OPINION OF ADVOCATE GENERAL
SPIELMANN
delivered on 10 April 2025 (1)

Case C-225/22

'R' S.A.
v
AW 'T' sp. z o.o.

(Request for a preliminary ruling from the Sąd Apelacyjny w Krakowie (Court of Appeal, Kraków, Poland))

(Reference for a preliminary ruling – Rule of law – Effective legal protection in the fields covered by EU law – Second subparagraph of Article 19(1) TEU – Tribunal previously established by law – Judgment of the Supreme Court setting aside a judgment of a court of appeal and referring the case back to that court for re-examination – Possibility of finding that a higher court is irregularly constituted – Effects of acts of courts that have been irregularly constituted – Legal certainty – Res judicata)

Introduction

1. In the context of the crisis surrounding the rule of law in Europe, abundant case-law of the Court of Justice – which has been the subject of much debate – has established a general outline of the requirements for independence and impartiality of courts arising from the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2. We are currently seeing requests for a preliminary ruling referred to the Court aimed at obtaining clarification as to the conclusions to be drawn from that case-law. (2)

3. Can a national court find that, due to irregularities in the procedure for appointing some of its members, a higher national court is not a tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter? If so, what is the legal status of the acts adopted by such a court? Those delicate legal questions, on which the present Opinion is focused, have been referred to the Court of Justice by the Sąd Apelacyjny w Krakowie (Court of Appeal, Kraków, Poland) in the context of this request for a preliminary ruling.

4. In its forthcoming judgment, the Court will, therefore, have the opportunity to adjudicate, inter alia, on whether the consequences of a breach of the requirement of a tribunal previously established by law must be defined by the Latin maxim *ex iniuria ius non oritur* (a right cannot arise from an unlawful act) in a situation where the acts adopted by the judicial body concerned have the force of *res judicata*.

European Union law

5. The second subparagraph of Article 19(1) TEU and the second paragraph of Article 47 of the Charter are relevant in the present case.

Polish law

6. The ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5) established, in particular, a body within the Sąd Najwyższy (Supreme Court, Poland) referred to as the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs, Poland; 'the Chamber of Extraordinary Control and Public Affairs').

7. Article 26 of the Law on the Supreme Court, as amended by the Law of 20 December 2019 amending the Law on the Ordinary Courts, the Law on the Supreme Court and certain other laws, provides:

'1. The areas of jurisdiction of the [Chamber of Extraordinary Control and Public Affairs] shall include extraordinary complaints, electoral disputes and challenges concerning the validity of national or constitutional referendums, and determination of the validity of elections and referendums, as well as other cases in the field of public law …

2. The [Chamber of Extraordinary Control and Public Affairs] shall have jurisdiction to hear applications or declarations concerning the recusal of a judge or the designation of the court before which proceedings must be conducted, including complaints alleging a lack of independence of the court or the judge …

3. The request referred to in paragraph 2 shall not be examined if it concerns the establishment and the assessment of the legality of the appointment of a judge or of his or her authority to carry out judicial functions.

…'

8. Article 89 of that law provides, in paragraphs 1 to 3:

'1. If such an action is necessary to ensure compliance with the principle of a democratic State subject to the rule of law and implementing the principles of social justice, an extraordinary appeal may be lodged against the final decision of a court of general jurisdiction or a military court bringing to an end the proceedings in the case in question:

(1) if the decision infringes the principles or freedoms and rights of human beings and citizens laid down in the Constitution, or

(2) if the decision flagrantly infringes the law in that it misinterprets it or applies it incorrectly, or

(3) if the fundamental findings of the court are in clear contradiction with the content of the evidence gathered in the case

and the decision cannot be set aside or varied by means of other extraordinary remedies.

2. An extraordinary appeal may be lodged by the Public Prosecutor General, the Ombudsman and, within the scope of their powers, by the President of the Prokuratoria Generalna of the Republic of Poland (the State agency responsible for defending the interests of the public treasury), the Ombudsman for the Rights of the Child, the Ombudsman for Patients' Rights, the President of the Financial Supervision Authority, the Financial Ombudsman, the Ombudsman for Small and Medium-Sized Enterprises and the President of the Competition and Consumer Protection Authority.

3. Extraordinary appeals must be lodged within a period of five years from the date on which the contested decision became final and, if an action or appeal on a point of law has been lodged against the decision, within a period of one year from the date on which that action or appeal is heard. An extraordinary appeal may not be upheld to the detriment of the defendant if it has been lodged one year after the date on which the decision became final, and, in the case of an action or appeal on a point of law, after the expiry of a period of six months from the date on which that action or appeal was heard.'

9. Article 115(1) of that law is worded as follows:

'1. Within a period of six years from the entry into force of this law, extraordinary appeals may be lodged against final decisions terminating proceedings in cases that have become *res judicata* after 17 October 1997. The first sentence of Article 89(3) shall not apply.'

The dispute in the main proceedings, the questions referred and the procedure before the Court

10. By application dated 9 August 2004, the company AW 'T' sp. z o.o. requested that B.O. as well as the companies 'R' and 'K' be prohibited from marketing, among other things, crossword puzzle magazines designated by the numbers '100', '200', '222', '300', '333', '500' and '1000', in which the crossword grids are presented inside a coloured box with a background of the same colour and a coloured border. The placing of those magazines on the market would, it was claimed, infringe the provisions of the ustawa prawo własności przemysłowej (the Law on industrial property rights) of 30 June 2000 (Dz. U. of 2003, item 1117) and the ustawa o zwalczaniu nieuczciwej konkurencji (the Law on combating unfair competition) of 16 April 1993 (Dz. U. of 2003, item 1503).

11. In a judgment of 25 October 2005, the Sąd Okręgowy w Krakowie (Regional Court, Kraków, Poland) prohibited 28 magazines protected by a registered trade mark from being placed on the market and dismissed the remainder of the applicant's claim.

12. By a judgment of 9 November 2006, following the appeal lodged by B.O. and the company 'R', the Sąd Apelacyjny w Krakowie (Court of Appeal, Kraków) (3) varied the judgment of the Sąd Okręgowy w Krakowie (Regional Court, Kraków), extending the prohibition described in the preceding point of the present Opinion.

13. Only B.O. brought an appeal on a point of law against that judgment before the Sąd Najwyższy (Supreme Court). On 21 February 2008, that court set aside the judgment of the Sąd Apelacyjny w Krakowie (Court of Appeal, Kraków) in so far as it varied the judgment of the Sąd Okręgowy w Krakowie (Regional Court, Kraków) and referred the case back to the appellate court for re-examination. Lastly, on 27 May 2010, the Sąd Apelacyjny w Krakowie (Court of Appeal, Kraków) delivered its judgment.

14. It was not until 27 January 2020 that, in accordance with Article 89 of the Law on the Supreme Court, the Prokurator Generalny (Public Prosecutor General, Poland) brought an extraordinary appeal before the Sąd Najwyższy (Supreme Court) in support of the company 'R' S.A. against the judgment of 9 November 2006 of the Sąd Apelacyjny w Krakowie (Court of Appeal, Kraków). In the view of the Public Prosecutor General, that court had infringed the principle of the prohibition of *reformatio in pejus* because, by varying the contested judgment of the Sąd Okręgowy w Krakowie (Regional Court, Kraków), it extended the prohibition imposed in particular on 'R'. The judgment of the appellate court

had prohibited the placing on the market of all crossword puzzle magazines designated on the cover by the numbers '100', '200', '222', '300', '333', '500' and '1000', whereas the judgment of the first-instance court had only prohibited the placing on the market of specific magazines designated by titles and publication references and bearing the relevant trade marks. In its judgment of 20 October 2021, the Sąd Najwyższy (Supreme Court) set aside – in so far as it concerned the company 'R' – the judgment of 9 November 2006 relating, in essence, to a prohibition of certain acts of unfair competition and referred the case back to the Sąd Apelacyjny w Krakowie (Court of Appeal, Kraków), as the referring court, for re-examination.

15. As part of that re-examination, AW 'T' asked the referring court to issue it with a copy of the judgment of 9 November 2006 and to append to it, as an order for enforcement, a statement confirming that that judgment is final, arguing that the judgment of 20 October 2021 of the Sąd Najwyższy (Supreme Court) should be treated as null and void.

16. In support of that request, AW 'T' referred, first, to the judgment of the European Court of Human Rights ('the ECtHR') of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*, (4) from which it would appear that the Chamber of Extraordinary Control and Public Affairs does not constitute a tribunal established by law.

17. Second, AW 'T' cited the judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, (5) from which that party inferred that a decision given in an irregularly constituted formation of a court is not binding on other courts and should be disregarded without having to be set aside first.

18. Third, AW 'T' expressed reservations in terms of the possibility of bringing an extraordinary appeal against a decision with the force of *res judicata*, lodged after a period of 14 years, particularly when that appeal was aimed at protecting the exclusively economic interests of a state-owned company.

19. The referring court explains that the judgment of 20 October 2021 of the Sąd Najwyższy (Supreme Court) was given by a chamber composed of judges appointed on the same date, during the same procedure. During that procedure, the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; 'the KRS') issued a resolution recommending those judges, which was then challenged before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), which suspended the enforcement of that resolution on a provisional basis. However, the President of the Republic of Poland appointed the judges in question before the Naczelny Sąd Administracyjny (Supreme Administrative Court) had ruled on the contested resolution.

20. In that context, the referring court notes that the formation of the Sąd Najwyższy (Supreme Court) that delivered the judgment of 20 October 2021 was composed of the judges E.S., T.D., P.K., A.R. and M.S., and that, due to the irregularities associated with the procedure that led to their appointment as judges in the Chamber of Extraordinary Control and Public Affairs, that formation of the court does not constitute a tribunal previously established by law within the meaning of EU law. Consequently, it would be appropriate to examine the effects of the decision of such a court.

21. According to the referring court, it is nevertheless necessary to ask, as a preliminary point, whether a national court is entitled to review the composition of the higher court that has referred a case to it for re-examination after ruling in an extraordinary appeal procedure, in a case where, in accordance with the national legislation, the first court is bound by the assessment made by the higher court.

22. In those circumstances the Sąd Apelacyjny w Krakowie (Court of Appeal, Kraków) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must the second subparagraph of Article 19(1), Article 2, Article 4(3) and Article 6(3) [TEU], in conjunction with Article 47 of the [Charter] and Article 267 [TFEU], and the principle of the primacy of EU law be interpreted as permitting a national court to disregard a decision of a constitutional court which is mandatory under national law, including constitutional law, in so far as that decision precludes an examination by the national court as to whether, having regard to the way in which the judges were appointed, the judicial body is an independent and impartial court previously established by law within the meaning of European Union law?

(2) Must the second subparagraph of Article 19(1), Article 2, Article 4(3) and Article 6(3) TEU, in conjunction with Article 47 of the Charter and Article 267 TFEU, be interpreted as precluding national rules adopted by a Member State:

(a) prohibiting the national court from assessing the lawfulness of the appointment of a judge and consequently examining whether the judicial body is a court within the meaning of European Union law and

(b) providing for the disciplinary liability of a judge for judicial actions connected with the examination in question?

(3) Must the second subparagraph of Article 19(l), Article 2, Article 4(3) and Article 6(3) TEU, in conjunction with Article 47 of the Charter and Article 267 TFEU, be interpreted as meaning that an ordinary court which satisfies the requirements laid down on a court within the meaning of EU law is not bound by a judgment of a court of final instance – sitting with members who were appointed to the office of judge in flagrant breach of national law governing the nomination process for the office of a judge of the Sąd Najwyższy (Supreme Court), as a result of which that court does not fulfil the requirement of an independent and impartial court previously established by law and of ensuring that individuals are afforded effective legal protection – issued as a result of an extraordinary appeal procedure (extraordinary appeal), setting aside a final judgment and referring the case back to the ordinary court for re-examination?

(4) If the answer to the third question is in the affirmative, must the second subparagraph of Article 19(1), Article 2, Article 4(3) and Article 6(3) TEU, in conjunction with Article 47 of the Charter and Article 267 TFEU, be interpreted in such manner that non-binding [judgment] means that:

(a) a judgment given by a court of final instance, established in the manner described in [question] 3, is not a judgment in a legal sense (is a non-existent judgment) within the meaning of EU law, and the assessment in that regard may be made by an ordinary court which satisfies the requirements laid down on a court within the meaning of EU law,

(b) or is the judgment given by the court of final instance, established in the manner described in [question] 3, a judgment that does exist in a legal sense, but the ordinary court retrying the case is entitled and obliged to disapply the application of provisions of national law concerning the consequences of that judgment to the extent necessary to ensure that individuals are afforded effective legal protection?’

23. By decision of the President of the Court of 11 May 2022, the referring court’s request for an expedited procedure was refused.

24. Written observations were submitted by the applicant in the main proceedings, the company ‘R’, by the defendant in the main proceedings, the company AW ‘T’, by the Polish, Danish and Netherlands Governments, and by the European Commission. The companies ‘R’ and AW ‘T’, the Polish Government and the Commission presented oral argument at the hearing on 9 January 2025.

Analysis

25. As requested by the Court, this Opinion will focus solely on the third and fourth questions referred for a preliminary ruling.

Jurisdiction and admissibility

26. The Polish Government raised a plea to the effect that the Court lacked jurisdiction to rule on all the questions referred for a preliminary ruling on the ground that the organisation of justice falls within the exclusive competence of the Member States. According to that Member State, it is, therefore, not possible to interpret the second subparagraph of Article 19(1) TEU as a provision imposing a specific organisation of justice on the Member States.

27. That argument can be easily refuted. Indeed, according to the settled case-law, although it is true that the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law; that may be the case, in particular, as regards national rules relating to the adoption of decisions appointing judges and, where applicable, rules relating to the judicial review that applies in the context of such appointment procedures. Furthermore, the objections thus put forward by the Polish Government relate, in essence, to the very scope of Article 19 TEU and, therefore, to the interpretation of that article. Such an interpretation clearly falls within the jurisdiction of the Court under Article 267 TFEU. (6)

28. The Polish Government also argued that all the questions referred for a preliminary ruling were inadmissible on the grounds that the questions of law raised were fictitious, irrelevant or hypothetical. According to that government, it is not apparent from the order for reference that there has been – in the main proceedings – an infringement of the right to a tribunal previously established by law, at the stage of the examination of the extraordinary appeal by the Chamber of Extraordinary Control and Public Affairs, or that the guarantee inherent in that right is called into question following the re-examination of the case by the referring court.

29. However, that argument is not persuasive either. Indeed, a response from the Court of Justice seems necessary to enable the referring court to decide whether or not it must re-examine the case in the main proceedings, in circumstances where the decision serving as the basis for that re-examination procedure was made by a body that cannot be considered to have been previously established by law within the meaning of the case-law of the European Court of Human Rights.

30. Furthermore, it should be noted that, without expressly questioning the admissibility of the present request for a preliminary ruling, the Commission has observed, in essence, that the information in the file does not enable it to determine whether the referring court, sitting in a single-judge formation, has jurisdiction to rule on the issues raised in the questions referred for a preliminary ruling, and whether the procedure for establishing the acquisition of the force of *res judicata* by the judgment of 9 November 2006 authorises the competent single judge to review the regularity of the formation of the higher court that set aside that judgment.

31. In that regard, I will simply point out, as does the Commission, that, according to the settled case-law, 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. Consequently, where those questions concern the interpretation of EU law, the Court is in principle bound to give a ruling. (7)

The third question referred

32. By its third question, the referring court asks whether it is bound by a decision of a higher court that does not meet the requirement of an independent and impartial tribunal previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU.

33. It is apparent from the order for reference that, by that question, the referring court seeks to ascertain, in essence, whether the second subparagraph of Article 19(1) TEU permits a national court to verify whether a higher court meets the requirement of an independent and impartial tribunal previously established by law, for the purposes of that same provision. (8) Indeed, in my view, the question whether – if that verification were to result in a negative conclusion – any decision made by the higher court would nevertheless be binding on the lower court relates to the issue concerning the legal status of such decisions, which is the subject of the fourth question referred for a preliminary ruling.

A brief overview of the case-law relating to the requirement of a tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU

34. It follows from case-law dating back to the judgment in *Associação Sindical dos Juízes Portugueses* (9) that, in order to ensure the effective judicial protection required under the second subparagraph of Article 19(1) TEU, maintaining the court's or tribunal's independence and impartiality is essential. The requirement for independence and impartiality of courts that could be called upon to apply EU law does, indeed, form part of the essence of the fundamental right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU will be safeguarded. (10)

35. According to the Court, the right to a 'tribunal previously established by law' is very closely related to the guarantees of 'independence' and 'impartiality'. Although identical guarantees are not involved in the architecture for a fair trial, they are, in their essence and scope, closely related. As the Court has held, (11) citing the judgment of the European Court of Human Rights in *Ástráðsson v. Iceland*, (12) the aforementioned guarantees have in common the fact that they both seek to preserve the rule of law and the separation of powers, in maintaining public confidence in the judiciary.

36. As regards the process of appointing judges, it is now established that, having regard to the fundamental implications of that process for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, such a process necessarily constitutes an inherent element of the concept of a 'tribunal previously established by law'. (13)

37. In the judgment in *Review Simpson* v *Council*, (14) the Court held that an irregularity committed during the appointment of judges within the judicial system of a Member State entails an infringement of the requirement of a tribunal previously established by law; that is particularly the case when that irregularity is *of such a kind and of such gravity* as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are *fundamental rules forming an integral part of the establishment and functioning of that judicial system*. (15)

The possibility for a national court to verify the regularity of the composition of a higher court

38. In the judgment in *Review Simpson*, the Court also held that the guarantees of access to an independent and impartial tribunal previously established by law, which represent the cornerstone of the right to a fair trial, imply in particular that *every* court is obliged to check whether, as composed, it constitutes such a tribunal where a *serious doubt* arises on that point. The Court thus 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. (16)

39. It follows from that judgment that the main responsibility for monitoring observance of the right to a court established by law lies with the courts, including national courts, whether in terms of the regularity of their own composition or the regularity of the composition of another court. (17)

40. With regard to the rule of law in Poland, it is clear from the case-law of the Court that national courts must be able to ascertain whether an irregularity vitiating the procedure for the appointment of a judge could give rise to an infringement of the requirements arising from the right to effective judicial protection, within the meaning of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, (18) and, in particular, those relating to access to an independent and impartial tribunal previously established by law, in circumstances in which compliance with those requirements could give rise to doubts. (19)

41. More specifically, it is apparent that the national courts must be able to assess whether, in the light of the factors in question and all the other relevant findings of fact that they will have made, the substantive conditions and procedural rules governing the adoption of appointment decisions are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to their imperviousness to external factors, and, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them. (20)

42. In this respect, it is important to note that the cases falling within that line of case-law concerned 'horizontal' relationships between the national court making such an assessment and the court of law that is the subject of the assessment. In fact, they concerned:

– different chambers of the same court in the judgments in *A.K.* (Izba Pracy i Ubezpieczeń Społecznych (Labour and Social Insurance Chamber) – Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court)) and *W.Z.* (Izba Cywilna (Civil Chamber) – Chamber of Extraordinary Control and Public Affairs of the Sąd Najwyższy (Supreme Court)),

– a court and a chamber of a court of the same rank in the judgment in *A.B.* (Naczelny Sąd Administracyjny (Supreme Administrative Court) – Civil and Criminal Chambers of the Sąd Najwyższy (Supreme Court)),

– a court and a chamber of that court in the judgment in *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (21) (Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) – chamber of the same Regional Court).

43. On the other hand, the Court has not yet had occasion to rule on the question of whether a national court must be able to verify whether a *hierarchically superior* judicial body constitutes an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU. (22)

44. For my part, I am convinced that the existence of such a hierarchical relationship is not such as to preclude the first court from carrying out that verification.

45. As I have already explained above, while it is indeed true that the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU. (23) More specifically, I note that the case-law of the Court establishes a link between the requirements of an independent and impartial tribunal previously established by law and the *principle of primacy*. The legal process is well known: the second subparagraph of Article 19(1) TEU imposes on the Member States a clear and precise obligation as to the result to be achieved and that obligation is not subject to any condition. (24) Thus, *any* national court, hearing a case within its jurisdiction, has the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect – such as Article 19 TEU – in the case pending before it. (25) In this respect, it should be recalled that the general idea that the application of the principle of primacy could result in a reversal of the national jurisdictional hierarchy dates back to the judgment in *Simmenthal* (26) and was reaffirmed, in the field of the rule of law, in the judgment in *RS (Effects of the decisions of a constitutional court).* (27)

46. In other words, where the procedural conditions or rules governing the adoption of appointment decisions are such that an infringement of the requirements of an independent and impartial tribunal previously established by law is found to exist, it certainly cannot be argued that the national provisions governing the jurisdictional hierarchy between the Supreme Court and the lower courts fall within the domain reserved for the procedural autonomy of the Member States.

47. The Court's judgment in *Randstad Italia,* (28) cited by the Commission in its written observations, confirms that interpretation. As a reminder, in that case, the referring court asked the Court whether the effective judicial protection of rights conferred by EU law precluded a national case-law interpretation according to which the highest court in the judicial order of a Member State did not have jurisdiction to set aside a judgment delivered in breach of EU law by the highest court in the administrative order of that Member State.

48. Admittedly, the Court referred to both the second subparagraph of Article 19(1) TEU and the principle of procedural autonomy. However, the assessment in that judgment – in the light of that provision – is extremely concise in so far as that provision was clearly respected in that case. Thus, the Court merely noted, in essence, that Italian procedural law allowed, in and of itself, interested parties to lodge an appeal before an independent and impartial court, previously established by law, in order to assert, before that court, an infringement of EU law. (29) This was sufficient to demonstrate compliance with the second subparagraph of Article 19(1) TEU, since that provision, rightly defined as an 'extraordinary tool for extraordinary cases', (30) is only relevant when it is necessary to preserve the essence of effective judicial protection, threatened by a generalised deterioration of judicial protection in a Member State, something that did not occur in the case giving rise to the judgment in *Randstad*.

49. On the other hand, the Court carefully examined the question, at the heart of that case, of whether EU law requires a Member State to provide, for the purpose of remedying a breach of that law, the possibility of bringing an appeal before the Corte Suprema di Cassazione (Supreme Court of Cassation, Italy) against a judgment of the Consiglio di Stato (Council of State, Italy), where such a remedy is not provided for under national law, with the answer being in the negative. That legal analysis, developed in particular with regard to a provision of secondary legislation read in the light of *Article 47 of the Charter*, unsurprisingly involved consideration of the procedural autonomy of the Member States.

50. If there had been evidence to suggest that Italian procedural law did not permit access to a court satisfying the requirements arising from the second subparagraph of Article 19(1) TEU, it would probably not have been necessary to verify whether the national provisions in question fell under the abovementioned procedural autonomy, and the requirement to apply the primacy of EU law would have been imposed.

51. I am, therefore, of the view that, while the idea of verification by a lower-ranking court as to whether a higher-ranking national court can be classified as a tribunal previously established by law is undoubtedly new, as indicated by some of the interested parties at the hearing, the fact remains that it is in line with the case-law that has interpreted the second subparagraph of Article 19(1) TEU.

52. In view of those considerations, I suggest that the Court should answer the third question referred for a preliminary ruling by the referring court, as follows: the second subparagraph of Article 19(1) TEU must be interpreted as meaning that a national court must be able to verify whether a higher court meets the requirement of an independent and impartial tribunal previously established by law, for the purposes of that provision, in circumstances in which there may be doubts as to whether that requirement has been met.

The referring court's assessment of whether the Chamber of Extraordinary Control and Public Affairs is a tribunal previously established by law

53. It must be borne in mind that it will ultimately be for the referring court to rule, in the light of all the principles deriving from the relevant case-law of the Court, and having made the assessments required for that purpose, on whether as a whole the conditions in which the five members of the Chamber of Extraordinary Control and Public Affairs, handing down the decision setting aside the judgment of 9 November 2006, were appointed, support the conclusion that that chamber meets the requirement of an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TFEU. (31) However, that circumstance does not preclude the Court, in the framework of the judicial cooperation provided for by Article 267 TFEU and on the basis of the material in the case file, from providing the referring court with an interpretation of EU law which may be useful to it in assessing the effects of Article 19 TEU. (32)

54. In the judgment in *Krajowa Rada Sądownictwa (Continued holding of a judicial office),* (33) the Court held that a request for a preliminary ruling from the Chamber of Extraordinary Control and Public Affairs was inadmissible. Basing its decision on the findings and assessments made (i) in the judgment of the European Court of Human Rights of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland* (34) and in the judgment of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 21 September 2021 and (ii) in the judgment in *W.Ż.*, the Court found in particular that, taken together, all the elements, both systemic and circumstantial, which characterised the appointment to the Chamber of Extraordinary Control and Public Affairs of the three judges who constituted the referring body in the case leading to that judgment, meant that the latter did not have the status of an independent and impartial tribunal previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter.

55. With regard to the appointments of the three members of the Chamber of Extraordinary Control and Public Affairs, I consider that it is valuable to recall the main considerations used by the Court to support such a conclusion. First, the Court established that the appointments were made on the basis of proposals set out in Resolution No 331/2018 of the KRS, which, in its new composition resulting from the implementation of the amendments to the Law on the KRS, did not provide sufficient guarantees of independence from the legislative and executive authorities. Second, the Court noted that the amendments made to Article 44 of that law had deprived of all effectiveness the remedies hitherto available against resolutions of the KRS. Third, the Court stated that the appointments of those same judges by the President of the Republic of Poland had been made even though the enforceability of that resolution had been suspended by the order of the Naczelny Sąd Administracyjny (Supreme Administrative Court), which demonstrated, on the part of the executive, an utter disregard for the authority, independence and role of the judiciary and deliberately sought to interfere with the effective course of justice.

56. The determination that the Chamber of Extraordinary Control and Public Affairs is not a tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter, is, in my view, fully transposable to the present case. Indeed, it is irrelevant that that finding was made in the context of assessing whether the adjudicating formation of that chamber that had referred the request for a preliminary ruling to the Court was a court or tribunal within the meaning of Article 267 TFEU, since the scope of the independence required for that purpose coincides with the scope of the requirement of an independent and impartial tribunal previously established by law. (35)

57. The judgment in *Krajowa Rada Sądownictwa* was followed by a series of orders in which the Court, based on the same grounds, concluded that requests for a preliminary ruling from the Chamber of Extraordinary Control and Public Affairs – composed in whole or in part of members appointed in the same circumstances as those at issue in that judgment – were inadmissible. (36) As it is, the five judges who, alongside two jurors, make up the adjudicating formation of that chamber in the case before us, were also appointed in those circumstances.

58. It should be added that the fact that two jurors sat in that formation has no bearing on the matter, in so far as the presence of a single judge appointed to the Chamber of Extraordinary Control

and Public Affairs in the same circumstances as those analysed in the judgment in *Krajowa Rada Sądownictwa* is sufficient, in principle, to deprive that chamber of its status as an independent and impartial tribunal previously established by law. (37)

59. It follows that, subject to the final assessments to be carried out by the referring court, the verification of the regularity of the composition of the formation of the Chamber of Extraordinary Control and Public Affairs that delivered the judgment of 20 October 2021 should lead to the conclusion that that the latter does not meet the requirements inherent in a tribunal previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU.

The fourth question referred

60. The fourth question concerns the consequences that EU law attaches to any decision made by a body that does not have the status of a tribunal previously established by law. More specifically, the referring court seeks to ascertain, in essence, whether the second subparagraph of Article 19(1) TEU must be interpreted as meaning that, in such a case, the national court concerned is required to disregard such a decision or to find it to be null and void.

The main doubts expressed by the referring court

61. It should be noted, first, that the referring court vacillates between two possible interpretations of the provision in question.

62. On the one hand, that court recognises that the scale and gravity of the failings in the appointment process and the systemic nature of the resulting effects could justify in this case an automatic assessment of the effects of the activity of such a body, such that any act rendered by it would not be a judgment in the legal sense (*sententia non existens*). According to that court, the judgment in *W.Ż.*, which also concerns the Polish courts and in particular the composition of the Chamber of Extraordinary Control and Public Affairs, could support such an interpretation.

63. On the other hand, the referring court argues that an automatic assessment of the effects of the issuance of a decision by an irregularly constituted judicial body could lead to the infringement of other principles, including legal certainty or the principle of *res judicata*.

64. In that respect, the referring court observes, in particular, that the passage of time as a factor qualifying the need for such an automatic assessment was the subject of the judgment in *Ástráðsson v. Iceland*. In countering the argument that the absence of a time limit for challenging an irregularity in the procedure for the appointment of judges would have the effect of rendering those appointments open to challenge indefinitely by a person invoking the right to a tribunal established by law, the European Court of Human Rights stated that 'with the passage of time, the preservation of legal certainty will carry increasing weight in relation to the individual litigant's right to a "tribunal established by law" in the balancing exercise that must be carried out'. (38)

The legal status of an act adopted by a judicial body that is not a 'tribunal previously established by law'

65. It is important to note that the issue of the *consequences* of the judicial activities of a body that is not a tribunal previously established by law was not addressed by the Court in the judgment in *Review Simpson*, as the irregularity affecting the judicial appointment procedure in that case was not considered serious enough to be recognised as an infringement of the requirement of a tribunal previously established by law.

66. More recently, the Court ruled on that point in the judgment in *W.Ż*. It seems to me to be crucial to define precisely the scope of the response provided in that judgment. To that end, the factual framework of the case leading to that judgment must be carefully summarised.

67. In the case in the main proceedings, an action had been lodged with the KRS by W.Ż., judge of the Sąd Okręgowy w K (Regional Court, K., Poland), against a decision transferring him without his consent to another division of that same court. The KRS had adopted a resolution ruling that there was no need to adjudicate on that action. W.Ż. had then lodged an appeal against that resolution with the Chamber of Extraordinary Control and Public Affairs of Sąd Najwyższy (Supreme Court). In that context, W.Ż. had also filed an application for recusal of all the judges sitting in that chamber on the grounds of their lack of independence and impartiality, with the Izba Cywilna (Civil Chamber) of the Sąd Najwyższy (Supreme Court) being responsible for examining that application.

68. The appeal brought against that resolution of the KRS had been declared inadmissible by order of a judge of the Chamber of Extraordinary Control and Public Affairs ('the contested order'), ruling as a single judge, without having had the file at his disposal and without having heard W.Ż. The Izba Cywilna (Civil Chamber) of the Sąd Najwyższy (Supreme Court), sitting in a three-judge formation, ruled for its part that that order had been adopted in breach of the provision of domestic law that prohibited the delivery of a decision terminating proceedings until a ruling had been made on the application for recusal of a judge, and in breach of W.Ż.'s rights of defence.

69. In its judgment, the Court of Justice concluded that the obligation incumbent on the national court to guarantee the full effectiveness of the second subparagraph of Article 19(1) TEU required that the contested order be held to be null and void. (39) Indeed, it emerged from the case file that, if the existence of the order at issue were to be established, the recusal proceedings pending before the Izba Cywilna (Civil Chamber) of the Sąd Najwyższy (Supreme Court) would have to have been terminated by a decision that there was no need to adjudicate on account of lack of purpose. By contrast, a declaration of the legal non-existence of that order would have made it necessary for that chamber to rule on the application for recusal made by W.Ż. Thus, the consequence of legal non-existence was justified, according to the Court, in so far as it proved vital with regard to the procedural situation at issue in that case, in order to guarantee the *primacy* of EU law. (40)

70. In addition, the Court stated, and this is crucial, that 'no consideration relating to the principle of legal certainty or the alleged finality [of the disputed order] can, in the present case, be successfully relied on in order to prevent a court such as the [referring court] from declaring such an order to be null and void'. (41)

71. It emerges from the judgment in *W.Ż*, on the one hand, that the determination of the legal status of acts such as the contested order and the disputed resolution of the KRS must be guided by the need to guarantee the full effectiveness of the judicial protection of the interested parties (and the primacy of EU law), and, on the other hand, that that outcome must be achieved by the court that has recognised the infringement in question by choosing an option from the 'palette' of consequences made available under national law. (42)

72. This leads me to make two remarks on the question of whether the effects of the activity of a judicial body that is not a tribunal previously established by law should be subject to automatic assessment, a question that is at the heart of the doubts experienced by the referring court.

73. First, the judgment in *W.Ż.* cannot be understood to mean that any act adopted by a national judicial body that does not have the status of a tribunal previously established by law should be considered legally non-existent. Under the cooperation mechanism established by the preliminary reference procedure, the assessment of the legal status of such an act falls within the jurisdiction of the national court that concluded that the judicial body in question did not have the status of a tribunal previously established by law, it being understood that the national court is required to exercise its jurisdiction with a view to ensuring the effective judicial protection of the interested parties.

74. Moreover, that observation seems to me to be borne out by the judgment in *YP and Others (Lifting of a judge's immunity and his or her suspension from duties).* (43) *The Court was asked to rule on the legal status* of a resolution of the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy

(Supreme Court) – the independence and impartiality of which were not guaranteed – authorising the opening of criminal proceedings against an ordinary judge who was sitting in a single-judge formation in a high-profile criminal case, which was approaching its final stage, while suspending the same judge and reducing his remuneration. In this respect, the Court concluded that, because of the conflict between that resolution and the second subparagraph of Article 19(1) TEU, the referring court was obliged to *disapply* that resolution, (44) and not to find it to be null and void.

75. Second, it seems to me apparent from the judgment in *W.Ż.* (45) that the full effectiveness of the second subparagraph of Article 19(1) TEU precludes the acts adopted by a judicial body that is not a tribunal previously established by law from continuing to produce their effects between the parties in question. Indeed, the requirement for effective judicial protection of the litigant implies that those acts should, at the very least, be disapplied by the national court hearing the case, and the principles of legal certainty and of the force of *res judicata* cannot permit the opposite conclusion.

76. As regards the principle of *res judicata*, I am fully aware of the importance this has both in the legal order of the European Union and in the national legal systems. As the Court has repeatedly ruled, in order to ensure both the stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become final following exhaustion of all available remedies, or following expiry of the time limits provided for such remedies, can no longer be called into question. EU law thus does not require a national court to disapply domestic rules of procedure conferring finality on a judgment, even where to do so would make it possible to remedy a domestic situation that is incompatible with EU law. (46)

77. It should be borne in mind, however, that, according to the Court, the second subparagraph of Article 19(1) TEU expresses a clear and precise obligation *as to the result to be achieved*, which is not subject to any condition, and that every national court is required to guarantee, within the framework of its jurisdiction, the *full effectiveness* of that provision. In other words, and as argued earlier in the present Opinion, once it is established that a judicial body does not satisfy one of the requirements arising from that provision, any argument based on the procedural autonomy of the Member States ceases to be relevant, with the result that the force of *res judicata* of the decisions delivered by that body must give way.

78. Such an interpretation can be understood in the light of the value of the rule of law laid down in Article 2 TEU and given concrete expression to in the second subparagraph of Article 19(1) TEU, (47) which constitutes, according to the Court, the fundamental premiss on which the European legal structure is based. (48) The situation in question thus appears to be comparable to those in which, with reference in particular to the principle of *effectiveness*, the Court has concluded that a final national judgment incompatible with a provision of EU law is inapplicable. (49)

79. In those circumstances, the requirement of effective judicial protection must necessarily take precedence over the principle of *res judicata*.

80. It should be added that, admittedly, it would seem to emerge from the judgment in *Ástráðsson v. Iceland* that irregularities in judicial appointments, which result in an infringement of the right to a tribunal established by law, do not affect the very existence of decisions rendered by an irregularly constituted court and do not necessarily lead to the obligation to set aside the decision rendered by that court, in particular where those decisions have the *force of res judicata.* (50)

81. I readily acknowledge that the interpretation proposed in the present Opinion does not correspond, on that point, to that arising from the judgment in *Ástráðsson v. Iceland*. However, this does not pose a problem with regard to the need for consistency arising from Article 52(3) of the Charter, (51) since this interpretation concerns the consequences of the finding of an infringement of the right to a tribunal previously established by law, and not the scope of that right.

82. In any case, in that regard, I would wish to point out that the role of the Court of Justice when giving a preliminary ruling is to give national courts *ex ante* indications on how to apply EU law and not to determine *ex post* the existence of an infringement in a specific case, as is the case with the European Court of Human Rights. Thus, with regard to the requirements relating to an independent and impartial tribunal previously established by law, the Court has entrusted the national courts, as ordinary courts operating under EU law, with the task of monitoring compliance with those requirements and, where necessary, restoring the effectiveness of judicial protection in the Member States concerned. Such a task is particularly important in the case of judicial systems, such as that of Poland, which are in deep crisis, where specific irregularities in judicial appointment procedures are part of a more general trend aimed at weakening, and sometimes even dismantling, the mechanism for securing the balance of powers in the internal legal order. In those circumstances, giving consideration to *res judicata* to the detriment of the effective judicial protection of the litigant and the litigant's right to a lawful court would impede the fulfilment of the abovementioned task entrusted to the national courts, without allowing the principle of *res judicata* to fulfil its specific function. Indeed, *res judicata* is certainly not designed to guarantee the stability of judicial systems that are so compromised, and, in the context of such systems, in no way promotes public confidence in the justice system.

Application to the present case

83. In the light of the above, if the referring court were to find that the formation of the Chamber of Extraordinary Control and Public Affairs which delivered the judgment of 20 October 2021 is not a tribunal previously established by law, I consider that the referring court should disapply Article 398^{20} of the Kodeks postępowania cywilnego (Polish Code of Civil Procedure), (52) which requires it to comply with the interpretation of the law provided by the Sąd Najwyższy (Supreme Court) in the same case. (53) As regards the judgment of 20 October 2021, the referring court would be required to disregard that judgment or, where such a consequence would be essential in view of the procedural situation at issue in order to guarantee the primacy of EU law, to find it to be null and void. The choice of one of those consequences must be in accordance with the possibilities offered by Polish law and guided by the objective of guaranteeing the litigant concerned, namely the company AW 'T', effective judicial protection within the meaning of the second subparagraph of Article 19(1) TEU.

84. Thus, in my view, the referring court must refrain from appending the order of enforcement to the judgment of 20 October 2021 of the Sąd Najwyższy (Supreme Court), such that finality can be restored to the referring court's judgment of 9 November 2006 with regard to the company 'R'.

85. That conclusion is necessary regardless of whether the judgment of 20 October 2021 of the Sąd Najwyższy (Supreme Court) has, in accordance with national law, the authority of *res judicata*. Such a finding seems particularly justified in the present case. It should be remembered that that judgment was delivered at the end of a procedure aimed at providing a judicial review of final decisions, particularly those from the ordinary courts, known as an 'extraordinary appeal'. Such an appeal, which can be lodged by a number of public-law entities including the Public Prosecutor General, and on a series of grounds specified by the relevant Polish legislation, makes it possible to set aside final decisions adopted almost 25 years previously. For that reason, it has been the subject of severe criticism from the Commission (54) and the European Commission for Democracy through Law ('the Venice Commission'), (55) specifically in terms of its compliance with the *principle of legal certainty*.

86. It would, therefore, at the very least be paradoxical to consider that a judgment constituting the culmination of such an extraordinary appeal procedure should retain its validity on the ground that it has the force of *res judicata*.

87. In the light of the above, I propose that the Court should answer the fourth question as follows: the second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law must be interpreted as meaning that a national court which has delivered a judgment that has been set aside, in extraordinary appeal proceedings, by a higher judicial body that has referred the case back to it for re-examination, must disregard the judgment of that body or, where such a consequence is essential

in view of the procedural situation at issue in order to guarantee the primacy of EU law, must find that judgment to be null and void, where that judgment cannot be regarded as originating from an independent and impartial tribunal, previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU.

Conclusion

88. In view of the above, I propose that the Court should answer the third and fourth questions referred for a preliminary ruling by the Sąd Apelacyjny w Krakowie (Court of Appeal, Kraków, Poland), as follows:

(1) The second subparagraph of Article 19(1) TEU

must be interpreted as meaning that a national court must be able to verify whether a higher court meets the requirement of an independent and impartial tribunal previously established by law, for the purposes of that provision, in circumstances in which there may be doubts as to whether that requirement has been met.

(2) The second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law

must be interpreted as meaning that a national court which has delivered a judgment that has been set aside, in extraordinary appeal proceedings, by a higher judicial body that has referred the case back to it for re-examination, must disregard the judgment of that body or, where such a consequence is essential in view of the procedural situation at issue in order to guarantee the primacy of EU law, must find that judgment to be null and void, where that judgment cannot be regarded as originating from an independent and impartial tribunal, previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU.

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1 Original language: French.

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2 See pending Case C-521/21, *Rzecznik Praw Obywatelskich* (*Exclusion of a judge of an ordinary court)*.

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3 'The judgment of 9 November 2006'.

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4 CE:ECHR:2021:1108JUD004986819.

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5 C-487/19, 'the judgment in *W.Ż.*', EU:C:2021:798.

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6 See judgment of 9 January 2024, *G. and Others (Appointment of judges to the ordinary courts in Poland)* (C-181/21 and C-269/21, EU:C:2024:1, paragraphs 57 and 58 and the case-law cited).

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7 See judgment of 25 February 2025, *Sąd Rejonowy w Białymstoku* (C-146/23 and C-374/23, EU:C:2025:109, paragraph 37 and the case-law cited).

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8 Although the referring court also cites Article 2, Article 4(3) and Article 6(3) TEU, as well as Article 267 TFEU and Article 47 of the Charter, I believe that the Court's response may refer solely to the second subparagraph of Article 19(1) TEU. It must be recalled in that regard that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. With this in mind, the Court may reformulate the questions referred to it, where appropriate restricting its interpretation to the relevant provisions among those covered by the request for a preliminary ruling. See, for example, judgment of 26 January 2023, *Ministerstvo na vatreshnite raboti (Recording of biometric and genetic data by the police)* (C-205/21, EU:C:2023:49, paragraph 77), in which the Court reformulated the third question referred for a preliminary ruling by the national court.

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9 Judgment of 27 February 2018 (C-64/16, EU:C:2018:117).

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10 See judgment of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235, paragraphs 93 and 94).

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11 The judgment in *W.Z.* (paragraph 124).

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12 ECtHR, 1 December 2020 (CE:ECHR:1201JUD002637418; 'the judgment in *Ástráðsson v. Iceland*', §§ 231 and 233).

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13 The judgment in *W.Ż*. (paragraph 125).

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14 Judgment of 26 March 2020 (C-542/18 RX-II and C-543/18 RX-II, 'the judgment in *Review Simpson*', EU:C:2020:232).

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15 The judgment in *Review Simpson (paragraph 75). My emphasis.*

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16 The judgment in *Review Simpson* (paragraph 57).

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17 See Leloup, M., 'The appointment of judges and the right to a tribunal established by law: The ECJ tightens its grip on issues of domestic judicial organisation: Review Simpson', Common Market Law Review, Vol. 57, No 4, 2020, p. 1158, according to which 'as such, the ECJ relies primarily on the self-regulation by the domestic judiciary'. My emphasis.

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18 It should be recalled that the second subparagraph of Article 19(1) TEU requires all Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law, for the purposes in particular of Article 47 of the Charter. That latter provision must, therefore, be taken into consideration for the purposes of interpreting Article 19 TEU. See judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596, paragraph 87).

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19 See, in particular, 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, 'the judgment in *A.K.*', EU:C:2019:982, paragraphs 152 and 153). See also judgments of 2 March 2021, *A.B. and Others (Appointment of Judges to the Supreme Court – Actions)* (C-824/18, 'the judgment in *A.B*', EU:C:2021:153; of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931); and of 5 June 2023, *Commission* v *Poland (Independence and private life of judges)* (C-204/21, EU:C:2023:442, paragraphs 130 and 131 and the case-law cited). In the case giving rise to that latter judgment, the Court was called upon to rule on whether certain national provisions, which prevented national courts from assessing the lawfulness of the appointment of a judge or his or her power to exercise the judicial functions arising from such an appointment or from casting doubt on the legitimacy of courts or tribunals, infringed the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter. In its judgment, the Court held in particular that, in view of their broad and imprecise wording, those national provisions were liable to prevent a court called upon to examine a decision of a lower court from undertaking such an assessment, whether it is a matter of ruling on its own composition as a court of second instance or *on that of the lower court (see paragraph 217 of that judgment).*

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20 See, in particular, the judgment in *A.K.* (paragraph 153).

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21 Judgment of 16 November 2021 (C-748/19 to C-754/19, EU:C:2021:931).

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22 That thorny issue had already arisen in the cases resulting in the judgment of 9 January 2024, *G. and Others (Appointment of judges to the ordinary courts in Poland)* (C-181/21 and C-269/21, EU:C:2024:1), and the order of 27 May 2024, *Y.Ya. (Secondment of judges)* (C-797/21, EU:C:2024:425). In both cases, however, the Court did not address that issue, as the requests for a preliminary ruling were declared inadmissible.

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23 See, in particular, judgment of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:924).

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24 See the judgment in *A.B.* (paragraph 146) and the judgment in *W.Ż.* (paragraph 159).

25 The judgment in *W.Ż.* (paragraph 158).

26 Judgment of 9 March 1978 (106/77, EU:C:1978:49).

27 Judgment of 22 February 2022 (C-430/21, EU:C:2022:99).

28 Judgment of 21 December 2021 (C-497/20, 'the judgment in *Randstad*', EU:C:2021:1037).

29 See the judgment in *Randstad* (paragraphs 56, 65 and 66).

30 See Opinion of Advocate General Bobek in Joined Cases *Asociaţia 'Forumul Judecătorilor Din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2020:746, point 223).

31 See, by analogy, judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931, paragraph 74).

32 See the judgment in *W.Z.* (paragraph 133).

33 Judgment of 21 December 2023 (C-718/21, 'the judgment in *Krajowa Rada Sądownictwa*', EU:C:2023:1015).

34 CE:ECHR:2021:1108JUD004986819.

35 This is because that judgment in *Krajowa Rada Sądownictwa* applies the case-law arising from the judgment of 29 March 2022, in *Getin Noble Bank* (C-132/20, EU:C:2022:235), according to which the independence inherent in the concept of 'court or tribunal' within the meaning of Article 267 TFEU is presumed, and that presumption can be rebutted where a final judicial decision handed down by a national or international court or tribunal leads to the conclusion that the judicial body under consideration is not an independent and impartial tribunal previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU, and the second paragraph of Article 47 of the Charter.

36 See orders of 9 April 2024, *T. (Audiovisual programmes for children)* (C-22/22, EU:C:2024:313); of 29 May 2024, *Prokurator Generalny (Polish extraordinary appeal II)* (C-43/22, EU:C:2024:459); of 29 May 2024, *Rzecznik Praw Obywatelskich (Polish extraordinary appeal)* (C-720/21, EU:C:2024:489); and of 21 June 2024, *Kancelaria B.* (C-810/23, EU:C:2024:543).

37 See the judgment in *Review Simpson* (paragraphs 69 to 75).

38 The judgment in *Ástráðsson v. Iceland* (§ 252).

39 My subsequent arguments are based on the idea that the notion of 'null and void' refers to the legal non-existence of the act, which, in my view, reflects an accurate interpretation of the judgment in *W.Ż*.

40 The judgment in *W.Ż.* (paragraph 161).

41 The judgment in *W.Ż.* (paragraph 160).

42 The metaphor of the 'palette' is borrowed from the excellent article of Dougan, M., 'The primacy of Union law over incompatible national measures: Beyond disapplication and towards a remedy of nullity?', *Common Market Law Review*, Vol. 59, No 5, 2022, p. 1321.

43 Judgment of 13 July 2023 (C-615/20 and C-671/20, 'the judgment in *YP*', EU:C:2023:562).

44 The judgment in *YP* (paragraph 65). See also the judgment of 6 March 2025, *D.K. (Withdrawal of cases from a judge)* (C-647/21 and C-648/21, EU:C:2025:143, paragraph 92).

45 In the same way as in the judgment in *W.Ż.*, the Court stated, in paragraph 70 of the judgment in *YP*, that no consideration relating to the principle of legal certainty or the alleged finality (*res judicata*) of the resolution at issue could be successfully relied on in order to prevent the referring court, in particular, from disapplying such a resolution.

46 See, in particular, judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 52 and the case-law cited).

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47 See judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, in particular paragraph 32).

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48 See Opinion 2/13 *(Accession of the European Union to the ECHR)*, of 18 December 2014 (EU:C:2014:2454, paragraphs 166 and 167).

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49 See, inter alia, judgments of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraph 62); of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraph 93); and of 17 May 2022, *Ibercaja Banco* (C-600/19, EU:C:2022:394, paragraph 50).

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50 At the end of § 252, which was not cited by the referring court, the ECtHR specified that, in the balancing exercise to be carried out, 'needless to say, account must also be taken … of the relevant statutory time limits that may be applicable in the domestic law of the Contracting Parties to challenges of such nature.'

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51 Under that article: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms [signed in Rome on 4 November 1950], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

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52 Dz. U. 1964, item 296.

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53 That article reads: 'The court to which the case has been referred back shall be bound by the interpretation of the law made by Sąd Najwyższy (Supreme Court) in that same case. It is not possible to base an appeal on a point of law against a decision delivered after a re-examination of the case on grounds contrary to the interpretation of the law made in that case by the Sąd Najwyższy (Supreme Court).'

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54 Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland – Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017) 835 final, pp. 26 and 27).

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55 Opinion CDL(2017)035 (points 58, 63 and 130).