Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 2 March 2023 [1]

Case C-718/21

L.G.
v
Krajowa Rada Sądownictwa

(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' – Jurisdiction of the Court – Second subparagraph of Article 19(1) TEU – Effective legal protection in the fields covered by EU law – Principles of the irremovability of judges and judicial independence – Possibility of continuing to hold a judicial office after reaching retirement age – Effects of the declaration of intention to continue to hold a judicial office after reaching retirement age subject to the authorisation of another body – Effects of exceeding the time limit for filing such a declaration)

I. Introduction

1. This request for a preliminary ruling was made by the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs; 'the Chamber of Extraordinary Control') of the Sąd Najwyższy (Supreme Court, Poland) in an appeal brought by L.G. ('the appellant'), a judge at the Sąd Okręgowy w K. (Regional Court of K., Poland), against the resolution of the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; 'the KRS') to discontinue consideration of his request for authorisation to continue to hold a judicial office after reaching retirement age, due to the fact that the deadline for submission of the declaration of intention to that effect had passed.

2. This request for a preliminary ruling raises, at the outset, the delicate issue of whether the Chamber of Extraordinary Control can be classified as a 'court or tribunal' within the meaning of Article 267 TFEU. As to the substance of the case, the request for a preliminary ruling essentially concerns the interpretation of the principles of the irremovability of judges and judicial independence, as a corollary of the principle of 'effective legal protection' enshrined in the second subparagraph of Article 19(1) TEU, in relation to national legislation which, on the one hand, makes the effect of a judge's declaration of intention to continue to exercise his or her functions after reaching retirement age subject to authorisation by the KRS and, on the other hand, lays down an absolute preclusive time limit for that declaration.

[1] Original language: French.

3. The present case must be viewed against the background of the recent reforms of the Polish judicial system [2] and the abundant case-law of the Court of Justice relating to those reforms, in particular in connection with actions for failure to fulfil obligations brought by the European Commission [3] and references for a preliminary ruling brought by the Polish courts. [4]

II. Legal context: Polish law

A. The Law on the Supreme Court

4. The ustawa o Sądzie Najwyższym (Law on the Supreme Court), of 8 December 2017, [5] which, among other things, created the Chamber of Extraordinary Control, states as follows in Article 26(1):

'The areas of jurisdiction of the [Chamber of Extraordinary Control] 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, including disputes relating to the protection of competition, energy regulation, telecommunications and rail transport, and appeals against decisions of the Przewodniczy Krajowej Rady Radiofonii i Telewizji [(President of the National Television and Radio Broadcasting Council, Poland)] as well as complaints concerning the excessive duration of proceedings before ordinary and military courts and the [Sąd Najwyższy (Supreme Court)].'

B. The Law on the system of ordinary courts

5. Article 69(1) and (1b) of the ustawa – Prawo o ustroju sądów powszechnych (Law on the system of ordinary courts), of 27 July 2001, as amended, [6] states as follows:

'1. A judge shall retire upon reaching 65 years of age unless, no later than 6 months and no earlier than 12 months before reaching that age, he or she submits a declaration to the [KRS] indicating his or her wish to continue in his or her post and presents a certificate, issued in accordance with

[2] In particular, the recent reforms of the Sąd Najwyższy (Supreme Court), with regard to the Chamber of Extraordinary Control, and of the KRS.

[3] See judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531; 'the judgment in *Independence of the Supreme Court*'); of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:924; 'the judgment in *Independence of ordinary courts*'); and of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596; 'the judgment in *Disciplinary regime for judges*'). A fourth case in respect of failure to fulfil obligations is currently pending (*Commission* v *Poland*, C-204/21) and an Opinion was delivered by Advocate General Collins on 15 December 2022 in relation to that case (EU:C:2022:991).

[4] See judgments 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; 'the judgment in *A.K.*'); of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234); of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153; 'the judgment in *A.B.*'); of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798; 'the judgment in *W.Ż.*'); of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931); of 22 March 2022, *Prokurator Generalny and Others (Disciplinary Chamber of the Supreme Court – Appointment)* (C-508/19, EU:C:2022:201); and of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235; 'the judgment in *Getin Noble Bank*'). Those reforms are also the subject of numerous ongoing cases, including Joined Cases *YP and Others (Lifting of a judge's immunity and his or her suspension from duties)* (C-615/20 and C-671/20) and *G. and Others (Appointment of judges to the ordinary courts in Poland)* (C-181/21 and C-269/21), which were the subject of the Opinion delivered by Advocate General Collins (EU:C:2022:986 and EU:C:2022:990).

[5] Dz. U. of 2018, item 5.

[6] Codified text, Dz. U. of 2020, item 2072.

the rules specified for candidates applying for a judicial post, confirming that his or her health is no impediment to performing the duties of a judge.

…

1b. The [KRS] may authorise a judge to continue in his or her post, if there is a legitimate interest for the administration of justice or an important social interest in that judge continuing in that role, having regard to the rational use of the staff of the ordinary courts and the needs resulting from the workload of individual courts. The resolution of the [KRS] shall be final. In a situation where the procedure connected with the judge continuing in his or her post has still not come to an end after he or she has reached the age referred to in paragraph 1, the judge shall remain in post until such time as that procedure has come to an end.

…'

C. The Law on the KRS

6. Under Article 42 of the ustawa o Krajowej Radzie Sądownictwa (the Law on the KRS), of 12 May 2011, as amended:[7]

'1. Resolutions issued by the Council in individual cases shall be reasoned.

2. The statement of reasons for a resolution shall be drawn up within one month of its adoption.

3. Resolutions issued in individual cases shall be served on the participants in the procedure, along with the associated statement of reasons and instructions on how those resolutions may be challenged before the Supreme Court.'

7. Article 44(1) of the Law on the KRS states as follows:

'A participant in the procedure may appeal to the [Sąd Najwyższy (Supreme Court)] on the ground that the [KRS] resolution is unlawful, unless separate provisions provide differently. …'

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

8. By letter of 30 December 2020, the appellant submitted a declaration to the KRS indicating his intention to continue to work as a judge after reaching the retirement age of 65 years, which he would reach on 12 June 2021, in accordance with Article 69 of the Law on the system of ordinary courts.[8] By letter of 31 December 2020, the appellant also submitted a request to the KRS for leave to proceed with his declaration beyond the stated time limit, given that he had not submitted that declaration at least six months before he reached retirement age, as required by that legal provision.[9]

[7] Codified text, Dz. U. of 2021, item 269.

[8] The declaration in question, sent by the President of the Sąd Okręgowy w K. (Regional Court of K.), was accompanied by the necessary medical, psychological and aptitude certificates, and by psychological competence certificates, required by the relevant regulations.

[9] He argued that the failure to meet that deadline was caused by the workload generated by his ongoing judicial activities.

9. By a resolution of 18 February 2022, the KRS declared that declaration inadmissible on the ground that it had been submitted beyond the time limit of six months before retirement age laid down in the relevant legal provision and adopted a resolution discontinuing consideration of the case, thus closing the procedure concerning the granting of authorisation for the appellant to continue to hold office as a judge. [10]

10. The appellant brought an appeal against that resolution before the Sąd Najwyższy (Supreme Court), sitting as the Chamber of Extraordinary Control, which is the referring court. [11] The referring court wishes to determine whether Article 69 of the Law on the system of ordinary courts infringes the principles of the irremovability of judges and judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, inasmuch as, first, that national provision makes the performance of the duties of a judge after retirement age subject to authorisation from another body, which could influence the content of the judgments delivered by the judge in question and, second, that same provision establishes that a request to exercise the duties of a judge after retirement age has been reached cannot be considered if the time limit for submission of that request has expired, irrespective of the effects of the retirement in the specific circumstances, in particular with regard to the interests of the administration of justice or the possible existence of an important social interest.

11. In those circumstances the Chamber of Extraordinary Control of 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) Does the second subparagraph of Article 19(1) [TEU] preclude a provision of national law such as the first sentence of Article 69(1b) of the [Law on the system of ordinary courts], which makes the effectiveness of a declaration by a judge of his or her intention to continue to hold a judicial office after reaching retirement age subject to the authorisation of another body?

(2) Does the second subparagraph of Article 19(1) [TEU] preclude the adoption of an interpretation of a national provision under which a judge’s belated declaration of his or her intention to continue to hold a judicial office after reaching retirement age is ineffective, irrespective of the reason for the failure to observe the time limit and the significance of that failure for the proceedings concerning authorisation for his or her continuing to hold a judicial office?’

12. Written observations were filed by the KRS, by the Polish, Danish and Netherlands Governments and by the European Commission. The KRS, the Polish, Belgian and Netherlands Governments and the Commission submitted oral observations at the hearing on 8 November 2022. The appellant, the KRS, the Belgian and Netherlands Governments and the Commission also submitted written observations on the order from the referring court of 3 November 2022, by which that court submitted additional observations to the Court of Justice to support its request for a preliminary ruling, particularly concerning its status as a ‘court or tribunal’ within the meaning of Article 267 TFEU.

[10] The resolution was adopted following a proposal to discontinue consideration of the case by a team appointed ad hoc by the President of the KRS, in the absence of an opinion from the Minister for Justice, who was informed of the appointment of that team.

[11] The appellant also filed an application to suspend the effects of the disputed resolution, which was granted by an order of the Sąd Najwyższy (Supreme Court) of 29 April 2021.

IV. Analysis

A. The jurisdiction of the Court

1. The doubts raised as to the status of the referring court as a 'court or tribunal' within the meaning of Article 267 TFEU

13. The Commission and the Belgian and Netherlands Governments raise doubts as to whether the referring court is a 'court or tribunal' within the meaning of Article 267 TFEU.

14. Indeed, the members of the Chamber of Extraordinary Control, established by the Law on the Supreme Court, were appointed to the position of judge of the Sąd Najwyższy (Supreme Court), on the proposal of the KRS, by Resolution No 331/2018 of 28 August 2018 ('Resolution No 331/2018'), under the following circumstances:

– that resolution was adopted by the KRS in a composition whose independence has been questioned in several judgments of the Court of Justice; [12]

– that resolution was appealed to the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) and on 27 September 2018 that court issued a protective order suspending its enforcement;

– the European Court of Human Rights ('the ECtHR') has held, in essence, that two panels of the Chamber of Extraordinary Control composed of three judges appointed on the basis of the same resolution did not constitute 'tribunal[s] established by law' within the meaning of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'); [13]

– after the appointment of judges on the basis of Resolution No 331/2018, that resolution was finally annulled by the Naczelny Sąd Administracyjny (Supreme Administrative Court) on 21 September 2021. [14]

15. In view of these circumstances, it seems to me appropriate, before addressing the questions referred for a preliminary ruling, to ascertain whether the Chamber of Extraordinary Control, sitting as a panel of three judges, constitutes a 'court or tribunal' within the meaning of Article 267 TFEU and, consequently, whether the Court of Justice has jurisdiction to answer the questions referred for a preliminary ruling by that chamber.

[12] See, in particular, the judgments in *A.K.* (paragraphs 136 to 145), in *A.B.* (paragraphs 130 and 131) and in *Disciplinary regime for judges* (paragraphs 100 to 108). This was a composition resulting from the Law on the KRS, as amended by the ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the National Council of the Judiciary and certain other laws) of 8 December 2017 (Dz. U. of 2018, item 3).

[13] ECtHR, 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland* (CE:ECHR:2021:1108JUD004986819). The assessment of Resolution No 331/2018 by the ECtHR was also the subject of the judgment in *W.Ż.* (paragraphs 134 to 154).

[14] These circumstances are highly controversial, because the referring court (in its supplementary observations), the KRS and the Polish Government have levelled several criticisms, in particular in terms of the interpretation of the protective order and the judgment of the Naczelny Sąd Administracyjny (Supreme Administrative Court) by the case-law of the European Union and the ECtHR.

2. The principles relating to the concept of 'independence' of the referring court within the meaning of Article 267 TFEU

16. According to the settled case-law of the Court of Justice, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.[15] In the present case, it is only this last factor, namely the independence of the Chamber of Extraordinary Control, that is in question, it being considered prima facie obvious – and in any case not contested – that this body fulfils the other criteria mentioned above.

17. According to further settled case-law of the Court, the requirement for independence of the courts, which the Member States must guarantee under the second subparagraph of Article 19(1) TEU,[16] as regards national courts called upon to rule on questions relating to the interpretation and application of EU law, has two aspects: the first is external and concerns the *autonomy* of the court,[17] and the second is internal and concerns its *impartiality*.[18] Those guarantees of autonomy and impartiality, which constitute the two components of the concept of 'independence', presuppose the existence of rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to remove 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.[19]

18. With regard, more particularly, to the requirement for independence inherent in the concept of 'court or tribunal' within the meaning of Article 267 TFEU, in its judgment in *Getin Noble Bank*, the Court held, in essence, that there was a *presumption* whereby a national court such as, in particular, the Sąd Najwyższy (Supreme Court) satisfies the requirements that must be met for a body to be classified as a 'court or tribunal' within the meaning of Article 267 TFEU, irrespective

15 See, in particular, the judgment in *Getin Noble Bank* (paragraph 66 and the case-law cited).

16 The Court has held on numerous occasions that that provision constitutes a general principle which gives concrete expression to the value of the rule of law stated in Article 2 TEU, and regularly interprets the provision in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), which, in turn, asserts that general principle stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR (see, in particular, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 32 and 35 and the case-law cited).

17 This aspect essentially requires that the court concerned exercise its functions without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgement of its members and to influence their decisions (see the judgment in *Independence of ordinary courts*, paragraph 109 and the case-law cited). The rules applicable to the status of judges and the performance of their duties must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part that could prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals (see the judgment in *W.Ż.*, paragraph 110 and the case-law cited).

18 This aspect essentially seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings and requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (see the judgment in *Independence of ordinary courts*, paragraph 110 and the case-law cited).

19 See the judgments in *Independence of ordinary courts* (paragraph 111 and the case-law cited), and in *W.Ż.* (paragraph 109 and the case-law cited). According to the Court of Justice, which relies in this respect on the case-law of the ECtHR, these two requirements for autonomy and impartiality must guarantee the confidence which such tribunals must inspire in the public in a democratic society, relying (especially with regard to impartiality) on the 'appearance of independence theory' (see, to that effect, the judgment in *A.K.* (paragraphs 127 to 129); in literature, see Kajewski, M. and Ziółkowski, M., 'EU Judicial Independence Decentralized: A.K.', *Common Market Law Review*, 2020, Vol. 57, No 4, p. 1 123; Pappalardo, F. and Renoud, E., 'La théorie des apparences, les juges et l'État de droit en Pologne', *Revue des affaires européennes*, 2021, No 3, p. 667.

of its actual composition. [20] The Court stated that, in the context of a preliminary ruling procedure referred to in Article 267 TFEU, it is not for the Court to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and their procedure. [21] At the same time, the Court has held that this presumption may nevertheless be rebutted, first, where a *final judicial decision* handed down by a national or international court or tribunal leads to the conclusion that the judge constituting the referring court is not 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 Article 47 of the Charter, [22] or, second, where *other factors*, beyond the personal situation of the judges formally submitting a request pursuant to Article 267 TFEU, could have repercussions on the functioning of the referring court to which those judges belong and thus contribute to undermining the independence and impartiality of that court. [23]

19. Having said that, I consider it important to stress that, in my view, the interpretation of the principle of independence in the context of Article 267 TFEU calls for a different examination from that required, respectively, in the context of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, having regard to the different functions and objectives of these texts. This approach, which has been developed, for the most part, by certain Advocates General, [24] has not, to my knowledge, been fully confirmed by the Court, which, in its judgments concerning the requirement for independence inherent in the concept of 'court or tribunal' within the meaning of Article 267 TFEU, continues to refer to the need for the court or tribunal in question to have the characteristics of an independent, impartial court or tribunal established by law, 'for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of … Article 47 of the Charter'. [25]

[20] The judgment in *Getin Noble Bank* (paragraph 69). That case also involved the Sąd Najwyższy (Supreme Court), although in a single-judge composition. In the case, the instrument appointing that judge, dated 10 October 2018, had been adopted in circumstances identical to those which were the subject of the judgment in *W.Ż.*. That instrument was based on Resolution No 331/2018, enforcement of which had been suspended by order of the Naczelny Sąd Administracyjny (Supreme Administrative Court) (see point 14 of the present Opinion, and the judgment in *W.Ż.*, paragraphs 32 to 34).

[21] See the judgment in *Getin Noble Bank* (paragraph 70 and the case-law cited).

[22] See, to that effect, the judgment in *Getin Noble Bank* (paragraphs 68 to 72 and the case-law cited).

[23] See, to that effect, the judgment in *Getin Noble Bank* (paragraph 75). In that case, the Court merely noted that, since it had no knowledge of the fact that the judge constituting the referring court would be the subject of such a final judicial decision, the possible flaws that may have vitiated the national procedure for the appointment of that judge were not capable of leading to the inadmissibility of the request for a preliminary ruling (paragraph 73). In its judgment of 12 May 2022, *W.J. (Change in the habitual residence of the maintenance creditor)* (C-644/20, EU:C:2022:371, paragraph 52), the Court stated, in essence, that the evidence capable of rebutting the presumption in question must be concrete and precise.

[24] According to Advocate General Bobek, while there is only one principle of judicial independence in EU law, nevertheless, in so far as these three provisions are different in terms of their function and objective, the type of examination to be carried out in 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 (see Opinion of Advocate General Bobek in *Getin Noble Bank*, C-132/20, EU:C:2021:557, point 36). Previously, Advocate General Wahl had essentially pleaded for a less rigid interpretation of the status of independent body in relation to the concept of 'court or tribunal' for the purposes of Article 267 TFEU than in the case of Article 6 ECHR and Article 47 of the Charter (Opinion of Advocate General Wahl in Joined Cases *Torresi*, C-58/13 and C-59/13, EU:C:2014:265, points 48 to 51).

[25] See, in particular, the judgment in *Getin Noble Bank* (paragraph 72). In that case, the Court did point out, however, that the presumption whereby a request for a preliminary ruling issued by a national court satisfies, in particular, the requirement for that court to be considered independent (see point 18 of the present Opinion) applies 'solely for the purposes of assessing the admissibility of references for a preliminary ruling under Article 267 TFEU' and that 'it cannot be inferred from this that the conditions for appointment of the judges that make up the referring court necessarily satisfy the guarantees of access to an independent and impartial tribunal previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU or Article 47 of the Charter' (the judgment in *Getin Noble Bank*, paragraph 74; see also judgment of 13 October 2022, *Perfumesco.pl*, C-355/21, EU:C:2022:791, paragraph 33).

20. In essence, the present approach makes the following distinction among the conditions for application of the three provisions in question:

– the second subparagraph of Article 19(1) TEU seeks to ensure that the system of legal remedies established by each Member State guarantees effective judicial protection in the fields covered by EU law.[26] It therefore requires a 'systemic' examination of the characteristics of a judicial system;

– Article 47 of the Charter helps to ensure respect for the right to effective judicial protection of any individual relying, in a given case, on a right which he or she derives from EU law.[27] It therefore requires a 'practical' examination (on a case-by-case basis) to assess whether an effective remedy exists in the case in question;[28]

– Article 267 TFEU is directed at a concept of 'court or tribunal' that has a 'functional' nature, in that it serves to identify the national bodies which can become the interlocutors of the Court in the context of a preliminary ruling procedure.[29] According to this concept of 'functional independence', which refers primarily to the absence of hierarchical control by the administration, it is the function (and thus the *body*) that must be independent, regardless of the fact that judges (as *individuals*) may be linked to executive power, in particular by ties of recognition (when they have been appointed in a '*privileged*' way) or allegiance (when they hope to have advantages in the course of their career, such as promotions, extensions, and so forth).[30] This concept therefore requires a 'formal' examination, in relation to the body submitting the question, and not in relation to the individuals who sit in the body.[31]

21. Furthermore, it is not irrelevant to point out that the assessment of the very specific concept of 'independence' in the context of Article 267 TFEU is the last of a whole series of factors that are not strictly speaking cumulative but form part of an overall examination and which, taken together, lead to the consideration that a 'court or tribunal' can be classified as such within the meaning of that provision.[32] The independence of the court is thus examined in the light of the

[26] See judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraph 52).

[27] See judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraph 52). In that regard, the Court has also held that the right to an effective remedy before a tribunal enshrined in Article 47 of the Charter corresponds to the obligation imposed on the Member States in the second subparagraph of Article 19(1) TEU to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law (see judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 44). In the legal literature, see, in particular, Wildemeersch, J., 'L'avènement de l'article 47 de la Charte des droits fondamentaux et de l'article 19, paragraphe 1, second alinéa, TUE: un droit renouvelé à la protection juridictionnelle effective', *Cahiers de droit européen*, 2021, No 3, p. 867.

[28] However, this does not prevent the Court from using Article 47 of the Charter as a parameter for assessing the independence of courts and tribunals within the meaning of the second subparagraph of Article 19(1) TEU (see, in particular, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 35 and the case-law cited, and the judgment in *Independence of the Supreme Court*, paragraph 54).

[29] See, in that regard, Opinion of Advocate General Bobek in *Getin Noble Bank* (C-132/20, EU:C:2021:557, points 48, 50 to 52 and 65). The same Advocate General has stated that the assessment of independence under Article 267 TFEU requires that the concept of a 'court or tribunal' be examined at the structural, institutional level. It is examined by looking at the judicial body making the reference as such, while taking into account the function that that body is called to exercise in the specific circumstances of a case (see, to that effect, his Opinion in Joined Cases *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:403, points 52, 56 and 166, and in *Ministerstwo Sprawiedliwości*, C-55/20, EU:C:2021:500, point 56).

[30] In other words, the Court's analysis in that regard is not intended to verify whether *individuals* who belong to the court and sit in the formation of the court that made the reference each fulfil the criteria in question. The focus is on the *body* making the reference (see, to that effect, Opinion of Advocate General Bobek in *Getin Noble Bank*, C-132/20, EU:C:2021:557, point 52 and the case-law cited).

[31] See, to that effect, Opinion of Advocate General Bobek in *Getin Noble Bank* (C-132/20, EU:C:2021:557, point 47). What the Court must therefore consider is the (formal) legal framework, to verify whether the body making a reference is structurally independent from both the parties in a dispute before it ('internal' independence) and does not receive external guidance from other public powers ('external' independence) (point 63).

[32] See, in particular, to that effect, judgment of 17 September 1997, *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 23 and the case-law cited).

other factors, with the result that, in my view, this assessment is all the stricter when the presence of certain other factors is doubtful, and vice versa.[33] On the other hand, it seems to me that the Court tends to carry out an 'independence test' of this kind most often in respect of bodies that operate outside the traditional national judicial system, or that are not regarded as a 'court or tribunal' under national law,[34] whereas it has not always been inclined to question the independent nature of a body that is formally integrated into the judicial system of the Member State in question,[35] as further confirmed by the presumption established in the judgment in *Getin Noble Bank*.[36]

22. This 'minimalist' interpretation of the concept of 'independence' in the context of Article 267 TFEU has, in my view, the advantage that, first, it does not excessively impinge on the principle of cooperation between the national courts and the Court of Justice in the preliminary ruling procedure, given the importance of that mechanism for ensuring the uniform and consistent interpretation of EU law[37] and, second, it maintains the crucial role of references for preliminary rulings with regard to protecting the rights of individuals. Indeed, it is only the Court's continuing jurisdiction to deliver preliminary rulings under Article 267 TFEU that enables individuals, in certain situations, to avail themselves of the effective judicial protection guaranteed by EU

[33] In the literature, the view has been taken that the presence of all of these factors is not always considered essential (see Pertek, J., 'Notion de juridiction: le droit au renvoi préjudiciel des organes ordinaux des professions libérales', *Revue des affaires européennes*, 2022, No 1, p. 127).

[34] See, in particular, judgments of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145, paragraph 40), concerning bodies competent to hear fiscal complaints, whose members were appointed from among civil servants of the administrations and dismissed by decision of the Minister for the Economy and Finance; of 29 November 2001, *De Coster* (C-17/00, EU:C:2001:651, paragraph 18), relating to a body invested with jurisdiction in relation to local tax proceedings in Belgium, the members of which were appointed by the Judicial Board of the Brussels-Capital region; of 21 October 2010, *Nidera Handelscompagnie* (C-385/09, EU:C:2010:627, paragraphs 34 to 40), concerning a body responsible for examining taxpayers' complaints in tax matters, linked to the organisational structure of the Ministry of Finance, to which it was obliged to make annual reports and with which it had an obligation to cooperate; of 22 November 2012, *Westbahn Management* (C-136/11, EU:C:2012:740, paragraph 28), concerning a body with jurisdiction for settling disputes relating to railway procurement contracts in Austria, most of whose members were appointed by the Government; and of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801, paragraph 18), concerning a body with primary jurisdiction in disputes between economic operators and contracting authorities relating to public procurement contracts. In the legal literature, see Kajewski, M. and Ziółkowski, M., 'EU Judicial Independence Decentralized: A.K.', *Common Market Law Review*, 2020, Vol. 57, No 4, p. 1118.

[35] With regard, for example, to the Sąd Najwyższy (Supreme Court), see judgments of 20 May 2021, *FORMAT Urządzenia i Montaże Przemysłowe* (C-879/19, EU:C:2021:409); of 8 July 2021, *Koleje Mazowieckie* (C-120/20, EU:C:2021:553); in *W.Ż. (concerning the civil chamber)*; of 21 October 2021, *Zakład Ubezpieczeń Społecznych I Oddział w Warszawie* (C-866/19, EU:C:2021:865); and of 22 March 2022, *Prokurator Generalny and Others (Disciplinary Chamber of the Supreme Court – Appointment)* (C-508/19, EU:C:2022:201) (Labour and Social Insurance Chamber), in which the Court of Justice responded to the referring court without questioning its status as an independent body.

[36] Furthermore, while the guarantees of independence and impartiality required for application of the second subparagraph of Article 19(1) TEU presuppose the existence of rules, in particular as regards appointment, which make it possible to remove any legitimate doubt as to the imperviousness and neutrality of that body, the Court has long held that it is not for the Court, in examining whether a body is a 'court or tribunal' within the meaning of Article 267 TFEU, to assume that those rules are applied in a manner contrary to the principles enshrined in the national legal order or those of a State governed by the rule of law (see, to that effect, judgment of 4 February 1999, *Köllensperger and Atzwanger*, C-103/97, EU:C:1999:52, paragraph 24, and the Opinion of Advocate General Bobek in *Getin Noble Bank*, C-132/20, EU:C:2021:557, point 62).

[37] Moreover, such an interpretation makes it possible for the referring court to fulfil the obligation incumbent upon any court to check whether, as composed, it constitutes an independent and impartial tribunal previously established by law where a serious doubt arises on that point (see, to that effect, judgment of 26 March 2020, Review of *Simpson* v *Council* and *HG* v *Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 57 and the case-law cited, and the order of the Vice-President of the Court of 14 July 2021, *Commission* v *Poland*, C-204/21 R, EU:C:2021:593, paragraph 164).

law.[38] This is all the more true in the circumstances of the present case, in view of the numerous initiatives taken by the Polish legislature, aimed, inter alia, at preventing references to the Court of Justice for preliminary rulings on the question of the independence of the courts in Poland.[39]

23. It follows that, in view of its specific function, the interpretation of the concept of independence of a 'court or tribunal' within the meaning of Article 267 TFEU does not prejudge the interpretation of that concept in the context of the second subparagraph of Article 19(1) TEU or Article 47 of the Charter. In other words, we cannot rule out a situation where a body might in principle constitute a 'court or tribunal' within the meaning of Article 267 TFEU, irrespective of the fact that elements of the case – whether of a systemic or ad hoc nature – might lead to the conclusion that the same court or tribunal does not constitute an independent, impartial court or tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU or of Article 47 of the Charter.[40]

24. While I am well aware that, in principle, the fundamental system of administration of justice does not allow for 'gradations', the approach referred to above – which is based on the presumption established by the judgment in *Getin Noble Bank*, clarifying its application – seeks, by means of a more flexible interpretation of the concept of 'independence' in the context of Article 267 TFEU, to enable a national court to perform its essential functions, even where there are doubts as to its independence, by guaranteeing it, on the one hand, the possibility of examining its own independence with the Court's assistance and, on the other, the possibility of ensuring that EU citizens have the fundamental right to effective judicial protection where the rights guaranteed by EU law are infringed.

25. However, would it not be more appropriate to adopt a different approach, which, in the present case, would impose limits on the infringements by the legislative and executive branches in respect of the judiciary in Poland – which have been tolerated until now – and which would thereby support the Polish judges appointed under the old system in their attempt, in the name of the principle of judicial independence, to keep out of the judicial arena of the European Union the 'new judges' appointed as a result of the recent reforms, in disregard of that principle? There is no easy answer. In any case, this stricter approach is not without consequences: as the hearing showed, about one in four judges assigned to the ordinary and administrative courts in Poland is now appointed under the new system. This approach would considerably restrict access to the preliminary ruling mechanism for most Polish courts, leaving it open only to those composed

[38] Indeed, as pointed out by Advocate General Wahl, an overly strict application of the criteria laid down in the Court's case-law on the admissibility of references under Article 267 TFEU would risk producing the opposite result: rather than strengthening the protection of individuals and ensuring a high standard of protection of fundamental rights in accordance with Article 6 ECHR and Article 47 of the Charter, individuals would be deprived of the possibility of having the 'natural judge' (the Court of Justice) hear their claims based on EU law and, as a consequence, the effectiveness of EU law throughout the European Union would be weakened (see, to that effect, Opinion of Advocate General Wahl in Joined Cases *Torresi*, C-58/13 and C-59/13, EU:C:2014:265, point 49). As has been observed in the literature, in the context of Article 267 TFEU, the main concern of the Court has not been to apply the substantive criteria of independence, but rather the functional criterion of widening access to the preliminary ruling procedure, in order to ensure the uniform application of EU rights and their effective protection (see Tridimas, T., 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure', *Common Market Law Review*, 2003, Vol. 40, No 1, p. 28, and Bonelli, M. and Monica, C., 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary', *European Constitutional Law Review*, 2018, Vol. 14, No 3, p. 622).

[39] This finding was made by the Court in its judgment in *A.B.* (paragraph 100).

[40] In the light of that finding, I consider it appropriate to qualify the expression used by the Court in the judgment in *Getin Noble Bank* (paragraph 72), in the wording of the first situation in which the presumption of 'court or tribunal' can be rebutted. While the Court refers to a 'final judicial decision … [that] leads to the conclusion that the judge constituting the referring court is not 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*' (emphasis added), account should be taken of the fact that the examination of the principle of independence under Article 267 TFEU does not necessarily coincide with the same examination under the second subparagraph of Article 19(1) TEU or Article 47 of the Charter.

exclusively of judges appointed under the old system. This would mean that the Polish judiciary would be de facto removed from the European Union's judicial system, a result which, in my view, could even potentially encroach upon the procedure provided for in Article 7 TEU. [41]

26. In conclusion, while, as a general rule, according to the famous adage, 'clothes do not make the man', I am of the view that, with a certain degree of approximation, in the formal and circumscribed context of the assessment of the concept of 'court or tribunal' within the meaning of Article 267 TFEU, 'the robe makes the judge'. [42]

3. The impact of the rules on the appointment of judges on status as an 'independent court'

27. Having discussed and clarified the case-law on the interpretation of the concept of an 'independent court' in the context of Article 267 TFEU, it should be noted that the doubts in the present case as to the independent nature of the referring court relate to the rules on the appointment of its judges. The principles set out in the previous section should therefore be applied in the specific context of the rules on the appointment of judges and, more particularly, the rules on the involvement of bodies outside the judiciary as part of that appointment process, namely the KRS.

28. In that regard, the Court has stated that the fact that the Member States, in the exercise of their powers relating to the organisation of justice, involve a body other than the judiciary – such as an administrative body – in decisions relating, inter alia, to the appointment or retention in office of judges is not in itself sufficient to conclude that there has been an infringement of the principle of the independence of judges so appointed. [43] In the Court's view, the mere fact that the legislative or executive authorities intervene in the process of appointing a judge does not necessarily create a dependent relationship with those authorities or give rise to doubts as to the judge's impartiality, if, once appointed, the person concerned is not subjected to any pressure and does not receive instructions in the performance of his or her duties. [44]

29. It follows, in my view, that any irregularities in the appointment of the members of a judicial formation can deprive a body of the status of 'independent court or tribunal' for the purposes of Article 267 TFEU only if they affect the very ability of that body to judge independently. [45] Therefore, if the members of a judicial formation, once appointed, are qualified for the office and are expected (according to the applicable rules) to take their decisions independently, this should be sufficient to qualify as an 'independent court or tribunal' for the purposes of Article 267 TFEU.

[41] I would point out, moreover, that even in the context of the specific procedure referred to in Article 7 TEU, where the Council decides to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, it must take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

[42] The term 'robe' should, in this case, be understood as the function.

[43] See, by analogy, judgment of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535, paragraphs 55 and 56), concerning the involvement of the National Council of the Judiciary, composed predominantly of members chosen by the legislature, in the process of appointing judges, and the judgments in *Independence of the Supreme Court* (paragraph 111) and in *Independence of ordinary courts* (paragraph 119), concerning the respective powers of the President of the Republic of Poland to decide whether judges of the Sąd Najwyższy (Supreme Court) should continue to hold office and of the Minister for Justice to make the same decision in relation to judges of ordinary courts. I will examine this aspect in more detail with regard to the interpretation of the second subparagraph of Article 19(1) TEU (see, in particular, points 56 to 60 of the present Opinion).

[44] See, to that effect, judgment of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535, paragraph 54 and the case-law cited).

[45] Just as I proposed in my Opinion in Joined Cases *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* (C-562/21 PPU and C-563/21 PPU, EU:C:2021:1019, points 46 and 47), it seems to me appropriate to distinguish between substantive rules relating to the capacity and competence of judges to exercise their office and those relating to purely formal aspects of that appointment (see, by analogy, judgment of 26 March 2020, Review of *Simpson* v *Council* and *HG* v *Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 79).

4. The status of the referring court as an 'independent court' for the purposes of Article 267 TFEU in the circumstances of the case

30. The Chamber of Extraordinary Control is a special formation of the Sąd Najwyższy (Supreme Court) for hearing cases. While the Court of Justice has held that the latter satisfies, in principle, the requirements of Article 267 TFEU, [46] its establishment as a Chamber of Extraordinary Control occurred against the background of the recent reforms of the Polish judicial system, and the judges belonging to it were appointed to the post of judges of the Sąd Najwyższy (Supreme Court) under the highly controversial conditions described in point 14 of this Opinion.

31. In essence, the doubts as to the independence of the referring court are linked to the indirect involvement of the executive branch in the appointment of its judges, which took place through the intervention of the KRS. Following the recent reforms of the Polish judicial system, this body has, it is said, become a 'captive institution', controlled by the executive branch.

32. However, although I have no wish to endorse such a legislative development, which reflects a regrettable backward step in the Polish judicial system, I would point out that, according to the Court's settled case-law cited in point 28 of this Opinion, the involvement of a body outside the judiciary in the appointment of judges is not sufficient, in itself, to conclude that the principle of the independence of judges has been infringed. Furthermore, there is nothing in the file to suggest that the judges appointed to the referring court following the reform are not fit to perform their duties, or that the applicable legal framework or their status prevents them from performing their duties independently. [47]

33. It should also be noted that, according to the assessment criteria introduced by the Court of Justice in the judgment in *Getin Noble Bank*, the Sąd Najwyższy (Supreme Court) enjoys a 'presumption of independence', which can be rebutted either by a final judicial decision finding that the judge constituting the referring court does not have the status of an independent, impartial tribunal previously established by law, or by other elements that undermine the independence and impartiality of that court. [48]

34. However, without needing to revisit my proposal to qualify that principle, [49] it seems to me that, in this case, those situations do not pertain.

35. Admittedly, in its judgment of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*, [50] referred to several times in the course of the proceedings, the ECtHR held that a panel of judges from the same Chamber of Extraordinary Control [51] did not satisfy the requirement for a tribunal previously established by law within the meaning of Article 6(1) ECHR. However, I doubt that this is able to constitute a final judicial decision attesting that the referring court is not, in essence, an independent court or tribunal for the purposes of Article 267 TFEU, in the light of the judgment in *Getin Noble Bank*. [52] It seems to me that that decision is more concerned with examining respect

[46] See point 18 of this Opinion.

[47] See point 29 of this Opinion.

[48] See point 18 of this Opinion.

[49] See footnote 40 of this Opinion.

[50] CE:ECHR:2021:1108JUD004986819.

[51] The KRS stated during the hearing that one of the three judges making up the referring court sat on the same bench as the judge to whom this judgment related.

[52] See paragraph 72 of that judgment.

for the right to effective judicial protection, which falls within the scope of Article 6(1) ECHR and could, therefore, play a role in the application of Article 47 of the Charter, but not necessarily in the application of Article 267 TFEU. [53]

36. I therefore consider that, on the basis of the information available in the file, the referring court can be described as a 'court or tribunal' within the meaning of Article 267 TFEU in so far as, irrespective of the controversies relating to the appointment of its members, it is, in principle, called upon to decide the case in the main proceedings in complete autonomy from the executive branch, which is (indirectly) involved in that appointment process, [54] and with complete impartiality with regard to the interests of the parties.

37. In the light of the foregoing considerations, I am of the view that, for the purposes of the present proceedings, the Sąd Najwyższy (Supreme Court), sitting as a panel of three judges making up the Chamber of Extraordinary Control, can be regarded as a 'court or tribunal' within the meaning of Article 267 TFEU and that, consequently, the Court of Justice has jurisdiction to answer the questions referred by that court for a preliminary ruling.

B. The first question referred

38. By its first question, the referring court asks, in essence, whether the second subparagraph of Article 19(1) TEU precludes national legislation, such as Article 69 of the Law on the system of ordinary courts, which makes the option for a practising judge to continue to perform his or her duties after reaching retirement age subject to the authorisation of another body, in this case the KRS.

39. I would point out, first of all, that the Court of Justice has ruled on several occasions on the applicability and scope of the second subparagraph of Article 19(1) TEU in relation to national (in particular Polish) rules governing the judicial system, including rules concerning the continued performance of the duties of judges beyond the retirement age. [55]

40. In the following paragraphs, I will examine, in so far as is relevant to the present case, (1) the scope of the second subparagraph of Article 19(1) TEU and (2) the case-law precedents concerning the continued holding of a judicial office by judges beyond the retirement age, before (3) proposing an answer to the first question referred for a preliminary ruling.

[53] See points 19 to 23 of this Opinion.

[54] See, to that effect, judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17, paragraphs 66 to 69). In the main proceedings, the involvement of the executive branch is demonstrated by the fact that, following the recent reforms of the Polish judicial system, the members of the KRS who adopted Resolution No 331/2018 are, for the most part, close to the Polish executive and legislature.

[55] See, in particular, the judgments in *Independence of the Supreme Court*, concerning the continued holding of a judicial office by judges of the Sąd Najwyższy (Supreme Court), and in *Independence of ordinary courts*, relating to the continued holding of a judicial office by judges of ordinary courts.

1. The scope of the second subparagraph of Article 19(1) TEU

(a) The principle of 'effective legal protection' in the fields covered by EU law

41. The second subparagraph of Article 19(1) TEU establishes that Member States are to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law and, therefore, it is for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields.[56] Moreover, to the extent that the second subparagraph of Article 19(1) TEU refers to the requirement for effective judicial protection, it must be interpreted in the light of Article 47 of the Charter, irrespective of whether that latter provision is itself applicable in the case.[57]

42. Given that Article 19 TEU entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice,[58] it follows that it encompasses 'the fields covered by Union law', irrespective of whether the Member States are implementing that law within the meaning of Article 51(1) of the Charter.[59]

43. In the present case, it cannot be denied that the ordinary Polish courts can be called upon to rule on questions relating to the application or interpretation of EU law and that they therefore come within the Polish judicial system in the 'fields covered by Union law', within the meaning of the second subparagraph of Article 19(1) TEU, with the result that those courts must meet the requirements of effective judicial protection.[60]

[56] See, in particular, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 34 and the case-law cited). The Court, in essence, starts from the premiss that, in order to guarantee consistency and uniformity in the interpretation of EU law, including through the keystone of the preliminary ruling procedure provided for in Article 267 TFEU, and given the right of individuals to challenge before the courts the legality of any national measure concerning the application to them of an EU act, Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice (see, in particular, to that effect, the judgment in *Independence of the Supreme Court*, paragraphs 42 to 47).

[57] See, to that effect, judgment of 22 February 2022, *RS (Effects of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraphs 34 to 37 and the case-law cited).

[58] See judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraph 49 and the case-law cited). Under the provision in question, every Member State must thus, in particular, ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule in that capacity on the application or interpretation of EU law, meet the requirements of effective judicial protection (see the judgment in *W.Ż.*, paragraph 104 and the case-law cited).

[59] See, in particular, the judgment in *W.Ż.* (paragraph 103 and the case-law cited). Consequently, although, as was argued by the Polish Government in its written observations, 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 (see, in particular, the judgment in *Independence of ordinary courts*, paragraph 102 and the case-law cited). That may be the case, in particular, as regards national rules relating to the adoption of decisions appointing judges (see the judgment in *W.Ż.*, paragraph 75 and the case-law cited).

[60] See, to that effect, the judgments in *Independence of ordinary courts* (paragraph 104), and *W.Ż.* (paragraph 106 and the case-law cited).

(b) The principle of independence of national courts as a corollary of the principle of effective judicial protection

44. According to the settled case-law of the Court, in order to ensure effective judicial protection in accordance with the second subparagraph of Article 19(1) TEU, maintaining a national court or tribunal's independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy. [61]

45. As was pointed out in points 17 and 18 of this Opinion, the Court has ruled that the requirement for independence of national courts has a first external aspect, concerning the autonomy of the body, and a second internal aspect, concerning its impartiality, and that such guarantees of autonomy and impartiality presuppose the existence of rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, which make it possible to remove any reasonable doubt in the minds of individuals as to the imperviousness and neutrality of that body. [62]

(c) The requirement for irremovability of judges as inherent in the principle of independence of the courts

46. With regard more specifically to the 'external' independence (autonomy) of the courts, the Court of Justice has held that the freedom of judges from all external intervention or pressure requires certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office. [63]

47. 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. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus 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 the appropriate procedures are followed. [64]

48. The same applies, in my view, to the rules concerning the possibility of judges remaining in office beyond the retirement age, which are, therefore, subject to the requirements imposed by the principle of the irremovability of judges.

[61] See judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 41) and the judgment in *Independence of ordinary courts* (paragraph 105 and the case-law cited). To summarise, the requirement that national courts be independent, which is inherent in the task of adjudication, forms part of the essence of the 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, in particular the value of the rule of law, will be safeguarded (see, to that effect, the judgments in *Independence of the Supreme Court*, paragraph 58 and the case-law cited, and *W.Ż.*, paragraph 108 and the case-law cited).

[62] According to the 'appearance of independence' theory (see point 17 of this Opinion).

[63] See the judgment in *Independence of ordinary courts* (paragraph 112 and the case-law cited).

[64] See the judgment in *Independence of ordinary courts* (paragraph 113 and the case-law cited).

2. Case-law precedents concerning the continued holding of a judicial office beyond the retirement age

49. As a preliminary point, I should note that two recent judgments have been delivered by the Court of Justice on Polish legislation concerning the continued holding of a judicial office by judges beyond the retirement age:

– the judgment in *Independence of the Supreme Court*, concerning a provision [65] that granted the President of the Republic of Poland the power to authorise the continued holding of a judicial office by judges of the Sąd Najwyższy (Supreme Court) beyond the retirement age; [66]

– the judgment in *Independence of ordinary courts*, concerning a previous version of Article 69(1) of the Law on the system of ordinary courts, [67] which established that the Minister for Justice could decide to authorise the continued holding of a judicial office by ordinary judges beyond the retirement age [68] and which appears particularly relevant in the present case.

50. In those judgments, the Court held that it is for the Member States alone to decide whether or not they will authorise such an extension to the period of judicial activity beyond normal retirement age, and the fact that the organs of the State such as the President of the Republic (in the case of the extension of the term of office of the judges of the Sąd Najwyższy (Supreme Court)) and the Minister for Justice (in the case of the extension of the term of office of ordinary judges) are entrusted with the power to decide whether or not to grant any such extension is not sufficient in itself to conclude that the principle of judicial independence has been undermined. [69] However, the Court has held that, where the Member States opt for such mechanisms, they are required to ensure that the substantive conditions and procedural rules to which such extensions are subject are not such as to undermine the principle of judicial independence. [70]

51. With regard, more specifically, to those substantive conditions and procedural rules, the Court has found that the discretion held by the President of the Republic and the Minister for Justice, respectively, for the purposes of deciding whether or not to authorise a judge to continue to carry out his or her duties was such as to give rise to reasonable doubts, inter alia in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests that may be the subject of argument before them. [71]

65 This was Article 37 of the ustawa o Sądzie Najwyższym (Law on the Supreme Court), of 8 December 2017 (Dz. U. of 2018, item 5).

66 Namely, for a period of three years, renewable once, from the age of 65. The national legislation in that case also contained a provision lowering the retirement age (from 70 to 65), which was the subject of a separate complaint by the Commission as well as censure from the Court for infringement of the principle of irremovability of judges (see the judgment in *Independence of the Supreme Court*, paragraph 96).

67 According to the judgment in question, this was the version of that provision in force following the amendments made by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (the Law amending the Law on the system of ordinary courts and certain other laws), of 12 July 2017 (Dz. U. of 2017, item 1452).

68 Namely, from age 60 to 70 for women, and from age 65 to 70 for men. The national legislation in that case also included a provision to lower the retirement age (from 67 to 60 for women and to 65 for men), which, however, was not the subject of a separate complaint by the Commission.

69 See, to that effect, the judgments in *Independence of the Supreme Court* (paragraph 111) and in *Independence of ordinary courts* (paragraph 119).

70 See, to that effect, the judgments in *Independence of the Supreme Court* (paragraphs 110 and 111) and in *Independence of ordinary courts* (paragraphs 118 and 119).

71 See, to that effect, the judgments in *Independence of the Supreme Court* (paragraph 118) and in *Independence of ordinary courts* (paragraph 124).

52. The Court based that conclusion, in essence, on the fact that decisions on whether or not to authorise the possible continuation of the exercise of the office of a judge were based on criteria that were too vague and could not be verified, and that those decisions did not moreover provide a statement of reasons and could not be challenged in court proceedings;[72] as regards the discretion granted to the Minister for Justice, no period was laid down within which he or she must adopt his or her decision on the application for an extension of the term of office.[73] The Court has also held that the power conferred on the Minister for Justice for the purposes of deciding whether or not to authorise judges of the ordinary Polish courts to continue to hold a judicial office failed, in particular, to comply with the principle of irremovability, having been conferred in the more general context of a reform that resulted in the lowering of the normal retirement age of the judges concerned.[74]

53. An assessment almost identical to that in the judgment in *Independence of ordinary courts* is required in the present case, while taking into account the fact that, following that judgment, the Republic of Poland amended its legislation concerning the continued holding of a judicial office by ordinary judges beyond the retirement age, in particular by reinstating the retirement age previously in force for judges and conferring on the KRS – and no longer on the Ministry of Justice – the power to authorise the continued holding of a judicial office by a judge beyond that age, under certain conditions.

3. Assessment of the circumstances of the present case

54. In this case, I note that Article 69(1b) of the Law on the system of ordinary courts establishes, in so far as is relevant to the present case, that the KRS may authorise a judge, who so wishes, to continue to hold a judicial office beyond the retirement age, if there is a legitimate interest for the administration of justice or an important social interest in that judge continuing in that role, having regard to the rational use of the staff of the ordinary courts and the needs resulting from the workload of individual courts.[75]

[72] See, to that effect, the judgments in *Independence of the Supreme Court* (paragraph 114) and in *Independence of ordinary courts* (paragraph 122). Furthermore, in the former case, the Court held that although the involvement of the KRS in the procedure, with that body being required to deliver an opinion to the President of the Republic before the latter adopts his or her decision, could, in principle, be such as to contribute to making that procedure more objective, this was not the case in the circumstances there, as the KRS has, as a general rule, merely delivered opinions for which no reasons at all have been stated or for which sometimes purely formal reasons have been stated (see the judgment in *Independence of the Supreme Court*, paragraphs 115 to 117).

[73] See, to that effect, the judgment in *Independence of ordinary courts* (paragraph 123). With regard, in particular, to the absence of any deadline within which the Minister for Justice must adopt his or her decision, the Court has observed that the provision in question, in conjunction with the text which provided that, where a judge reaches the normal retirement age before the procedure for extending the period of judicial duties has ended, the person concerned is to remain in post until that procedure has come to an end, was likely to prolong the period of uncertainty for the judge concerned. Accordingly, the length of the period for which the judges are thus liable to continue to wait for a decision from the Minister for Justice once the extension has been requested, likewise, ultimately fell within the Minister's discretion.

[74] See, to that effect, the judgment in *Independence of ordinary courts* (paragraphs 125 to 130). In the case in which that judgment was delivered, it was the combination of the measure lowering the normal retirement age and the discretion vested in that instance in the Minister for Justice for the purposes of granting or refusing authorisation for judges of the ordinary Polish courts to continue to hold a judicial office that, in the view of the Court, failed to comply with the principle of irremovability.

[75] According to Article 69(1) of that law, authorisation for a judge to continue to hold a judicial office is also subject to the production of a certificate, issued in accordance with the conditions applicable to candidates applying for judicial posts, confirming that his or her state of health makes it possible to continue to sit on the bench, a condition that does not, in principle, raise any concerns under the second subparagraph of Article 19(1) TEU, in so far as it is intended only to ensure that the judge's physical and psychological state allows him or her to continue to perform that role.

55. In the following points, taking into account the case-law cited in point 50 of this Opinion, I will provide guidance as to the interpretation of the second subparagraph of Article 19(1) TEU in the circumstances of the present case, having regard, on the one hand, (a) to the nature of the KRS and, on the other hand, (b) to the substantive conditions and procedural rules governing the adoption of its decisions on the continued holding of a judicial office by judges.

(a) The nature of the KRS

56. As regards the nature of the KRS, I would point out from the outset that the Court's recent case-law has repeatedly established that, following the recent reforms of the Polish judicial system, this body is not independent of the legislative and executive branches. [76]

57. This conclusion has also been confirmed by the case-law of the ECtHR on Article 6(1) ECHR. Indeed, in its judgment of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*, [77] the ECtHR concluded that the Chamber of Extraordinary Control did not constitute a 'tribunal established by law' and that the Republic of Poland had therefore acted in breach of Article 6(1) ECHR, on the ground that the members of that chamber had been appointed upon a proposal of the KRS, which was not independent of the legislative and executive branches of power. [78]

58. That conclusion has also been reached by the highest Polish courts on several occasions. First, in judgments of 6 and 13 May 2021, the Naczelny Sąd Administracyjny (Supreme Administrative Court) found that the KRS did not offer sufficient guarantees of independence and that its level of dependence on the legislative and executive authorities was so high that it could not be irrelevant in assessing the question as to whether the judges it selects meet the objective requirements of independence and impartiality under Article 47 of the Charter. Second, in its resolution of 23 January 2020, the Sąd Najwyższy (Supreme Court) also noted that the KRS is not an independent body, being directly subject to the political authorities. [79]

59. That being said, and however regrettable this situation may be, it seems to me that, in accordance with the Court's case-law, the fact that a body such as the KRS is vested with the power to decide whether or not to grant a possible extension of the exercise of judicial functions beyond the normal retirement age is not in itself sufficient to conclude that the principle of

[76] See the judgments in *A.K.* (paragraphs 141 to 152); in *A.B.* (paragraphs 130 to 135); in *Disciplinary regime for judges* (paragraphs 104 to 110); and in *W.Ż.* (paragraphs 149 and 150). Specifically, the Court has noted that almost all the members making up the KRS in that new composition have been appointed by the Polish executive or legislature or are members thereof. Such changes create a risk of the legislature and the executive having a greater influence over the KRS and of the independence of that body being undermined (see the judgment in *Disciplinary regime for judges*, paragraph 104).

[77] CE:ECHR:2021:1108JUD004986819 (§§ 290, 320 and 353 to 355). In the same vein, see ECtHR, 22 July 2021, *Reczkowicz v. Poland* (CE:ECHR:2021:0722JUD004344719, §§ 274 and 276).

[78] Furthermore, in its judgment of 15 March 2022, *Grzęda v. Poland* (CE:ECHR:2022:0315JUD004357218, § 348), the ECtHR found that the Republic of Poland had also infringed Article 6(1) ECHR by prematurely terminating the term of office of a member judge of the KRS without giving him access to judicial review of the measure. In that context, the ECtHR held that the Polish reforms of the judicial system, and in particular the restructuring of the KRS, were aimed at weakening judicial independence and that the judiciary had been exposed to interference by the executive and legislative powers and thus substantially weakened.

[79] Case BSA I-4110-1/20. By that resolution, adopted at the initiative of the First President of the Sąd Najwyższy (Supreme Court) following the judgment in *A.K.*, the combined chambers of that court concluded that, as a result of the reforms during 2017, the KRS was no longer independent and that a judicial formation including a person appointed as a judge on the recommendation of that body was contrary to the law. That resolution has also been considered extensively in the judgment of the ECtHR, 22 July 2021, *Reczkowicz v. Poland* (CE:ECHR:2021:0722JUD004344719, §§ 89 to 106).

judicial independence has been infringed.[80] The Court, recognising the competence – in principle – of the Member States as regards the organisation of the judiciary, accepts that those Member States may, in the exercise of that competence, invest a body outside the judiciary (either independent or under the authority of the legislature or the executive) with the power to take decisions relating, in particular, to the appointment of judges or their continued holding of a judicial office.[81]

60. However, in accordance with the Court's case-law, it is important to ensure that the substantive conditions and procedural rules governing the adoption of such 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,[82] which I will examine below.

(b) The substantive conditions and procedural rules governing the adoption of decisions on the continued holding of a judicial office by judges

61. In terms of the substantive conditions and procedural rules governing the adoption of decisions on the continued holding of a judicial office by judges beyond the retirement age, I would note that, according to the version of Article 69(1b) of the Law on the system of ordinary courts, which has been the subject of the judgment in *Independence of ordinary courts*,[83] the Minister for Justice could authorise a judge to continue to exercise his or her duties, 'having regard to the rational use of the staff of the ordinary courts and the needs resulting from the workload of individual courts'. The Court has held, on the one hand, that these criteria are too vague and unverifiable, also criticising the absence of a requirement to state reasons and the absence of any mechanism for decisions to be challenged in court proceedings, and, on the other hand, criticised the lack of a deadline for the Minister for Justice to make a decision.[84]

62. First, as regards the substantive conditions, I note that the version of Article 69(1b) of the Law on the system of ordinary courts, which is the subject of the main proceedings in the present case, establishes that the KRS may authorise a judge to continue in his or her post beyond the retirement age, 'if there is a legitimate interest for the administration of justice or an important social interest in that judge continuing in that role, having regard to the rational use of the staff of the ordinary courts and the needs resulting from the workload of individual courts'. Compared to its previous version, the provision in question therefore adds the condition that the continued holding of a judicial office by a judge must serve 'a legitimate interest for the administration of justice or an important social interest'.

[80] The Court has already held that the fact that a body, such as a national council of the judiciary, which is involved in the procedure for the appointment of judges is, for the most part, made up of members chosen by the legislature cannot, in itself, give rise to any doubt as to the independence of the judges appointed at the end of that procedure (see, to that effect, judgment of 9 July 2020, *Land Hessen*, C-272/19, EU:C:2020:535, paragraphs 55 and 56). This conclusion is, moreover, consistent with the Court's case-law, which has established that even the powers of the President of the Republic to decide on extending the term of office of the judges of the Sąd Najwyższy (Supreme Court), on the one hand, and the powers of the Minister for Justice to decide on extending the term of office of the judges of the ordinary courts (under the previous regulations), on the other hand, were not sufficient, on their own, to conclude that the principle of judicial independence had been infringed (see the judgments in *Independence of the Supreme Court* (paragraphs 108 and 110) and in *Independence of ordinary courts* (paragraph 119).

[81] The Court's case-law in that regard is in line with that of the ECtHR, according to which, in essence, the appointment of judges by authorities of the executive branch does not raise reasonable doubts as to their independence, provided that, once appointed, they are free from influence or pressure when exercising their adjudicatory role (see, in particular, ECtHR, 30 November 2010, *Henryk Urban and Ryszard Urban v. Poland*, CE:ECHR:2010:1130JUD002361408, § 49).

[82] See, by analogy, the judgments in *Independence of the Supreme Court* (paragraphs 108 and 110) and in *Independence of ordinary courts* (paragraph 119).

[83] See also footnote 66 of this Opinion.

[84] See the judgment in *Independence of ordinary courts* (paragraphs 122 and 123).

63. However, I doubt that this new clarification adds any further clarity to the criteria on which KRS resolutions are based that would limit the discretion criticised by the Court. [85]

64. Second, as regards the procedural rules, first of all, it seems to me that, like the previous legislation, which was censured by the Court, the new legislation does not lay down a time limit within which the KRS is required to adopt its resolution. The Polish Government has merely stated in its written observations and at the hearing that, within the meaning of the last sentence of Article 69(1b) of the Law on the system of ordinary courts, where a judge reaches retirement age before the procedure for extending his or her term of office has ended, the person concerned will remain in post until that procedure has come to an end.

65. Next, it seems to me that, in so far as Article 42(1) and (2) of the Law on the KRS applies to such resolutions, which it is for the referring court to ascertain, those resolutions are to be reasoned within one month of their adoption, a requirement that should, in principle, make it possible to address the criticisms expressed in that regard by the Court under the previous rules.

66. Lastly, as the case in the main proceedings demonstrates, the resolution of the KRS, unlike under the previous legislation, can be appealed to the Chamber of Extraordinary Control, [86] whose independence has nevertheless been the subject of much criticism. [87]

67. In conclusion, without prejudice to the verifications that are to be carried out by the referring court on the basis of the above, I doubt whether the mechanism involving the authorisation of the KRS for the purpose of keeping judges in office beyond the retirement age offers sufficient guarantees of independence from the legislative and executive branches, taking into account all the relevant factors, both factual and legal, relating both to the conditions under which the members of that body were appointed and to the way in which it fulfils its role in practice.

68. In conclusion, I therefore propose that the answer to the first question referred should be that the second subparagraph of Article 19(1) TEU should be interpreted as precluding national legislation that makes the effectiveness of a judge's declaration of intention to continue to hold a judicial office after reaching retirement age subject to authorisation from a body that has been shown to be lacking in independence from the legislative or executive branches and that adopts its decisions on the basis of criteria that are vague and difficult to verify.

[85] It is of course necessary to recall that the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (see, to that effect, judgment of 18 July 2007, *Commission* v *Germany*, C-490/04, EU:C:2007:430, paragraph 49 and the case-law cited), an assessment that is incumbent upon the referring court, taking into account the possible existence of a line of case-law of the Chamber of Extraordinary Control, referred to by the Polish Government, which would clarify the application of the criteria mentioned.

[86] As clarified by the Polish Government at the hearing and without prejudice to the verifications incumbent upon the referring court, this is apparent from Article 44(1) of the Law on the KRS, according to which, in essence, a participant in the procedure may lodge an appeal with the Sąd Najwyższy (Supreme Court) against a resolution of the KRS, and from Article 26 of the Law on the Supreme Court, which entrusts such appeals to the jurisdiction of the Chamber of Extraordinary Control. However, account should be taken of the amendments made to that provision by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law on the system of ordinary courts, the Law on the Supreme Court and certain other laws) of 20 December 2019 (Dz. U. of 2020, item 190), which entered into force on 14 February 2020. That provision, as amended, is the subject of an action for failure to fulfil obligations brought by the Commission (Case C-204/01), currently pending (see order of the Vice-President of the Court of 14 July 2021, *Commission* v *Poland*, C-204/21 R, EU:C:2021:593, and Opinion of Advocate General Collins in *Commission* v *Poland*, C-204/21, EU:C:2022:991).

[87] I refer to the criticisms concerning lack of independence of the Chamber of Extraordinary Control raised by certain interveners in the context of the discussion of the classification of that chamber as a 'court or tribunal' within the meaning of Article 267 TFEU (see, in particular, points 30 to 37 of the present Opinion), while recalling that the assessment of the principle of independence of a court or tribunal for the purposes of Article 267 TFEU calls for an examination that differs from that required for the purposes of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter (see points 19 to 23 of this Opinion).

C. The second question referred

69. By its second question, the referring court asks, in essence, whether the second subparagraph of Article 19(1) TEU precludes national legislation, such as Article 69 of the Law on the system of ordinary courts, interpreted as establishing that a declaration of intention to continue holding a judicial office after retirement age has been reached cannot be considered if the time limit for submission of that declaration has passed, irrespective of the circumstances and effects of the failure to comply with the time limit in question.

70. I would point out that the national legislation in question, in so far as it affects the term of office of judges of the ordinary courts, falls within the scope of the principle of irremovability of judges, which is inherent in the principle of judicial independence for the purposes of the second subparagraph of Article 19(1) TEU. [88]

71. Furthermore, in the absence of detailed EU rules, the compatibility of the aforementioned provision with the principle of independence should be examined in the light of the principles of procedural autonomy and effectiveness. [89]

72. In the present case, it should be noted first of all that a provision similar to the one in question was not criticised by the Commission in the cases which gave rise to the judgments in *Independence of the Supreme Court* [90] and in *Independence of ordinary courts*. [91]

73. However, as the Commission points out in its written observations, clear and foreseeable deadlines for declarations from judges concerned, of their intention to continue to hold their posts beyond the retirement age, constitute objective procedural requirements that are likely to contribute to the legal certainty and objectivity of the entire procedure for authorising the continued holding of judicial offices. In the present case, I note that the time limit in question, which begins to run from the point when the judge reaches the age of 64 and expires six months before he or she reaches the age of 65, first, is fixed in relation to an event that is well known to the judge concerned, namely the date of his or her 65th birthday, and, second, is sufficiently generous to give that judge the opportunity to take a reasoned decision as to whether or not to declare an intention to continue in office.

74. Therefore, on the one hand, I consider that the preclusive effect of that time limit is a clear procedural requirement that is likely to contribute to the objectivity of the procedure and to legal certainty, thus being of benefit for the sound organisation of the judicial system.

75. On the other hand, given that there is no possibility of an exemption from the time limit being granted, this means that any declaration made after the expiry of the time limit is inadmissible, and I note that, in principle, this does not subject judges to any external pressure or influence and, moreover, deprives the KRS of the possibility of exercising any discretionary power.

88 See points 44 to 48 of this Opinion.

89 See judgment of 21 December 2021, *Randstad Italia* (C-497/20, EU:C:2021:1037, paragraph 58 and the case-law cited). Moreover, the Court of Justice has held that it is for the Member States alone to decide whether or not they will authorise such an extension to the period of judicial activity beyond normal retirement age, although they are required to ensure that the conditions and the procedure to which such extensions are subject are not such as to undermine the principle of judicial independence (see point 50 of this Opinion).

90 See paragraph 15 of that judgment.

91 See paragraph 9 of that judgment. It should be noted that the legislation in force at the time required that a judge's declaration of intention to continue holding a judicial office was required to be sent no later than six months before retirement age was reached.

76. The only doubt that, in my opinion, could possibly be raised with regard to Article 69 of the Law on the system of ordinary courts concerns the proportionality of an absolute time limit that does not take into account, inter alia, the principles of necessity or *force majeure*, provided that this is confirmed by the referring court.

77. However, it seems to me, first, that in the circumstances of the present case that situation remains hypothetical, as the order for reference does not refer to any case of *force majeure* or any extraordinary factor that could prevent the judge concerned from lodging his or her declaration in good time,[92] and, second, that the possible occurrence of a situation beyond the judge's control that would prevent him or her from complying with the time limit for lodging a declaration should, in any event, be weighed up against the requirements of the organisation of justice.[93]

78. Therefore, subject to the verifications referred to above, which are the responsibility of the referring court, it does not appear to me that, in the circumstances of the present case, the provision in question infringes the principle of judicial independence.

79. In conclusion, I propose that the answer to the second question referred should be that the second subparagraph of Article 19(1) TEU should be interpreted as not precluding, in principle, the adoption of an interpretation of national legislation under which a judge's belated declaration of his or her intention to continue to hold a judicial office beyond the retirement age is ineffective, irrespective of the circumstances of the failure to observe the time limit and the significance of that failure for the proceedings concerning authorisation for his or her continuing to hold a judicial office, provided that that legislation complies with the principle of proportionality.

V. Conclusion

80. In view of the considerations set out above, I propose that the Court should answer the questions referred for a preliminary ruling by the Sąd Najwyższy (Supreme Court, Poland) as follows:

(1) The second subparagraph of Article 19(1) TEU must be interpreted as precluding national legislation that makes the effectiveness of a judge's declaration of intention to continue to hold a judicial office after reaching retirement age subject to authorisation from a body that has been shown to be lacking in independence from the legislative or executive branches and that adopts its decisions on the basis of criteria that are vague and difficult to verify.

[92] As noted in point 8 of this Opinion, the appellant asserted that the failure to comply with the time limit was essentially caused by the scale of his workload.

[93] I should note, in particular, that the Court of Justice has held, on the one hand, that the application of the European Union's rules on procedural time limits can only be derogated from in very exceptional circumstances, given that the strict application of those rules serves the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (see, to that effect, judgment of 26 November 1985, *Cockerill-Sambre* v *Commission*, 42/85, EU:C:1985:471, paragraph 10), and, on the other hand, that the concepts of *force majeure* and unforeseeable circumstances include an objective component relating to abnormal circumstances beyond the appellant's control, and a subjective component relating to the appellant's obligation to protect himself or herself against the consequences of the abnormal event by taking appropriate steps without making excessive sacrifices. In particular, the appellant must pay close attention to the course of the procedure set in motion and, amongst other things, act diligently in order to comply with the prescribed time limits (see judgment of 15 December 1994, *Bayer* v *Commission*, C-195/91 P, EU:C:1994:412, paragraph 32). For example, it seems clear to me that, from a certain point, it will no longer be possible for the bodies responsible for managing the staff of the ordinary courts to deal effectively either with keeping a judge in post or with replacing that judge, and that, consequently, not even the principle of *force majeure* – which is not in question in the present case – can justify extending the time limit for applying to remain in office until a date that is too close to the day on which the person concerned reaches retirement age.

(2) The second subparagraph of Article 19(1) TEU must be interpreted as not precluding, in principle, the adoption of an interpretation of national legislation under which a judge's belated declaration of his or her intention to continue to hold a judicial office beyond the retirement age is ineffective, irrespective of the circumstances of the failure to observe the time limit and the significance of that failure for the proceedings concerning authorisation for his or her continuing to hold a judicial office, provided that that legislation complies with the principle of proportionality.