



C/2023/1278

11.12.2023

**Request for a preliminary ruling from the Sąd Najwyższy (Poland) lodged on 21 July 2023 — E. S.A v  
W. sp. z o.o. and Bank S.A.**

**(Case C-459/23, E.)**

(C/2023/1278)

*Language of the case: Polish*

**Referring court**

Sąd Najwyższy

**Parties to the main proceedings**

*Appellant on a point of law:* E. S.A

*Respondents on a point of law:* W. sp. z o.o., Bank S.A.

**Questions referred**

1. Must the second subparagraph of Article 19(1) TEU, in the light of the interpretation given by the Court of Justice in its judgment in Case C 487/19 W.Z., be interpreted as meaning that designating a judge of the Sąd Najwyższy (Supreme Court, Poland), without his or her consent, to adjudicate temporarily in another chamber of the Sąd Najwyższy is, like transferring a judge of an ordinary court between two divisions of that ordinary court, in breach of the principle of the irremovability and independence of judges, where:
  - the judge is appointed to adjudicate in cases whose subject matter does not coincide with the substantive jurisdiction of the chamber to which the judge of the Supreme Court was appointed to adjudicate;
  - the judge has no judicial remedy against the decision regarding that designation which meets the requirements laid down in paragraph 118 of the judgment in Case C 487/18 W.Z.;
  - the order of the First President of the Supreme Court on the appointment to adjudicate in another chamber and the order of the President who directs the work of the Civil Chamber of the Supreme Court on the allocation of specific cases have been issued by persons appointed to the position of judge of the Supreme Court in the same circumstances as in Case C 487/18 W.Z., and, in the light of previous case-law, judicial proceedings involving such persons are either invalid or infringe a party's right to a fair trial under Article 6 ECHR;
  - designating, without his or her consent, a judge to adjudicate for a fixed period in a chamber of the Supreme Court other than that in which he or she performs his or her duties, while maintaining the obligation to adjudicate in his or her home chamber, has no basis in national law;
  - designating a judge, without his or her consent, to adjudicate for a fixed period in chamber of the Supreme Court other than that in which he or she performs his or her duties results in an infringement of Article 6(b) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time? (1)

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(1) OJ 2003 L 299, p. 9.

2. Regardless of the answer to the Question 1, must the second subparagraph of Article 19(1) TEU be interpreted as meaning that a court in a formation constituted as a result of an order of the First President of the Supreme Court on an appointment to adjudicate in another chamber of the Supreme Court and an order of the President who directs the work of the Civil Chamber of the Supreme Court on the allocation of specific cases, issued by persons appointed to the position of judge of the Sąd Najwyższy, in the same circumstances as in Case C 487/18 W.Z., does not constitute a tribunal 'established by law' where, according to previous case-law, judicial proceedings involving persons so appointed are invalid or infringe a party's right to a fair trial under Article 6 ECHR?
3. In the event that Question 1 is answered in the affirmative or Question 2 is answered to the effect that a court thus established does not constitute a tribunal 'established by law', must the second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law be interpreted as meaning that judges appointed to a formation of a court established in the manner described in Questions 1 and 2 may refuse to act in the case allocated to them (which includes refusing to adjudicate), regarding as non-existent the orders regarding designation to adjudicate in another chamber of the Sąd Najwyższy and allocation of specific cases, or are they to deliver their ruling, leaving it to the parties to decide whether to contest it on the grounds that it infringes a party's right to have a case heard by a court or tribunal which meets the requirements laid down in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights?
4. In the event that the above questions are answered to the effect that the referring court is a tribunal established by law within the meaning of the second paragraph of Article 19(1) TEU, must Article 3(3)(b) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors,<sup>(2)</sup> in conjunction with Article 20 and Article 1(2)(c) thereof, be interpreted as meaning that a public undertaking, as referred to in Article 2(1)(b) of the directive, carrying on activity relating to the wholesale and retail sale of electricity, is obliged to acquire, through a public procurement procedure, green certificates, as referred to in Article 2(k) to (l) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC? <sup>(3)</sup>
5. In the event that Question 4 is answered in the affirmative, must Article 14 of Directive 2004/17, in conjunction with Article 1(4) thereof, be interpreted as meaning that a framework agreement between such an undertaking and a renewable energy producer is to be concluded through a public procurement procedure where the estimated (albeit not specified in the agreement) total value of the green certificates acquired in performance of that agreement exceeds the threshold laid down in Article 16(a) of that directive, but the value of the individual transactions concluded in performance of the agreement does not exceed that threshold?
6. In the event that the Questions 4 and 5 are answered in the affirmative, does the conclusion of a contract in complete disregard of the rules on public procurement constitute a case referred to in Article 2d(1)(a) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors<sup>(4)</sup> or is it a different case of infringement of EU public procurement law which allows a contract to be declared null and void outside the procedure laid down in national law implementing the above directive?
7. In the event that Questions 4 to 6 are answered in the affirmative, must the general principle which prohibits any abuse of rights be interpreted as meaning that a contracting undertaking, as referred to in Article 2(1)(b) of Directive 2004/17, cannot seek cancellation of a contract which it concluded with a supplier in breach of national provisions implementing EU directives on public procurement where the actual reason for seeking cancellation of the contract is not compliance with EU law but a loss of profitability of performance thereof by the contracting authority?

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<sup>(2)</sup> OJ 2004 L 134, p. 16, as subsequently amended.

<sup>(3)</sup> OJ 2009 L 140, p. 16, as subsequently amended.

<sup>(4)</sup> OJ 1992 L 76, p. 14, as subsequently amended.