



Reports of Cases

Case C-132/20

**DM,
EN
and
BN**

v

Getin Noble Bank S.A.

(Reference for a preliminary ruling from the Sąd Najwyższy)

Judgment of the Court (Grand Chamber), 29 March 2022

(Reference for a preliminary ruling – Admissibility – Article 267 TFEU – Concept of court – Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Rule of law – Effective judicial protection – Principle of judicial independence – Tribunal previously established by law – Judicial body, a member of which was appointed for the first time to the position of judge by a political body within the executive branch of an undemocratic regime – Way in which the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) operates – Unconstitutionality of the law on the basis of which that council was composed – Possibility of regarding that body as an impartial and independent court or tribunal within the meaning of EU law)

1. *Questions referred for a preliminary ruling – Admissibility – Conditions – Request from a national court or tribunal within the meaning of Article 267 TFEU – Presumption of admissibility regardless of the actual composition of that court or tribunal – Limits (Art. 19(1), second subpara., TEU; Art. 267 TFEU; Charter of Fundamental Rights of the European Union, Art. 47)*

(see paragraphs 69, 72, 74, 75)

2. *Questions referred for a preliminary ruling – Jurisdiction of the Court – Limits – Interpretation of EU law in a dispute requiring the resolution of a preliminary issue related to events predating the accession of a Member State to the European Union – Preliminary issue related to a situation continuing to produce effects after that accession – Included (Art. 267 TFEU)*

(see paragraphs 86, 87)

3. *Member States – Obligations – Provision of remedies sufficient to ensure effective judicial protection – Scope*

(Art. 19(1), second subpara., TEU; Charter of Fundamental Rights of the European Union, Arts 47 and 51(1))

(see paragraphs 89-91, 93)

4. *EU law – Principles – Right to effective judicial protection – Right to an independent and impartial tribunal previously established by law – Scope*
(Art. 2 TEU)

(see paragraphs 94-96, 118, 119, 121, 122)

5. *Member States – Obligations – Provision of remedies sufficient to ensure effective judicial protection – Dispute concerning the use of unfair terms in a contract concluded with consumers by sellers or suppliers – Verification, by the national court hearing an appeal, of the lawfulness of the panel of judges who examined the dispute – Judges appointed to such a position by the bodies of an undemocratic regime in place in the Member State concerned before its accession to the European Union and kept in their position after the end of that regime – Impact of circumstances predating that accession on their independence and their impartiality – None – Condition*
(Arts 2, 19(1), second subpara., and 49 TEU; Charter of Fundamental Rights of the European Union, Art. 47; Council Decision 93/13, Art. 7(1) and (2))

(see paragraphs 67, 100-108, operative part 1)

6. *Member States – Obligations – Provision of remedies sufficient to ensure effective legal protection – Dispute concerning the use of unfair terms in a contract concluded with consumers by sellers or suppliers – Determination by the national court hearing an appeal of whether the panel of judges who examined the dispute was lawful – Judges appointed to such a position upon selection by the body of a Member State either composed on the basis of a regulation subsequently declared unconstitutional or lawfully composed but following a non-transparent procedure – No impact of those circumstances on the independence and impartiality of the said judges – Condition*
(Art. 19(1), second subpara., TEU; Charter of Fundamental Rights of the European Union, Art. 47; Council Decision 93/13, Art. 7(1) and (2))

(see paragraphs 113, 114, 123-132, operative part 2)

Résumé

In 2017, in Poland, several consumers had brought an action before the competent regional court concerning the allegedly unfair nature of a term in the loan agreement which they had concluded with Getin Noble Bank, a bank. Since they did not obtain full satisfaction either at first instance or on appeal, the appellants brought an appeal before the Sąd Najwyższy (Supreme Court, Poland), the referring court.

In order to examine the admissibility of the appeal brought before it, that court is required, in accordance with national law, to determine whether the composition of the panel of judges which delivered the judgment under appeal was lawful. In that context, sitting as a single judge, the referring court raises the question whether the composition of the appellate court is consistent with EU law. In its view, the independence and impartiality of the three appeal judges could be called into question by reason of the circumstances in which they were appointed to the office of judge.

In that regard, the referring court, first, refers to the circumstance that the initial appointment of one of the judges (FO) to such a position was by decision of a body of the undemocratic regime that was in Poland before its accession to the European Union and that that judge was kept in that position after the end of that regime, without having sworn a new oath and still benefiting from the length of service acquired when that regime was in place.¹ Second, the referring court claims that the judges concerned were appointed to the appellate court on a proposal of the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; ‘the KRS’): one of them, in 1998, when the resolutions of the body were not substantiated and no legal remedy was available against them, and the other two, in 2012 and 2015, when, according to the Trybunał Konstytucyjny (Constitutional Court, Poland), the KRS did not operate transparently and its composition was contrary to the Constitution.

By its Grand Chamber judgment, the Court holds, in essence, that the principle of effective judicial protection of the rights which individuals derive from EU law² must be interpreted as meaning that the irregularities alleged by the referring court with regard to the appeal judges at issue are not in themselves such as to give rise to reasonable and serious doubts, in the minds of individuals, as to the independence and impartiality of those judges, nor, therefore, to call into question the status of an independent and impartial tribunal, previously established by law, of the panel of judges in which they sit.

Findings of the Court

As a preliminary point, the Court rejects the plea of inadmissibility according to which the single judge of the Polish Supreme Court, called upon to examine the admissibility of the appeal brought before that court, was not entitled to refer questions to the Court for a preliminary ruling in view of the flaws in his own appointment, which call into question his independence and impartiality. In so far as a reference for a preliminary ruling emanates from a national court or tribunal, it must be presumed that it meets the requirements laid down by the Court to constitute a ‘court or tribunal’ within the meaning of Article 267 TFEU. Such a presumption may nevertheless be rebutted where a final judicial decision handed down by a national or international court would lead to the conclusion that the court constituting the referring court is not an independent and impartial tribunal established by law. Since the Court has no information to rebut such a presumption, the request for a preliminary ruling is therefore admissible.

Next, the Court examines the two parts of the questions referred.

¹ It will be referred to below as ‘circumstances predating accession’.

² Principle to which the second subparagraph of Article 19(1) TEU refers, according to which ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’, and which is affirmed in Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’), and by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29). The latter reaffirms, in Article 7(1) and (2), the right to an effective remedy to which consumers who consider themselves wronged by those terms are entitled.

By the first part, the referring court asks whether the second subparagraph of Article 19(1) TEU and Article 47 of the Charter preclude a panel of judges in which a judge who, like FO, began their career under the communist regime and was kept in their post after the end of that regime from being considered to be an independent and impartial tribunal.

In that regard, after acknowledging that it has jurisdiction to rule on that question,³ the Court states that, although the organisation of justice in the Member States falls within the competence of the latter, they are required, in the exercise of that competence, to comply with their obligations under EU law, including the obligation to ensure observance of the principle of effective judicial protection.

As regards the impact on a judge's independence and impartiality of the circumstances prior to accession, relied on by the referring court vis-à-vis judges such as FO, the Court points out that, at the time of Poland's accession to the European Union, it was considered that, in principle, its judicial system was consistent with EU law. In addition, the referring court has provided no specific explanation as to how the conditions for FO's initial appointment would enable undue influence to be exercised on him currently. Thus, the circumstances surrounding his initial appointment could not in themselves be considered to be such as to give rise to reasonable and serious doubts, in the minds of individuals, as to the independence and impartiality of that judge, in the subsequent exercise of his judicial duties.

By their second part, the questions referred seek to ascertain, in essence, whether the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 7(1) and (2) of Directive 93/13 preclude a panel of judges connected with the court or tribunal of a Member State in which a judge sits whose initial appointment to a judicial position or subsequent appointment to a higher court occurred either upon selection as a candidate for the position of judge by a body composed on the basis of legislative provisions subsequently declared unconstitutional by the constitutional court of that Member State ('the first circumstance at issue') or after selection as a candidate for the position of judge by a body lawfully composed but following a procedure that was neither transparent nor public and no legal remedy was available against it ('the second circumstance at issue') from being considered to be an independent and impartial tribunal previously established by law.

In that regard, the Court observes that not every error that may take place during the procedure for the appointment of a judge is of such a nature as to cast doubts on the independence and impartiality of that judge.

In the present case, as regards the first circumstance at issue, the Court notes that the Constitutional Court did not rule on the independence of the KRS when it declared unconstitutional the composition of that body at the time of the appointment of the two judges other than FO in the panel of judges who delivered the judgment under appeal before the referring court. That declaration of unconstitutionality is therefore not capable, per se, of calling into question the independence of that body or raising doubts, in the minds of individuals, as to the independence of those judges, with regard to external factors. Moreover, no specific evidence capable of substantiating such doubts was put forward by the referring court to that effect.

³ According to settled case-law, the Court has jurisdiction to interpret EU law only as regards its application in a new Member State with effect from the date of that State's accession to the European Union. In the present case, even though it relates to circumstances predating accession to the European Union by Poland, the question referred concerns a situation which did not produce all its effects before that date since FO, appointed as a judge before accession, is currently a judge and performs duties corresponding to that office.

The same conclusion must be drawn in the case of the second circumstance at issue. It is not apparent from the order for reference that the KRS, in its composition after the end of the Polish undemocratic regime, lacked independence from the executive and the legislature.

In those circumstances, those two circumstances do not establish an infringement of the fundamental rules applicable to the appointment of judges. Thus, provided that the irregularities relied on do not create a real risk that the executive could exercise undue discretion undermining the integrity of the outcome of the judicial appointment process, EU law does not preclude a panel of judges in which the judges concerned sit from being considered to be an independent and impartial tribunal established by law.