my Opinion in *Ministerstwo Sprawiedliwości* (C-55/20, EU:C:2021:500, points 31 to 62).

[25] See, inter alia, the German ('gesetzliche Grundlage der Einrichtung'), Spanish ('origen legal'), French ('origine légale'), Italian ('origine legale'), Portuguese ('origem legal').

[26] As the Court recently noted in a case which raised, although in a different context, a similar interpretative issue in the judgment of 15 March 2017, *Al Chodor* (C-528/15, EU:C:2017:213, paragraph 31).

58. In the present case, the Court is in fact being invited to further expand on the criterion of 'established by law' for the purposes of Article 267 TFEU. To that effect, that criterion would no longer merely mean that the judicial *body* making the reference has been established by law, in this sense *by legislation*, as opposed to a contract, but would also require an examination as to whether the individual *judge* making the references has been *lawfully appointed*, as well as any other possible element relating to the lawfulness of the functioning of that body.

59. In my view, such a development would not be reasonable. As explained above, the specific concept of court 'established by law', in the context of the Article 267 TFEU criteria, has always meant something rather different. It is true that there is a concept which goes by the same (or very similar) name, namely 'a tribunal established (in accordance) with the law', which is part of the examination of whether the right to a fair trial has been infringed in the individual case for the purposes of Article 6(1) of the European Convention on Human Rights ('ECHR'),[27] now effectively replicated in Article 47 of the Charter.[28]

60. However, as it follows from the explanations already provided above,[29] the purpose of both provisions, Article 47 of the Charter, on the one hand, and Article 267 TFEU, on the other, are different. Identifying the appropriate judicial interlocutors in terms of bodies in a Member State which may refer a question to the Court of Justice is different to detecting breaches of the lawful composition of the bench in each individual case in order to protect individual EU law-based rights. In the latter case, the examination of the lawfulness of the composition of the bench must naturally reach the level of individual cases, while that is not necessarily the same in the former.

61. Thus, to simply and mechanically 'cut and paste' the concept of 'tribunal established by law' from Article 47 of the Charter into Article 267 TFEU, since they sound largely similar, without properly reflecting on the different content and purpose of those concepts, would not be a very wise approach.

62. Second, with regard to the *criterion of independence* under Article 267 TFEU, the Court has consistently held that that criterion calls for '*rules*, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as 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'.[30] The Court has also clarified that, in principle, it is not for the Court to infer that the national provisions ensuring the courts' independence may be applied in a manner contrary to the principles enshrined in the domestic legal order or the principles of a State governed by the rule of law.[31]

[27] Judgment of the ECtHR of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418, §§ 229 to 234), as recently confirmed in judgment of the ECtHR of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland* (CE:ECHR:2021:0507JUD000490718, §§ 243 to 247).

[28] Most recently, see, for example, Opinion of Advocate General Tanchev in *W.Ż* (Case C-487/19, EU:C:2021:289, points 70 to 80).

[29] Points 36 to 42 of this Opinion.

[30] See, more recently, judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraph 53 and the case-law cited). My emphasis.

[31] Judgment of 4 February 1999, *Köllensperger and Atzwanger* (C-103/97 EU:C:1999:52, paragraph 24). This case-law echoes the approach taken by the European Court of Human Rights on this matter, see judgment of the ECtHR of 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal* (CE:ECHR:2018:1106JUD005539113, § 186).

63. Accordingly, the Court's analysis has – on this matter too – focused on the legal framework, and the guarantees laid down therein, to protect the judges' ability to exercise their office free from any form of (direct or indirect, actual or potential) pressure. [32] The focus has always been on whether the body making a reference is structurally independent from both the parties in a dispute before it, [33] as well as from any external guidance, such as that body being institutionally part of the administration. [34]

64. For instance, in a recent case, doubts were expressed by some parties as to whether the referring judge, who sat in a single-judge formation, met the EU standard of independence and impartiality on the ground that – in so far as the question concerned the status of Italian magistrates – he naturally had an interest in the outcome of the dispute. After examining the relevant domestic rules, however, the Court rejected that objection and held the case to be admissible. It found that Italian magistrates 'perform their duties wholly autonomously, subject to disciplinary rules, and without external pressure capable of influencing their decisions'. Without inquiring into the specific position of the referring judge, the Court added that it had 'no doubt … that magistrates meet the [criterion] that they be established by law'. [35]

(b) The value of an ongoing dialogue

65. In short, a re-interpretation of the concept of 'court or tribunal', for the purposes of Article 267 TFEU, which would require the Court to examine the specific situation of the individuals who form part of those national bodies would be at odds with both the nature and purpose of the preliminary ruling procedure. In contrast to Article 47 of the Charter, and potentially, if of a certain gravity, also to Article 19(1) TEU, the analysis under Article 267 TFEU has always been concerned merely with identifying the proper institutional interlocutors for the Court, not with the lawfulness of each and every element of the procedure pending before the referring court. Indeed, the preliminary ruling procedure is, at some level, a formalised and thus a formal one: Article 267 TFEU sets up a dialogue between judicial *institutions*, not between the *individuals* of which those institutions are composed.

66. I would add four further systemic reasons as to why I suggest that that ought to remain the case, even in quite problematic cases such as the present one.

67. First, it would be counterintuitive (and counterproductive) for the Court categorically to refuse to enter into a judicial dialogue with bodies which are indeed, certainly formally, exercising judicial functions at the national level and require assistance in interpreting and applying EU law to the proceedings pending before them. I hardly need to point out, in this context, that the Court's answer to their questions would be binding both for the referring court

[32] See, among others, judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347, paragraphs 22 to 32).

[33] Judgment of 19 September 2006, *Wilson* (C-506/04, EU:C:2006:587, paragraph 49).

[34] Thus excluding bodies tasked with administrative appeals from making a reference to the Court under Article 267 TFEU – see, for instance, judgment of 30 March 1993, *Corbiau* (C-24/92, EU:C:1993:118, paragraphs 15 to 17) or of 30 May 2002, *Schmid* (C-516/99, EU:C:2002:313, paragraphs 34 to 38).

[35] Judgment of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)* (C-658/18, EU:C:2020:572, especially paragraphs 43 and 55). Compare this case with previous cases – essentially concerning the same issue – in which the Court rejected the reference as inadmissible, but only because the referring court was, under national law, manifestly incompetent. Although some of the parties had raised the issue of impartiality, the Court did not refer to any such argument in its orders: see orders of 6 September 2018, *Di Girolamo* (C-472/17, not published, EU:C:2018:684), and of 17 December 2019, *Di Girolamo* (C-618/18, not published, EU:C:2019:1090).

and for other national courts that may face the same legal issues.[36] Therefore, by making a reference under Article 267 TFEU, the referring court commits to follow the Court's interpretation of the EU provisions that may be applicable in the case at hand.

68. Second, the existence of (alleged, possible or probable) issues with the legal and moral rectitude of the national judge(s) adjudicating in a case does not deprive the individual *parties* to the proceedings of their right to have the relevant EU provisions applied correctly. Therefore, an institutional and general approach to the concept of 'court or tribunal' within the meaning of Article 267 TFEU seems to me to be more in keeping with the right to an effective remedy enshrined, inter alia, in Article 47 of the Charter.

69. Third, in more practical terms, the Court is ill-equipped to carry out an assessment of the impartiality and moral integrity of specific judges at national level in the form of an admissibility assessment under Article 267 TFEU. Leaving aside the fact that such an endeavour requires an interpretation of the relevant national laws, and also the fact that the probative value of any elements of fact and the interpretation of the provisions of the national law is likely to be disputed by the parties, the crucial point is still that a detailed and in-depth examination would need to take place at the stage of admissibility. In this way, the merits of a claim pertaining to either Article 47 of the Charter or Article 19 TEU would be already examined at the stage of admissibility, with the analysis potentially becoming somewhat circular.[37]

70. Fourth and finally, there is the issue of horizontal consistency of the Court's case-law. Under normal circumstances, a number of persons, myself included, would find the suggestion that the Court should be assessing the 'quality' of the individual judge(s) of a national court which makes a request for a preliminary ruling in order to accept or decline that request rather puzzling. Are the judges who submitted the request law-abiding persons who exercise their functions with the required integrity? Is there some possible conflict of interest in the individual case? May a judge who is subject to disciplinary proceedings still submit a request in another case? What about a judge suspected of corruption, with criminal investigations already opened against him or her, but who has not been formally suspended from office? Is the Court required to examine all these issues when 'filtering' requests made under Article 267 TFEU?

71. In recent years, particularly in view of the rule of law crisis in several Member States, the Court has been obliged not only to develop its case-law in order to provide guidance with regard to situations and scenarios that few would have ever imagined possible, but also to carve out exceptions to normally applicable rules due to abnormal cases. As I have already explained elsewhere, I do not see any alleged issue with double standards in such cases since the situations are objectively different.[38]

72. However, in the present case, the Court is effectively asked to re-interpret generally applicable *Dorsch* criteria – which are applicable transversally to all cases regardless of the judicial body in a Member State – and to expand the scope and arguments (of the parties) that may already be raised at the stage of admissibility under Article 267 TFEU. For all the reasons advanced in this part of this Opinion, I do not believe that such a step is either called for or necessary, even in view of such extraordinary cases like the present one.

[36] Generally on this issue, and with references to the relevant case-law, see my Opinion in *Hochtief Solutions Magyarországi Fióktelepe* (C-620/17, EU:C:2019:340, points 59 to 62).

[37] In detail with regard to similar issues arising in the context of judgment of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535), see my Opinion in *WB and Others*, points 115 to 120.

[38] See my Opinion in *WB and Others*, point 154.

73. In the light of the foregoing, I arrive at the conclusion that the possible flaws in the appointment procedure of the judge who made the reference in the present case,[39] and/or his personal and professional ties to the Minister for Justice/General Prosecutor,[40] should not result in the inadmissibility of the present reference.

74. That conclusion nonetheless comes with two important caveats.

75. First, it must be emphasised very clearly that such a conclusion, for the specific purposes of Article 267 TFEU, in no way means that the referring court is lawfully composed and/or that, more specifically, the referring judge has been lawfully appointed. Indeed, the points raised by the Ombudsman are, in my view, quite disturbing. This is particularly true when the Ombudsman's allegations are examined in the broader institutional and constitutional context – of which the Court is well aware – on the state of the rule of law in Poland.

76. However, those factors could, where appropriate, be relevant in the context of an assessment of the referring court's independence pursuant to Article 19(1) TEU and/or Article 47 of the Charter, and may lead to the conclusion that both of those provisions have been breached. By contrast, as explained above, those factors are not normally relevant to determining whether a national body constitutes a 'court or tribunal' under Article 267 TFEU. The suggestion that formal institutional partners ought to continue talking, even if one of them might have rather serious doubts about the personal qualities of some of the individuals composing the other party, is based on very different considerations than the – even implicit – endorsement of the other party.

77. Second, I am not excluding the fact that a different conclusion could potentially be reached if the significance of the factors relating to the personal situation of one or more judges of a national court formally submitting a request pursuant to Article 267 TFEU were to go beyond the individual(s) in question and were to have repercussions on the overall functioning of the national body to which the judges belong. However, in such a scenario, the focus and examination would be on the *body* making a reference, and thus in keeping with the logic of *Dorsch* and the institutional approach suggested in this Opinion. The adoption of an institutional approach to the assessment of the *Dorsch* criteria does not mean that the institutional *context* must not be considered. Naturally, at some level, an institution is the aggregation of the individuals forming it. How the individuals who form part of a (presumably) judicial body have been appointed to judicial office is clearly part of that context.

78. That situation could arise, for example, with regard to a captive or hijacked judicial institution in a Member State which simply can no longer be called a 'court or tribunal'. It may possibly arise when the accumulation of the issues relating to, for example, appointments to that (formally judicial) institution, the political influence being exercised over its decision-making, and other possible elements, reveal a pattern in which there is no longer any independent court worth the name. In such as case, however, the conclusion would be that the *body as such* can no longer be

[39] For the sake of completeness, but without having, in my view, any bearing on the disposition of the present case, it might be added that the existence of procedural irregularities in that appointment procedure were confirmed, after the hearing in the present case took place, by judgments of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 6 May 2021, II GOK 2/18, II GOK 3/18, II GOK 5/18, II GOK 6/18 and II GOK 7/18. Because of those procedural irregularities, that court annulled the contested resolutions of the KRS, without, however, in any way touching upon the validity of the decisions of the President of the Republic appointing the judges in question.

[40] With regard to the problems flowing, in respect of Article 19(1) TEU and Article 47 of the Charter, from that 'unholy alliance' of roles, see my Opinion in *WB and Others*, in particular points 178 to 192.

considered a 'court or tribunal', even for the notably lighter touch of Article 267 TFEU, which means that the Court of Justice can no longer engage with such a body . That latter body would then be completely cut off from any dialogue.

79. In the light of all the above, I take the view that, for the purposes of the present proceedings, the Sąd Najwyższy (Supreme Court), sitting in a single-judge formation, may still be considered a 'court or tribunal' within the meaning of Article 267 TFEU.

2. Is the reference 'relevant' under Article 267 TFEU?

80. Another issue concerning the admissibility of the case which has been raised in the present proceedings concerns the 'relevance' (or 'necessity') of the questions referred.

81. According to settled case-law, the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is *necessary* for the effective resolution of a dispute.[41] In that regard, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.[42]

82. It follows that questions relating to EU law enjoy a presumption of relevance: the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[43]

83. More specifically, as regards the criterion of relevance/necessity, the Court has consistently stated that that criterion requires that the decision to be given by the referring court must be *capable of taking account* of the answer provided by the preliminary ruling.[44]

84. In that respect, in *Miasto Łowicz* – a recent case in which, like the present one, issues relating to the rule of law were raised – the Court emphasised that, for the purposes of establishing the relevance for the purposes of Article 267 TFEU, there must be a connecting factor between the dispute before the referring court and the provisions of EU law whose interpretation is sought, 'by virtue of which that interpretation is objectively required for the decision to be taken by the referring court'.[45] That connecting factor exists, according to the Court, where: (i) the dispute is substantively connected to EU law; (ii) the question concerns the interpretation of EU law provisions of a procedural nature that may be applicable; or (iii) the answer sought from the

41 To that effect, judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 194 and the case-law cited).

42 See judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)* (C-510/19, EU:C:2020:953, paragraph 25 and the case-law cited).

43 Ibid., paragraph 26.

44 See, inter alia, judgments of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 24), and of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 31).

45 Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 48).

Court appears capable of providing the referring court with an interpretation of EU law which allows it to resolve procedural questions of national law before being able to rule on the substance. [46]

85. The present reference does not fall under the first two categories, in so far as there is no EU provision of a substantive or of a procedural nature that is applicable in the case pending before the referring court, the interpretation or validity of which the referring court harbours doubts. It is true that the referring court invokes Article 7(1) and (2) of Directive 93/13, as well as Article 38 of the Charter, as provisions that may also be applicable to the dispute in the main proceedings. However, it would require quite a large stretch of the imagination and a long chain of transitive reasoning in order to get from the scope of those provisions to the substance of the issues that that court is effectively submitting.

86. In any event, it seems that the present case does fall under the third category. Indeed, the referring court requires an answer from the Court to the questions referred, in order to resolve a procedural question of national law, before being able to rule on the substance of the case before it.

87. According to information that emerged during these proceedings, the examination of appeals on a point of law before the Sąd Najwyższy (Supreme Court) is, in principle, carried out in two stages. At a preliminary stage, that court, sitting as a *single judge*, examines the admissibility of the appeal. Pursuant to Article 398^{9}(1), point 3, of the Polish Code of Civil Procedure ('the Polish CCP'), an appeal on a point of law is admissible only if, inter alia, the contested decision was issued following proceedings that were invalid. Under Article 379, point 4, of the Polish CCP, the proceedings are invalid if, inter alia, the composition of the court of trial was not in accordance with relevant legal regulations or if a case was heard in the presence of a judge who was subject to exclusion. It is only if an appeal is considered admissible that the Sąd Najwyższy (Supreme Court), ruling in a panel of *three judges*, examines the merits of the appeal at a later stage.

88. As the Polish Government and the Commission clarified at the hearing, the judge checking the admissibility of the appeal must positively establish the fulfilment of one of the four conditions of admissibility, set out in Article 398^{9}(1)) of the Polish CCP, in order for the case to proceed further. To that end, the judge in charge of this preliminary step will have to issue a specific and separate decision on admissibility, be it positive or negative, thereby closing that stage of the preliminary assessment.

89. In the light of the above, it cannot be concluded that the questions referred are of no relevance for the decision to be delivered by the referring court. Indeed, the issue of the proper composition of the court, the judgment of which is being reviewed, is one of the grounds of appeal in cassation. As such, it has to be assessed by the referring court, if need be *ex officio*, and any conclusion reached on that point must be reasoned separately. Such an issue, therefore, is indeed an element in *limine litis* of compatibility between national law and EU law and which the referring court is required to address in order to be able to decide whether the appeal on a point of law is admissible.

90. Consequently, I consider the questions referred to be *relevant*, and thus admissible, because the Court's answer to those questions will enable the referring court to give a ruling in a case pending before it.

[46] Ibid., paragraphs 49 to 51.

C. Merits

91. By its questions – some of which can be examined jointly – the referring court raises a number of interpretative doubts before the Court with regard to the principle of judicial independence, flowing from Article 19(1) TEU, read in conjunction with Article 2 TEU, and Article 47 of the Charter. Although in its questions the referring court invokes a number of other provisions, I do not consider that a separate discussion of those other provisions would be able to provide any additional clarity on the issues raised.

92. The issues raised by the referring court concern, in the first place, the type of analysis – of which that court distinguishes two forms, *in abstracto* and *in concreto* – that it is required to carry out in order to verify compliance with the principle of judicial independence. That issue is of a transversal nature and is found in several of the questions raised. I shall therefore examine it first, in my introductory remarks (1). Subsequently, and in that light, I shall proceed to the specific questions referred. To begin with, I shall assess whether certain facts relating to the first appointment to judicial office of individuals exercising judicial functions may call into question their independence for the purposes of Article 19(1) TEU and Article 47 of the Charter, whether it be with regard to an appointment made under the Communist regime (2), or at a later stage, under the allegedly deficient procedural systems which followed up until 2018 (3). Finally, I shall address the referring court's doubts as to whether it is, in principle, required to raise issues of independence of its own motion, and whether the principle of irremovability of judges could prevent it from doing so (4).

1. Introductory remarks: assessing judicial independence

93. The referring court's questions invite the Court, first and foremost, to clarify the manner in which the assessment of compliance with the principle of judicial independence is to be carried out. In order better to understand the issues raised by the referring court, it is appropriate briefly to recall the doubts expressed by that court in that respect.

94. In its request for a preliminary ruling, the referring court notes that, in its previous decisions, the Court has made clear that, in order to establish whether a national court is 'independent', regard must be had, inter alia, to the manner in which its members were appointed and to their term of office. In particular, the Court held that, regardless of the constitutional model chosen for the appointment, it is 'still necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges'. [47]

95. In that regard, the referring court notes that, in *A. K. and Others*, the Court indicated essentially that alleged breaches of the principle of independence must be examined by looking at all relevant elements and taking account, where appropriate, of the reasons and specific objectives alleged to justify the measures in question. The significance of the relevant elements should not be evaluated per se or in isolation, but assessed together in the light of the broader legal and institutional landscape. [48]

[47] Judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 127 and 130 to 134 and the case-law cited). ('*A. K. and Others*').

[48] *A. K. and Others*, paragraphs 152 and 153.

96. However, the referring court explains that it is unsure as to the actual manner in which the analysis of compliance with the principle of independence should be carried out. In particular, that court is of the view that the assessment could be made *in abstracto* or *in concreto*. With reference to the specific situation at issue in the main proceedings, the referring court explains that an assessment *in abstracto* would mean that each case in which a judge has been appointed by means of a flawed procedure would give rise to concerns, regardless of the impact on the specific case under consideration. Accordingly, the position, conduct and career path of a particular judge participating in the composition of a judicial panel would be immaterial in that context. On the other hand, compliance with the principle of independence could be verified *in concreto*, which would require a link to be demonstrated between an unlawful judicial appointment procedure and an actual or potential impact on the outcome of a particular case.

97. In my view, the problem set out by the referring court appears to be based on a somewhat incomplete reading of the judgment in question. The referring court singles out only one aspect of the judgment in *A. K. and Others*, and then, while being silent on the context and purpose of such an assessment, establishes a false dichotomy by presenting the *in abstracto* analysis and the *in concreto* analysis as mutually exclusive. In my view, if considered in their proper context, those two approaches are not alternatives, but are complementary or even cumulative.

98. First, by referring to 'all relevant circumstances', the Court has not excluded any type or category of relevant elements. In my view, the Court simply suggested that when assessing judicial (in)dependence, it may not suffice to look at mere 'law in books'.[49] What is often needed is to also enquire about the actual practice in applying those rules.[50] Accordingly, both formal and institutional elements (which are key to an *in abstracto* analysis), and more concrete and case-specific elements (which are at the heart of an *in concreto* analysis) may, and where appropriate should, be taken into account.

99. Given the variety of situations in which an issue of independence of the judiciary could be raised, it is impossible to say a priori which type of elements should carry more weight. The significance of those elements – which, I repeat, must in any event be assessed together – depends obviously on the specific characteristics of the case in question.

100. Moreover, the overall *context* in which the rules operate and how they relate or interact with other rules and actors is equally important. (In)dependence is by definition relational: it is the independence from or the dependence on something or somebody. Thus, metaphorically speaking, its assessment cannot be limited to a microscopic study of one slice of a salami, without having regard to the rest of the salami stick, how and where it is normally stored, its distance and relation to other objects in the storage room, and while nonchalantly ignoring the fact that there is a rather large carnivore lurking in the corner of the room.

101. Second, and perhaps even more importantly, it is simply impossible to lay down *ex ante* a universally valid test for assessing judicial independence *irrespective of* the EU provision that is applicable in the case at hand. To attempt to state conclusively, in the abstract, when exactly a certain court will be 'independent', without knowing either the *purpose* for which the question is

[49] Compare with judgment of the ECtHR of 6 October 2011, *Agrokompleks v. Ukraine* (CE:ECHR:2011:1006JUD002346503, §136). More generally on this issue, Spano, R., 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', *European Law Journal*, 2021, p. 9.

[50] For a more detailed discussion and categorisation of the potential scenarios, see my Opinion in *Asociația "Forumul Judecătorilor din România" and Others* (C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19, EU:C:2020:746, points 240 to 248).

formulated – that is to say whether it is in the context of Article 267 TFEU, Article 47 of the Charter, or Article 19(1) TEU – or the *circumstances* of an individual case, comes rather close to asking the Court to put the proverbial cart before the horse.

102. As I have sought to explain in preceding parts of this Opinion, and as I have already set out in detail in my Opinion in *WB and Others*, while the principle of judicial independence in EU law is one and the same, what exactly will be looked at, and the level of scrutiny that will be exercised, will be dependent on which provision of EU law is in fact being applied: Article 267 TFEU, Article 19(1) TEU, or Article 47 of the Charter. [51]

103. In the context of an analysis under Article 19(1) TEU, the Court is likely to focus first and foremost on formal and institutional elements, whereas in the context of an analysis under Article 47 of the Charter, it will be the case-specific elements that take centre stage. That focus is determined by the logic of each of the provisions: structural failures of a Member State and/or the infringement of individual rights derived from EU law. Yet, as explained, that is not a binary choice: one may amount to the other even though they are naturally not the same. The 'all the relevant circumstances' test means – and I may be forgiven for the truism – that any and all circumstances may be relevant. It will be the focus and the purpose of the provision assessed in the specific factual and legal context of a given case that will eventually determine which of them will be conclusive.

104. In summary, in order to assess compliance with the principle of independence of the judiciary, enshrined in Article 19(1) TEU and in Article 47 of the Charter, a national court must consider all relevant elements and take into account, where appropriate, the reasons and specific objectives of the national measures that may be applicable to the situation. In that context, both formal and institutional elements and case-specific elements may be relevant, depending on the characteristics of the case in question and the EU provision(s) that is/are applicable. The significance of those elements should not be evaluated per se or in isolation, but assessed together in the light of the broader legal and institutional landscape.

105. That said, I will now turn to the specific issues mentioned in the various question referred.

2. Questions 1 to 3

106. By its first, second and third questions – which are closely related and can therefore be examined together – the referring court is asking essentially whether the circumstances pertaining to the first appointment to judicial office of one of the judges of the court that delivered the contested judgment (Judge FO), which appointment took place under the Communist regime of the then Polish People's Republic ('the PRL'), has an impact on his independence in the current exercise of his judicial duties, for the purposes of Article 19(1) TEU and Article 47 of the Charter.

107. In that connection, the referring court indicates that, during the Communist era in Poland, when taking up office, a judge would swear an oath to the president of the relevant court, inter alia, to consolidate the freedom, independence and power of the 'democratic' Polish State, to protect and strengthen the order based on the social, economic and political principles of the PRL, and to strengthen respect for the law and loyalty to that State. According to the provisions in force at

[51] Points 36 to 42 of this Opinion, as well as points 163 to 169 of my Opinion in *WB and Others*.

the time, the task of the justice system in the PRL was to protect the 'people's democracy' and aid its development towards socialism. Courts during the Communist era in Poland were also obliged through their activities to educate citizens in a spirit of loyalty to the PRL.

108. In the view of the referring court, the way in which judges were appointed at that time, and the arrangements concerning their supervision and the possibility of dismissal, did not comply with the standards of a democratic State subject to the rule of law. In particular, until 1989, judges were appointed and dismissed by an executive body of a State characterised by an undemocratic system of power: the Council of State. The regulations governing the appointment and dismissal of judges, aside from their close dependence on the executive bodies of the State, also did not include any transparent appointment criteria or allow judicial self-government or bodies elected through democratic elections to participate in the appointment procedure. Those procedures, in the view of the referring court, undermine the confidence that the judiciary should inspire in a democratic society.

109. In the referring court's view, the amendments introduced into Polish law after 1989 did little to develop effective instruments for the verification of judicial appointments made during the Communist era or of potential breaches by judges of the principle of independence. Therefore, in the referring court's view, post-1989, there was neither any general verification of all judicial appointments made in the Communist era, nor any effective review of individual judicial appointments, even in cases where individual judges would have been manifestly in breach of the principle of judicial independence.

110. I do not find the above arguments convincing.

111. I certainly agree with the referring court that the procedures for the appointment of judges, and more generally the rules governing their tenure and activities, during the PRL era, did not offer adequate guarantees to meet the standard of judicial independence set out in the EU Treaties today.

112. However, as for the rest, I am at a loss as to the relevance of all those statements in *legal* terms *today*. By wrapping up a certain political vision of the world as a legal argument, the referring court appears to be suggesting something that either amounts to true retroactivity, or wholly unsubstantiated insinuations.

113. First, it is stating the obvious that EU law did not apply to Poland before its accession to the European Union. It is also trite law that, in the EU legal order, absent specific provisions on retroactive effects, new rules of law do not apply to legal situations that have arisen and become definitive under the old law, but they may apply to their future effects, and will apply to new legal situations.[52] Thus, I remain puzzled as to how rules and standards flowing from Article 19(1) TEU and/or Article 47 of the Charter could be applied to judicial appointments in Poland prior to 1989, without that amounting to true retroactivity.[53]

114. Second, there is indeed, in EU law, the caveat of ongoing legal effects. A problem of independence under Article 19(1) TEU and/or Article 47 of the Charter could, therefore, potentially arise if the national rules which the referring court made reference to were, in spite of no longer being in force for several decades, still capable of producing some effect *today*. In order for that to happen, and as far as the present case is concerned, one would need to show an ongoing

[52] See, with further references, my Opinion in *E.B.* (C-258/17, EU:C:2018:663, points 44 to 48).

[53] However, see judgment of 15 January 2019, *E.B.* (C-258/17, EU:C:2019:17, paragraphs 54 and 55).

impact, a relationship between those previous national rules and the emergence of present day legitimate and genuine doubts in the minds of individuals as to the independence and impartiality of a judge such as Judge FO.

115. However, in that regard, the order for reference is, rather surprisingly considering its overall length and detail, quite scarce in providing any specific explanations as to the *identity* of the person, institution or body which would be currently capable of exerting undue pressure over Judge FO, and as to the *reasons* why Judge FO could be inclined to yield to that pressure. Instead, the referring court appears to be labouring under the assumption that judges appointed during the Communist era are by definition 'forever tainted', simply by virtue of association with the previous regime, and because, as Question 3 implies, they were never reappointed and never swore a new judicial oath to the new democratic State.

116. Third, without wishing to comment in any way on the merits of such 'views', I would simply note that, over the course of the history of any country, there are constitutional moments within which a number of options as to the design of new State institutions and their personnel emerge.[54] However, when making that constitutional choice some 30 years ago, Poland, together with a number of other countries in central Europe, opted for continuity. Subsequently, judges appointed under the previous regime in Poland have benefited from a double layer of acceptance, at both national and EU level.

117. On the one hand, as the referring court points out, despite the adoption of certain 'lustration' measures,[55] the newly formed democratic State accepted that judges appointed in the PRL era could, in principle, remain in office. This was confirmed by the Polish Government at the hearing.

118. On the other hand, that situation was considered to be in compliance with EU law by the EU institutions for the purposes of Poland's accession to the European Union. It should not be overlooked, in that respect, that prospective Member States were required to meet the so-called 'Copenhagen criteria',[56] one of which concerned the existence of stable institutions guaranteeing, inter alia, democracy, the rule of law and protection of human rights.

119. Viewed in this context, the questions raised by the referring court amount in essence to suggesting that the constitutional choice exercised by Poland decades ago, and accepted by the European Union upon its entry into the Union, was wrong. Again, I shall not pass comment on the political implications of that proposition. However, in terms of the present case, as a matter of fact, any judicial intervention that would invalidate decisions taken by a national judge, such as Judge FO, simply for having been first appointed to judicial office in the PRL, would be akin to a *newly adopted* measure of 'lustration'.

[54] That is hopefully with the exception of the 'solution' mentioned in point 1 of this Opinion.

[55] The term 'lustration' – a neologism deriving from the ancient Latin word '*lustratio*' which meant purification by sacrifice – has been widely used to refer to measures of transitional justice, adopted in post-Communist States in central and eastern Europe, in order to facilitate institutional and administrative reforms, as well as political and societal transformation. Those measures often involved screening programmes aimed at assessing the integrity and capabilities of individuals serving in some key areas of the public administration (including judges). See, generally, Council of Europe, Parliamentary Assembly, 'Measures to dismantle the heritage of former communist totalitarian systems: Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a State based on the rule of law' (doc. 7568), 3 June 1996; and Horne, C.M., '*Transitional justice: Vetting and lustration*', in Lawther, C., Moffett, L., and Jacobs, D. (eds), *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Cheltenham, 2017, pp. 424 to 441.

[56] See Conclusions of the Presidency, European Council in Copenhagen (21 and 22 June 1993). See, currently, Article 49 TEU.

120. Fourth, no provision of EU law allows the Court to check the manner in which Member States have, before their accession, dealt with the political, legal and administrative heritage of the previous regimes.[57] Likewise, the shaping of applicable or new rules regarding judicial organisation, appointments, or judicial discipline remain, by default, within the institutional choices of the Member States.[58]

121. That does not mean, however, that any lustration measure that a Member State were to adopt *now* can escape verification of its compliance with EU law, where the latter *is applicable*. In particular, a measure that could have an impact on the activity of national courts acting in the fields governed by EU law would have to be consistent with, inter alia, the principles embodied in Article 19(1) TEU, which reflect the values enshrined in Article 2 TEU, such as the rule of law and respect for fundamental rights.

122. Although the Court has not had the opportunity to review any such measure, various forms of lustration have been considered in the past by the European Court of Human Rights ('ECtHR'). In that regard, the ECtHR has found that lustration measures could be justified if pursuing aims relating to, inter alia, the protection of national security, public safety, the promotion of trust in the new democratic institutions, the prevention of disorder, the transparency of public life, clarity and internal peace in the society, the economic well-being of the country and the rights and freedoms of others.[59] In that connection, the ECtHR has also stated that States may validly adopt lustration measures since 'a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded'.[60]

123. However, the ECtHR has considered that, even if not leading to a breach of human rights per se, certain conditions have to be satisfied for such measures to be compliant with the provisions of the ECHR. In terms of what is relevant to the present proceedings, I shall simply recall that the ECtHR required the national legal framework to, inter alia: (i) be sufficiently precise to be able to *individualise* the responsibility of each of the persons concerned,[61] (ii) include adequate *procedural guarantees* for the persons concerned,[62] and (iii) be *temporary* in nature, since the objective necessity of restricting individual rights because of the transitional measures decreases with time.[63]

[57] Nor, as far as I know, is there any binding international agreement on that matter, in particular one binding on the European Union and/or its Member States.

[58] See, inter alia, judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraph 48).

[59] Judgment of the ECtHR of 21 October 2014, *Naidin v. Romania* (CE:ECHR:2014:1021JUD003816207, § 51). Cf. also United Nations, Rule-Of-Law Tools for Post-Conflict States – Vetting: an operational framework, 2006, pp. 3 to 5: which suggests that personnel reform aiming at excluding from public service persons with serious integrity deficits contributes to re-establishing civic trust and re-legitimising public institutions.

[60] Judgment of the ECtHR of 26 September 1995, *Vogt v. Germany*, (CE:ECHR:1995:0926JUD001785191, § 59).

[61] Judgments of the ECtHR of 24 June 2008, *Adamsons v. Latvia* (CE:ECHR:2008:0624JUD000366903, § 116), and of 3 September 2015, *Sõro v. Estonia* (CE:ECHR:2015:0903JUD002258808, §§ 60 and 61). See also Council of Europe, Parliamentary Assembly, Resolution 1096 of 27 June 1996 on measures to dismantle the heritage of former communist totalitarian systems, p. 12.

[62] Judgments of the ECtHR of 14 February 2006, *Turek v. Slovakia* (CE:ECHR:2006:0214JUD005798600, § 115); of 24 June 2008, *Adamsons v. Latvia* (CE:ECHR:2008:0624JUD000366903, § 116); and of 24 April 2007, *Matyjek v. Poland* (CE:ECHR:2007:0424JUD003818403, § 62).

[63] Judgments of the ECtHR of 24 June 2008, *Adamsons v. Latvia* (CE:ECHR:2008:0624JUD000366903, § 116), and of 21 January 2016, *Ivanovski v. the former Yugoslav Republic of Macedonia* (CE:ECHR:2016:0121JUD002990811, § 185). See also the statement of the Venice Commission reproduced in the latter judgment in § 108, point (a), according to which 'introducing lustration measures a very long time after the beginning of the democratization process in a country risks raising doubts as to their actual goals. Revenge should not prevail over protection of democracy. Cogent reasons are therefore required'.

124. The ECtHR's findings appear, in my view, largely transposable to the EU legal order.[64] In the light of that case-law, I have serious doubts that a judicial decision such as that suggested by the referring court would be compatible with EU law. Without there being the need to elaborate on this issue, I see several potential issues arising, especially in respect of Article 2 TEU (rule of law) and Articles 47 and 48 of the Charter (due process).

125. However, and in any event, what I find most striking is that such a measure would be contemplated decades after the fall of the previous regime and the creation of a new State, but still, at least nominally, in the name of the need to deal with the Communist past. Whatever the true motives behind such suggestions being made in Poland today, I simply note that that sheer temporal disconnect would, by itself, exclude the objective necessity of such measures in a democratic society.[65] Put simply, the constitutional moment where any such measures could be legitimately envisaged, has, in my view, long since passed.

126. In the light of the foregoing, I take the view that the mere fact that some judges were appointed to judicial office for the first time during the PRL era is not an element capable, in itself, of calling into question their independence today. Therefore, the circumstances referred to in Questions 1 to 3 are not such as to cast doubts on the independence and impartiality of a national judge, such as Judge FO, for the purposes of Article 19(1) TEU and Article 47 of the Charter.

3. Questions 4 and 5

127. By its fourth question, the referring court seeks to know whether the fact that some members of the composition of the court which delivered the contested judgment were appointed to that court on the basis of resolutions adopted by the KRS in a composition resulting from legislation, as interpreted, subsequently declared unconstitutional by the Trybunał Konstytucyjny (Constitutional Court),[66] has any bearing on the assessment of whether that composition of the court complied with the requirement of independence. By its fifth question, the referring court also asks, in essence, whether a body – such as the KRS at the material time – which followed non-transparent and non-public procedures with regard to the appointment of judges can be regarded as being independent for the purposes of EU law.

128. These two questions can be treated together. They may perhaps best be approached in two stages: first, at face value, that is to say without taking into account the overall context, and then, second, by enriching the analysis with that broader context.[67]

129. First, it should be pointed out that, as follows from the case-law of the Court and the ECtHR, not every error that may take place during the procedure for the appointment of a judge is of such nature as to cast doubts on the independence of that judge.

130. In *Simpson*, the Court pointed out that an irregularity committed during the appointment of judges entails an infringement of Article 47 of the Charter, 'particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular

64 As also prescribed by Article 52(3) of the Charter and Article 6(3) TEU.

65 In the sense of the requirements of the ECtHR case-law quoted above in footnote 63, assuming that any such a case would even pass the stage of legitimate aim and legality once genuine motives behind such measures were to be analysed.

66 See above, point 19 of this Opinion.

67 Thus providing indeed a case study for the taking into account of 'all relevant circumstances', as outlined above in points 98 to 100 of this Opinion.

the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned'. In that case, the irregularity committed by the Council in the appointment of a member of the (then) European Union Civil Service Tribunal was found not to be of such gravity as to infringe Article 47 of the Charter. [68]

131. Similarly, in *Ástráðsson*, the Grand Chamber of the ECtHR followed a three-step test to determine whether an unlawful appointment of a judge breached the right to a 'tribunal established by law' under Article 6(1) ECHR. In essence, the ECtHR checked whether: (i) there was a manifest breach of the domestic rules on judicial appointments, (ii) the breach concerned a law of fundamental importance for appointing judges, and (iii) the breach had been effectively reviewed and remedied by domestic courts. [69]

132. In particular, as far as the second element mentioned above is concerned, the ECtHR emphasised the need to assess the breach 'in the light of the object and purpose of the requirement of a "tribunal established by law", namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers'. Accordingly, the ECtHR held that 'breaches of a purely technical nature that have no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold'. [70]

133. In the present case, the issues identified by the Trybunał Konstytucyjny (Constitutional Court) in its decision K 5/17 of 20 June 2017, related to the length of office of certain members of the KRS, which is one of the bodies participating in the judicial nomination process. The findings of that court appear to be mostly of a technical nature, at least when observed through the prism of Article 19(1) TEU and Article 47 of the Charter. Neither the referring court nor the Polish Government provided any specific and clear explanation to the contrary in the context of the present proceedings. When asked about that point at the hearing, the Polish Government stated that, in its view, the irregularity in the composition of the KRS had no automatic effects on the validity of the resolution of that body adopted between 2000 and 2018. It also remains unclear how the finding of the Trybunał Konstytucyjny (Constitutional Court) could have any impact on the public perception of the independence of the three judges in question.

134. That is so, notwithstanding the fact that the case-law shows the importance of identifying such an element.

135. For example, in *Commission* v *Poland*, the Court ruled that the national legislation at issue – which provided for an immediate effective lowering of the retirement age of Supreme Court judges, together with a discretionary authorisation, granted by the President of the Republic, to allow a judge to continue in that role – undermined the principle of the irremovability of judges, which is essential to their independence, and thereby infringed Article 19(1) TEU. Due to its specific features, and in the light of the circumstances in which it was adopted, the Court came to

[68] Judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, in particular paragraphs 75 to 82).

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

[70] Ibid., § 246.

the conclusion that that legislation could give rise to reasonable doubts as to the real motives behind it. In particular, the Court noted that several elements suggested that the legislation may have been adopted in order to exclude or side-line a certain group of judges.[71]

136. Similarly, in *A. K. and Others* and in *Repubblika*,[72] the Court had to consider the composition and functioning of two State bodies which intervene in the procedure for the appointment of judges in their respective Member States. The Court examined, in particular, the circumstances in which the members of those bodies were appointed, the manner in which those bodies performed their functions, the broader legal framework governing the role and activities of those bodies, and finally the political landscape in which those bodies operated.

137. In that light, in *A. K. and Others*, the Court found that certain elements could give rise, in the minds of individuals, to doubts as to the imperviousness of the body in question to external factors, especially to the influence of the legislature and the executive, although it ultimately left the assessment in question to the referring court. By contrast, in *Repubblika*, with regard to the relevant rules and the manner in which those rules had been applied by the institutions of a Member State, the Court found nothing pointing towards a possible lack of independence of the body in question. There was no ground to consider that the President of the Republic in that Member State could use his powers to appoint judges in a manner that could raise, among the wider public, genuine suspicions about the independence of the individuals selected.

138. In *WB and Others*, the referring court questioned the Court about the compatibility of national legislation according to which the Minister for Justice/General Prosecutor could, on the basis of criteria that are not made public, second judges to higher courts for an indefinite period and, at any time, may terminate that secondment at his own discretion with, inter alia, Article 19(1) TEU read in conjunction with Article 2 TEU. In my Opinion, I took the view that that legislation breaches those provisions in that it can have an impact on the manner in which certain judges exercise their functions. In particular, I suggested that, under that legislation, some judges may have an incentive to rule in favour of the prosecutor or, more generally, to the liking of the Minister for Justice/General Prosecutor. Indeed, judges of lower courts may be tempted by the possibility of being rewarded with a secondment to a higher court, with possibly improved career prospects and a higher salary. In turn, judges seconded to higher courts could be discouraged from acting independently, to avoid the risk that their secondment may be terminated by the Minister for Justice/General Prosecutor.[73]

139. Unlike in those cases, no 'motive, means and opportunity' can be detected with regard to a potential lack of independence of the three judges in question in the present case. Similar to my conclusion regarding the circumstances concerning the first appointment of a judge during the PRL era, here too I am left wondering *who* would be, at present, able to exert undue pressure over the three judges in question, certainly as a consequence or in view of the alleged fault in their appointment procedure, and *why* those judges may, at least in the minds of the individuals, be induced to bow to that pressure.

140. Second, however, a somewhat different picture arises when the analysis is indeed enlarged by 'all the relevant circumstances', in particular when considering the potential 'motive, means and opportunity' underlying the decision of the Trybunał Konstytucyjny (Constitutional Court) concerning the (im)proper composition of the KRS, on which the referring court bases all its

[71] Judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraphs 82 and 85).

[72] Judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraph 51).

[73] See my Opinion in *WB and Others*, points 171 to 196.

concerns regarding the correctness of judicial appointments during the period from 2000 to 2018. In that regard, a more inquisitive or critical observer may perhaps be inclined to wonder what were the true motives behind that decision, whether that decision itself was issued by an independent and properly composed tribunal,[74] and how much reliance can be placed in general on decisions of an institution which could be seen as being prone, at present, to instrumental abuse.[75]

141. In conclusion, the circumstances referred to in Questions 4 and 5 are also not such as to cast doubts on the independence and impartiality of any national judges for the purposes of Articles 19(1) TEU and Article 47 of the Charter.

4. Questions 6 and 7

142. By its sixth question, the referring court asks if it is required to examine of its own motion whether the court of lower instance, which delivered the contested judgment, meets the requirement of independence enshrined in Article 19(1) TEU and Article 47 of the Charter for the purposes of checking the possible invalidity of a judgment under appeal.

143. By its seventh question, the referring court seeks to ascertain whether, in view of the irrevocable nature of the appointment of judges provided for in the Polish Constitution, it must refrain from verifying, for the purposes indicated above, the independence of the judges who delivered the contested judgment.

144. In the light of the answers provided to the previous questions, there is, in principle, no need to answer those questions.

145. However, for the sake of completeness, I shall provide some brief thoughts on the issues raised by the referring court in those two questions. Essentially, the referring court wonders whether it is, in principle, required to raise issues of independence of its own motion, and whether the principle of irremovability of judges could prevent that court from doing so.

146. As far as Question 6 is concerned, it is not entirely clear why that question is raised in the first place, in view of the fact that the referring judge apparently has an obligation to verify *ex officio* the proper composition of the court that delivered the judgment on appeal under national law.[76] However, indeed, for the purpose of the potential application of Article 47 of the Charter, the answer to the referring court's doubts can be found in the judgment of the Court in *Simpson*.[77]

[74] See judgment of the ECtHR of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland*, (CE:ECHR:2021:0507JUD000490718), which held that certain recent appointments to the Trybunał Konstytucyjny (Constitutional Court) were made in flagrant breach of domestic law and that the unlawful external influence on that body exercised by the legislature and the executive undermines the very essence of the right to a 'tribunal established by law' under Article 6(1) ECHR.

[75] Most recently, and somewhat relevant for the present proceedings in view of the interested parties in this case, see, for instance, judgment of the Trybunał Konstytucyjny (Constitutional Court) of 15 April 2021, K 20/20, which came to the conclusion that a provision of the Law on the Ombudsman, which provides that the incumbent holder remains in office, even after the expiry of his or her mandate, until a new Ombudsman is appointed, is unconstitutional. It is not easy to understand why such a provision, legitimately assuring institutional continuity in a number of bodies across Europe, including the Court of Justice (see Article 5 of the Statute of the Court of Justice of the European Union), could be conceptually unconstitutional. However, any potential intellectual conundrum in this regard might quickly dissipate if one understands the context, in particular *why* there was a need for such a decision and *who* needed it.

[76] See above, points 13 and 88 of this Opinion.

[77] Judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, in particular paragraphs 75 to 82).

147. In that judgment, the Court stated that it follows from Article 47 of the Charter, which enshrines the rights to an effective remedy before an independent and impartial tribunal previously established by law and to a fair trial, that 'the Courts of the European Union must be able to check whether an irregularity vitiating the appointment procedure [of a judge] could lead to an infringement of [those rights]'. Those rights also imply that '*every court* is obliged to check whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point'. On the basis of previous case-law, the Court held that such a check is 'an essential procedural requirement, compliance with which is a matter of public policy and must be verified of the court's own motion'.[78]

148. The wording of that judgment is quite clear: when *genuine* doubts concerning the composition of the bench arise – for example because of a possible flaw in the appointment procedure of one or more judges concerned – *every court of the European Union* must raise such an issue, if need be *ex officio*. Therefore, although *Simpson* was concerned with a judicial procedure taking place before the Court of Justice of the European Union, the principles flowing from that judgment are applicable also in respect of national courts every time Article 47 of the Charter is applicable.

149. Nevertheless, as explained in the previous parts of this Opinion, in the present case, there appears to be no actual factor which points to a possible lack of independence of the judges who delivered the contested judgment.

150. As far as Question 7 is concerned, like the Commission, I have difficulty seeing how the principle of irremovability of judges – a principle that is said to be enshrined, as the referring court states, in the Polish Constitution – would have precluded the referring court from raising an issue regarding the independence of the judges in question on the ground of an allegedly unlawful appointment procedure.

151. The referring court appears to suggest that once a judge has been formally appointed under national law, that judge cannot be removed and the decision appointing him or her cannot be invalidated, despite that appointment possibly being unlawful in respect of the EU standard of independence, because to do so would conflict with the principle of irremovability.

152. I remain puzzled by both the starting assumptions seemingly embraced by the referring court and the conclusions drawn from them.

153. First, and once again, that court appears to focus closely on one specific issue viewed in clinical isolation, and on that basis establishes a false contradiction at a very high level of abstraction. Although under national law the decision appointing a judge to judicial office cannot be reviewed and annulled, it certainly does not follow that the decisions of that judge are immune from review or that, provided that all the necessary rules and procedures as complied with, that judge cannot be removed by way of disciplinary or other pertinent proceedings.

154. Second, I fail to see how the principle of irremovability of a judge, as commonly understood, would be at all at issue in the main proceedings. The referring judge is tasked with deciding on the admissibility of an appeal in cassation before the Sąd Najwyższy (Supreme Court). Those proceedings are clearly not, for example, disciplinary proceedings in which the removal of the judge in question, or the imposition of some other disciplinary measure against him, could be

[78] Ibid., paragraphs 53 to 58. My emphasis.

adopted. Therefore, I do not see a *direct* clash between the principle of irremovability of judges and the possibility of invalidating a judgment handed down in an appeal procedure because of an alleged wrongful composition of the bench.

155. Third, I also do not see an *indirect* clash in that respect. In my opinion, the considerations expressed in the order for reference overlook two important elements, concerned, respectively, with the nature of the principle of irremovability and its articulation with general principles of law.

156. On the one hand, the Court has consistently emphasised that, in order to ensure the independence of the judiciary, certain guarantees must exist in order to protect the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office. The principle of irremovability requires, in particular, that 'judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term'. [79]

157. At the same time, however, the Court made clear that irremovability is not, and cannot be, 'wholly absolute'. Irremovability, and more broadly the judicial independence that it is intended to guarantee, comes hand in hand with judicial accountability. Indeed, exceptions to that principle may exist, provided that 'they are warranted by legitimate and compelling grounds, subject to the principle of proportionality'. For instance, the Court pointed out that 'it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided that the appropriate procedures are followed'. [80]

158. Admittedly, the relationship between, on the one hand, the principle of irremovability and, on the other hand, the principle of independence of the judiciary, and the rights to an effective judicial protection and to a fair trial, does raise some delicate problems of linkage. A balance between those interests, which may at times pull in different directions, must be struck in each set of circumstances. That balance cannot be struck in the abstract, as the referring court would imply by its seventh question.

159. However, under no conceivable approach to that matter can the position implied in the request for a preliminary ruling be sustained. In fact, that position gives rise to a paradox: in order to protect the independence of judges, the non-independent judges would also have to be protected.

160. That is untenable. In a community based on the rule of law and in which the fundamental rights of individuals – such as those of effective judicial protection and to a fair trial – must be guaranteed, the very opposite of what is being suggested by the referring court is in fact true. One could even go as far as to say that, to that end, the 'removability' of non-independent judges is as important as the 'irremovability' of independent judges. Indeed, the existence of judges subject to some political, economic or other private interest strikes at the heart of a legal system based on the rule of law and of a democracy predicated on the separation of powers.

[79] See judgment of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)* (C-658/18, EU:C:2020:572, in particular paragraphs 47 and 48 and the case-law cited).

[80] Ibid., paragraph 48.

161. By that, I am not implying that any judge whose appointment raises issues of independence should *ipso facto* be removed from office and his or her decisions invalidated. Yet, a legal system must be able to enforce compliance with the principle of independence of the judiciary. This brings me to my final point.

162. As mentioned above, not all flaws in a judicial appointment procedure give rise to problems of independence. There is no automatism in that respect.[81] There is also no automatism vis-à-vis the consequences which flow from a finding that an individual was erroneously appointed to judicial office, in particular where the unlawfulness stems from a breach of the principle of independence. Instead, as a matter of EU law, a reasonable correlation must be found between the rules or principles that have been breached, the seriousness of the infringement committed, and the type and scope of remedies available (and, if need be, the penalties imposed on the perpetrators), in the light of the facts and circumstances of a case.[82]

163. General principles of EU law such as, inter alia, proportionality, legal certainty, respect for *res judicata*, and fairness of the procedure will certainly not be foreign to any assessment of whether the national remedies in this field ensure compliance with, and the effectiveness of, EU law.

164. Therefore, I see no tension between the possible finding that the appointment of a judge was vitiated by some procedural error (even where that error is of such nature as to give rise, in the minds of individuals, to doubts regarding his or her independence), and the principle of irremovability of judges.

V. Conclusion

165. I propose that the Court answer the question referred for a preliminary ruling by the Sąd Najwyższy (Supreme Court, Poland) as follows:

– In order to assess compliance with the principle of independence of the judiciary, enshrined in Article 19(1) TEU and in Article 47 of the Charter of Fundamental Rights of the European Union, a national court must consider all relevant elements and take into account, where appropriate, the reasons and specific objectives of the national measures that may be applicable to the situation. In that context, both formal and institutional elements and more concrete and case-specific elements may be relevant, depending on the specificities of the case in question and the EU provision(s) that may be applicable. The significance of those elements should not be evaluated per se or in isolation, but assessed together in the light of the broader legal and institutional landscape;

– The circumstances referred to in Questions 1 to 5 are not such as to cast doubts on the independence and impartiality of national judges for the purposes of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights;

– Article 47 of the Charter of Fundamental Rights must be interpreted as requiring national courts to verify whether an irregularity vitiating a procedure for the appointment of a judge

[81] See also judgment of the ECtHR of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418), joint partly concurring, partly dissenting opinion of Judges O'Leary, Ravarani, Kucsko-Stadlmayer and Ilievski, especially § 53.

[82] In general on that correlation, see my Opinion in *An tAire Talmhaíochta Bia agus Mara and Others* (C-64/20, EU:C:2021:14, points 34 to 63).

could lead to an infringement of rights conferred by EU law. Where a genuine and serious doubt arises on that point, that issue must be raised of the court's own motion. The principle of irremovability of judges does not preclude national courts from carrying out that verification.