Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2023*

(Reference for a preliminary ruling – Article 267 TFEU – Concept of 'court or tribunal' – Criteria – Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs) of the Sąd Najwyższy (Supreme Court, Poland) – Reference for a preliminary ruling from a panel of judges without the status of an independent and impartial tribunal previously established by law – Inadmissibility)

In Case C-718/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Izba Kontroli Nadzwyczajnej i Spraw Publicznych) (Supreme Court (Chamber of Extraordinary Control and Public Affairs), Poland), made by decision of 20 October 2021, received at the Court on 26 November 2021, in the proceedings

L.G.

v

Krajowa Rada Sądownictwa,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Prechal (Rapporteur), K. Jürimäe, C. Lycourgos, Z. Csehi and O. Spineanu-Matei, Presidents of Chambers, M. Ilešič, S. Rodin, I. Jarukaitis, A. Kumin, N. Jääskinen, D. Gratsias, M.L. Arastey Sahún and M. Gavalec, Judges,

Advocate General: A. Rantos,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 8 November 2022,

after considering the observations submitted on behalf of:

– L.G., by himself,

– the Krajowa Rada Sądownictwa, by A. Dalkowska, J. Kołodziej-Michałowicz, D. Pawełczyk-Woicka and P. Styrna,

* Language of the case: Polish.

– the Polish Government, by B. Majczyna and S. Żyrek, acting as Agents,

– the Belgian Government, by C. Pochet, M. Jacobs, L. van den Broeck and M. van Regemorter, acting as Agents,

– the Danish Government, by V. Pasternak Jørgensen and M. Søndahl Wolff, acting as Agents,

– the Netherlands Government, M.K. Bulterman and P.P. Huurnink, acting as Agents,

– the European Commission, by K. Herrmann and P.J.O. Van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 March 2023,

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 19(1) TEU.

2 The request has been made in proceedings between L.G. and the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) ('the KRS') concerning a decision that there is no need to rule on L.G.'s application for authorisation to continue to carry out his duties as a judge beyond the normal retirement age.

Legal context

The Constitution

3 Article 10 of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland; 'the Constitution') states:

'1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.

2. Legislative power shall be vested in the Sejm [(Lower Chamber of the Polish Parliament)] and the Senat [(Upper Chamber of the Polish Parliament)]. Executive power shall be vested in the President of the Republic of Poland and the Council of Ministers. Judicial power shall be vested in courts and tribunals.'

4 Article 45(1) of the Constitution provides:

'Everyone shall have the right to a fair and public hearing of his or her case, without undue delay, before a competent, impartial and independent court.'

5 Article 60 of the Constitution provides:

'Polish citizens enjoying full public rights shall have a right of access to the public service based on the principle of equality.'

6 Under Article 77(2) of the Constitution:

'Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.'

7 Article 179 of the Constitution provides:

'Judges shall be appointed for an indefinite period by the President of the Republic on the motion [of the KRS].'

8 Article 186(1) of the Constitution provides:

'The [KRS] shall safeguard the independence of courts and judges.'

9 Article 187 of the Constitution provides:

'1. The [KRS] shall be composed of:

(1) the First President of the Sąd Najwyższy [(Supreme Court, Poland)], the Minister of Justice, the President of the Naczelny Sąd Administracyjny [(Supreme Administrative Court, Poland)] and a person designated by the President of the Republic,

(2) fifteen members elected from among the judges of the Sąd Najwyższy [(Supreme Court)], the ordinary courts, the administrative courts and the military courts,

(3) four members elected by the Sejm [(Lower Chamber of the Polish Parliament)] from among the members [of the Lower Chamber] and two members elected by the Senat [(Upper Chamber of the Polish Parliament)] from among the senators.

…

3. The term of office of those chosen as members [of the KRS] shall be four years.

4. The organisational structure, the scope of activity and procedures for work of the [KRS] and the procedure by which its members are elected shall be laid down by law.'

The Law on the Supreme Court

10 The ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5) entered into force on 3 April 2018. That law has subsequently been amended on a number of occasions.

11 The Law on the Supreme Court established, inter alia, within the Sąd Najwyższy (Supreme Court), two new Chambers named Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs) and Izba Dyscyplinarna (Disciplinary Chamber) respectively.

12 Under Article 26(1) of the Law on the Supreme Court:

'The areas of jurisdiction of the Chamber of Extraordinary Control and Public Affairs shall include extraordinary complaints, electoral disputes and challenges concerning the validity of national or

constitutional referendums, and determination of the validity of elections and referendums, as well as other cases in the field of public law, including disputes relating to the protection of competition, energy regulation, telecommunications and rail transport, and appeals against decisions of the Przewodniczący 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)].'

The Law on the KRS

13 Under Article 9a of the ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011 (Dz. U. of 2011, item 714), 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), which entered into force on 17 January 2018, and by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the system of the ordinary courts and certain other laws) of 20 July 2018 (Dz. U. of 2018, item 1443), which entered into force on 27 July 2018 ('the Law on the KRS'):

'1. The Sejm [(Lower Chamber of the Polish Parliament)] shall elect 15 members [of the KRS] from among the judges of the Sąd Najwyższy [(Supreme Court)], the ordinary courts, the administrative courts and the military courts for a common four-year term of office.

…

3. The common term of office of the new members [of the KRS], elected from among the judges, shall commence on the day following their election. Outgoing members [of the KRS] shall perform their duties until the day on which the common term of office of the new members [of the KRS] begins.'

14 Article 37(1) of the Law on the KRS provides:

'If several candidates have applied for a single judicial post, [the KRS] shall examine and evaluate all the applications lodged together. In that case, [the KRS] shall adopt a resolution including its decisions for the purposes of presenting one proposal for appointment to the judicial post in respect of all the candidates.'

15 Article 43(2) of the Law on the KRS provides:

'If not all the participants in the procedure have challenged the resolution referred to in Article 37(1), the resolution shall become final as regards the part containing the decision not to present the proposal for appointment to the office of judge of participants who have not lodged an appeal, subject to the provisions of Article 44(1b).'

16 The transitional provision contained in Article 6 of the Law of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws is worded as follows:

'The term of office of the members [of the KRS] referred to in Article 187(1)(2) of the [Constitution], elected on the basis of the present provisions, shall last until the day preceding the beginning of the term of office of the new members [of the KRS], but shall not extend beyond 90 days from the date of entry into force of this law, unless it has previously come to an end as a result of its expiry.'

17 Article 44 of the Law on the KRS stated:

‘1. 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. …

1a. In individual cases concerning an appointment to the office of judge at the Sąd Najwyższy [(Supreme Court)], an appeal may be brought before the Naczelny Sąd Administracyjny [(Supreme Administrative Court)]. In such cases, it shall not be possible to appeal to the [Sąd Najwyższy (Supreme Court)]. An appeal to the [Naczelny Sąd Administracyjny (Supreme Administrative Court)] may not be based on a plea alleging an incorrect assessment of the candidates’ fulfilment of the criteria taken into account when making a decision on the presentation of a proposal for appointment to the judicial post at the [Sąd Najwyższy (Supreme Court)].

1b. If not all the participants in the procedure have challenged the resolution referred to in Article 37(1) in individual cases concerning appointment to the office of judge at the Sąd Najwyższy [(Supreme Court)], that resolution shall become final, as regards the part containing the decision to present the proposal for appointment to the judicial post at the Sąd Najwyższy [(Supreme Court)] and the part containing the decision not to submit a proposal for appointment to the judicial post at that court, as regards the participants in the procedure who have not brought an appeal.

…

4. In individual cases concerning appointment to the office of judge at the Sąd Najwyższy [(Supreme Court)], the annulment by the Naczelny Sąd Administracyjny [(Supreme Administrative Court)] of the [KRS] resolution not to put forward a proposal for appointment to the judicial post at the Sąd Najwyższy [(Supreme Court)] shall be equivalent to accepting the candidacy of the participant who lodged the appeal in the procedure for the vacant judicial post at the Sąd Najwyższy [(Supreme Court)], for a position for which, on the date of delivery of the judgment of the Naczelny Sąd Administracyjny [(Supreme Administrative Court)], the procedure before [the KRS] has not ended or, in the absence of such a procedure, for the next vacant judicial post at the Sąd Najwyższy [(Supreme Court)] which is published.’

18 Article 44(1a) of the Law on the KRS was inserted into that article by the Law of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws and paragraphs 1b and 4 were inserted into that article by the Law of 20 July 2018 amending the Law on the system of the ordinary courts and certain other laws. Before those amendments were made, the appeals referred to in paragraph 1a were brought before the Sąd Najwyższy (Supreme Court) in accordance with Article 44(1).

19 By judgment of 25 March 2019, the Trybunał Konstytucyjny (Constitutional Court, Poland) declared Article 44(1a) of the Law on the KRS incompatible with the Constitution, on the grounds, in essence, that the jurisdiction conferred on the Naczelny Sąd Administracyjny (Supreme Administrative Court) by that paragraph 1a was not justified in the light of either the nature of the cases concerned, the organisational characteristics of that court or the procedure applied by that court. In that judgment, the Trybunał Konstytucyjny (Constitutional Court) also stated that that declaration of unconstitutionality ‘necessarily le[d] to the conclusion of all pending court proceedings based on the repealed provision’.

20 Subsequently, Article 44 of the Law on the KRS was amended by the ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz ustawy – Prawo o ustroju sądów administracyjnych (Law amending the Law on the National Council of the Judiciary and the Law on the system of administrative courts) of 26 April 2019 (Dz. U. of 2019, item 914), which entered into force on 23 May 2019. Paragraph 1 of Article 44 is now worded as follows:

'A participant in the procedure may appeal to the Sąd Najwyższy [(Supreme Court)] on the ground that the resolution [of the KRS] is unlawful, unless separate provisions provide otherwise. It shall not be possible to bring an appeal in individual cases concerning appointment to the office of judge at the Sąd Najwyższy [(Supreme Court)].'

21 In addition, Article 3 of that law of 26 April 2019 provided that 'proceedings in cases concerning appeals against resolutions [of the KRS] in individual cases regarding the appointment of Sąd Najwyższy [(Supreme Court)] judges, which have been initiated but not concluded before this law comes into force, shall be discontinued by operation of law'.

The Law on the system of ordinary courts

22 Article 69 of the ustawa – Prawo o ustroju sądów powszechnych (Law on the system of the ordinary courts) of 27 July 2001 (Dz. U. No 98, item 1070), in the version applicable to the facts in the main proceedings, provides:

'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 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 dispute in the main proceedings and the questions referred for a preliminary ruling

23 By letter of 30 December 2020, L.G., a judge within the Sąd Okręgowy w K. (Regional Court, K., Poland), notified the KRS of his wish to continue to perform his duties beyond 12 June 2021, the date of his 65th birthday.

24 By a resolution of 18 February 2021, the KRS declared that there was no need to rule on L.G.'s application, after finding that it had been lodged after the expiry of the time limit referred to in Article 69(1) of the Law on the system of ordinary courts.

25 L.G. brought an action against that resolution before the Sąd Najwyższy (Supreme Court).

26 In those circumstances, the Sąd Najwyższy (Izba Kontroli Nadzwyczajnej i Spraw Publicznych) (Supreme Court (Chamber of Extraordinary Control and Public Affairs)) 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?'

The procedure before the Court

27 Since the Commission, in its written observations, raised doubts as to whether the panel of judges of the Chamber of Extraordinary Control and Public Affairs of the Sąd Najwyższy (Supreme Court) had submitted the present request for a preliminary ruling as a 'court or tribunal' within the meaning of Article 267 TFEU, the Court invited all the interested parties to discuss that matter at the hearing.

28 By order of 3 November 2022, received at the Court on 4 November 2022, the referring body set out various elements which, in its view, confirm that it has that status. Elements similar to those put forward by that body were, moreover, also presented by the KRS and the Polish Government and debated during the hearing before the Court.

29 Finally, after the hearing, the interested parties were given the opportunity to submit further written observations on the elements contained in the order of the referring body of 3 November 2022. L.G., the KRS, the Belgian and Netherlands Governments and the Commission have made use of that option.

The admissibility of the request for a preliminary ruling

30 The Commission expressed doubts as to whether the referring body, in the present case a panel of judges of the Chamber of Extraordinary Control and Public Affairs of the Sąd Najwyższy (Supreme Court) ('the Chamber of Extraordinary Control and Public Affairs') composed of three judges of that Chamber, meets the requirements arising from the second subparagraph of Article 19(1) TEU, in particular the requirement that there be a tribunal previously established by law, which must be met by a referring body in order for it to be a 'court or tribunal' within the meaning of Article 267 TFEU.

31 It is clear from the Commission's written observations that that institution's doubts in that regard relate, more specifically, first, to the fact that the appointment, on 10 October 2018, by the President of the Republic of Poland, of the three members concerned of the Chamber of Extraordinary Control and Public Affairs was made on the basis of proposals set out in Resolution No 331/2018, adopted on 28 August 2018 by the KRS ('Resolution No 331/2018'), namely a body

whose independence has been called into question on numerous occasions, including in several recent judgments of the Court. Secondly, it is established, as is apparent in particular from the judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, 'the judgment in *W.Ż.*', EU:C:2021:798), that, when those appointments were made, that resolution was the subject of a legal action before the Naczelny Sąd Administracyjny (Supreme Administrative Court), which had, by order of 27 September 2018, suspended the enforceability of that resolution.

32 In that regard, the Commission notes that, in the judgment of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland* (CE:ECHR:2021:1108JUD004986819) ('the judgment in *Dolińska-Ficek and Ozimek v. Poland*'), the European Court of Human Rights held that there had been a breach of the requirement of a 'tribunal established by law' laid down in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), due to the process which, on the basis of Resolution No 331/2018, led to the appointment of the members of two panels of three judges of the Chamber of Extraordinary Control and Public Affairs. It adds that one of those panels included one of the judges sitting in the referring body which made the present request for a preliminary ruling.

33 Furthermore, the Commission submits that, following the judgment of the Court of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, 'the judgment in *A.B. and Others*', EU:C:2021:153), Resolution No 331/2018 was annulled by the Naczelny Sąd Administracyjny (Supreme Administrative Court) by judgment of 21 September 2021.

34 In essence, L.G. and the Belgian and Netherlands Governments share the doubts expressed by the Commission.

35 For its part, in its order of 3 November 2022 referred to in paragraph 28 above, the referring body stated that the order of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 27 September 2018 suspending the enforceability of Resolution No 331/2018 had not been served on either the President of the Republic of Poland or on the persons whose appointment to a judicial post in the Chamber of Extraordinary Control and Public Affairs was proposed in that resolution, since the persons concerned were not parties to the dispute pending before that court. Moreover, only the operative part of that order of the Naczelny Sąd Administracyjny (Supreme Administrative Court), stating that the enforceability of Resolution No 331/2018 was suspended 'in the contested part', was published on 28 September 2018, the grounds of that order not having been made public until 19 October 2018, that is to say, nine days after the appointment of the persons concerned.

36 According to the referring body, in the light of the national provisions in force at the time the appeal against Resolution No 331/2018 was brought before the Naczelny Sąd Administracyjny (Supreme Administrative Court), there was nothing to suggest that such an appeal could lead to the proposals for appointment of the candidates accepted by the KRS in that resolution being called into question or, therefore, to prevent their appointment by the President of the Republic of Poland. Under Article 44(1b) of the Law on the KRS, in the version then in force, if such a resolution was not challenged by all the participants in the proceedings, it was to become final and, therefore, enforceable as regards the part of that resolution including proposals for appointment to the office of judge at the Sąd Najwyższy (Supreme Court). Moreover, at the time of the appointment of the judges making up the referring body, no procedure had yet been initiated for the purpose of establishing the possible incompatibility of that national provision

with EU law, since questions for a preliminary ruling on that subject were not referred to the Court until 22 November 2018 in Case C-824/18, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*.

37 As regards the judgment of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 21 September 2021, it is expressly stated in that judgment that its effects do not relate to the validity and effectiveness of the presidential acts of appointment to the judicial posts concerned, since such acts are not subject to judicial review.

38 Finally, as regards the fact that the judges concerned were appointed to the Chamber of Extraordinary Control and Public Affairs on the basis of a resolution of the KRS in its new composition resulting from the implementation of Article 9a of the Law on the KRS, the referring body takes the view that that circumstance is not a sufficient basis to accuse those judges or the panel on which they sit of a lack of independence, as is apparent both from the case-law of the Court and from that of the Naczelny Sąd Administracyjny (Supreme Administrative Court).

39 The Polish Government and the KRS share, in essence, the positions thus set out by the referring body.

40 According to the Court's settled case-law, 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, and therefore to determine whether the request for a preliminary ruling is admissible, 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 (judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 66 and the case-law cited).

41 The Court has already noted that the Sąd Najwyższy (Supreme Court) as such meets the requirements set out and stated, in that regard, that, in so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed that it satisfies those requirements, irrespective of its actual composition (see, to that effect, judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraphs 68 and 69).

42 It follows from the Court's settled case-law that, in the context of a preliminary ruling procedure referred to in Article 267 TFEU, it is not for the Court, in view of the distribution of functions between itself and the national courts, 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. The Court is therefore bound by an order for reference made by a court or tribunal of a Member State, in so far as that order has not been rescinded on the basis of a means of redress provided for by national law (judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 70 and the case-law cited).

43 The Court also takes account, in that context, of the fact that the keystone of the judicial system established by the Treaties is the preliminary ruling procedure provided for in Article 267 TFEU which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniformity in the interpretation of EU law, thereby serving to ensure its consistency, its full effect and its

autonomy as well as, ultimately, the particular nature of the law established by the Treaties (judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 71 and the case-law cited).

44 However, the Court has also stated, as regards a court formation consisting of a single judge, that the presumption referred to in paragraph 41 above may be rebutted where a final judicial decision handed down by a court or tribunal of a Member State or an 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 the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') (judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 72).

45 In that regard, it should be noted at the outset that the judgment in *Dolińska-Ficek and Ozimek v. Poland* of the European Court of Human Rights and the judgment of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 21 September 2021, relied on by the Commission, emanate from an international court and a court of a Member State respectively and are both final. In addition, those judgments relate specifically to the circumstances in which judges of the Chamber of Extraordinary Control and Public Affairs were appointed on the basis of Resolution No 331/2018.

46 In those circumstances, it is necessary, in the present case, to examine whether the findings and assessments made by the European Court of Human Rights in the judgment in *Dolińska-Ficek and Ozimek v. Poland* in the light of Article 6(1) ECHR, in conjunction with those made by the Naczelny Sąd Administracyjny (Supreme Administrative Court) in its judgment of 21 September 2021, are such as to lead the Court, which alone is responsible for interpreting EU law, to consider, in the light of its own case-law, that the panel of judges of the Chamber of Extraordinary Control and Public Affairs which made a reference to it for a preliminary ruling in the present case does not have the status of an independent and impartial tribunal previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter, and, consequently, that that panel of judges does not satisfy the requirements set out in paragraph 40 above in order to be classified as a 'court or tribunal' within the meaning of Article 267 TFEU.

47 In the first place, as regards the judgment in *Dolińska-Ficek and Ozimek v. Poland*, the European Court of Human Rights began by recalling, in paragraphs 272 to 280 of that judgment, its case-law according to which the concept of a tribunal 'established by law', within the meaning of Article 6(1) ECHR, the objective of which is, inter alia, to protect the judiciary against unlawful external influence, in particular from the executive, but also from the legislature or from within the judiciary itself, encompasses compliance with national rules governing judicial appointments, which must be couched in unequivocal terms. It also recalled that it followed from that case-law that that concept has very close links with the guarantees of 'independence' and 'impartiality' for the purposes of Article 6(1) ECHR. Such requirements have in common that they seek to ensure observance of the fundamental principles of the rule of law and the separation of powers, meaning that the examination under the 'tribunal established by law' requirement has to systematically enquire whether the alleged irregularity in a given case is of such gravity as to undermine the aforementioned fundamental principles and to compromise the independence of the court in question.

48 In support of its finding of an infringement of Article 6(1) ECHR in that case, the European Court of Human Rights noted, in essence, in paragraphs 281 to 338 of the judgment in *Dolińska-Ficek and Ozimek v. Poland*, that the appointments of the members of the Chamber of Extraordinary Control and Public Affairs in question were made in manifest breach of fundamental national rules governing the procedure for the appointment of judges. It based that finding, inter alia, on various decisions adopted by the Sąd Najwyższy (Supreme Court), namely a judgment of 5 December 2019 delivered by the Chamber of Labour and Social Security of that court and a resolution of 23 January 2020 adopted jointly by the Civil Chamber, the Criminal Chamber and the Chamber of Labour and Social Security of that court, both adopted following the judgment of the Court 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), and the order of 21 May 2019 by which that same national court had referred a request for a preliminary ruling to the Court in the case which gave rise to the judgment in *W.Ż.*

49 In that regard, first, as is apparent from paragraphs 309 to 312 and 320 of the judgment in *Dolińska-Ficek and Ozimek v. Poland*, the European Court of Human Rights noted the lack of sufficient guarantees of the independence of the KRS from the legislative and executive authorities in its new composition resulting from the implementation of Article 9a of the Law on the KRS. It inferred from that that the appointment of the judges in question to the Chamber of Extraordinary Control and Public Affairs, on the basis of Resolution No 331/2018, had been made in breach of constitutional principles governing the functioning of the KRS, such as the principles of the separation of powers and independence of the judiciary, with the result that those judges could not be regarded as independent and impartial.

50 Secondly, the European Court of Human Rights referred, in paragraphs 321 to 338 of the judgment in *Dolińska-Ficek and Ozimek v. Poland*, to the fact that the appointment of those same judges by the President of the Republic of Poland had been made even though the enforceability of Resolution No 331/2018 containing the proposals for the appointment of the persons concerned to the posts to be filled in the Chamber of Extraordinary Control and Public Affairs had been suspended by the order of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 27 September 2018.

51 In that regard, it is clear from the judgment in *Dolińska-Ficek and Ozimek v. Poland*, in particular paragraphs 330 and 338 thereof, that the European Court of Human Rights held, inter alia, that appointments made in such circumstances demonstrated, on the part of the executive, an utter disregard for the authority, independence and role of the judiciary and deliberately sought to interfere with the effective course of justice, with the result that they had to be regarded as constituting a flagrant breach of Article 6(1) ECHR and were manifestly incompatible with the principle of the rule of law.

52 In paragraphs 331 to 333 of that judgment, the European Court of Human Rights also underlined the particular gravity of the breach in that case, having regard to the fundamental importance and sensitive character of the matters within the jurisdiction of the Chamber of Extraordinary Control and Public Affairs.

53 While it is true that, of the six judges making up the judicial formations of the Chamber of Extraordinary Control and Public Affairs at issue in the cases which gave rise to the judgment in *Dolińska-Ficek and Ozimek v. Poland*, only one of them sits in the panel of that Chamber which made the present request for a preliminary ruling, it is nevertheless clear from the grounds of

that judgment that the assessments made by the European Court of Human Rights apply without distinction to all the judges of that Chamber who were appointed to it in similar circumstances and, in particular, on the basis of Resolution No 331/2018.

54 In the second place, as regards the judgment of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 21 September 2021, it should be noted that, by that judgment, delivered following the judgment in *A.B. and Others*, that national court annulled Resolution No 331/2018, including the part thereof which proposed the appointment of the judges referred to in the preceding paragraph, taking into account, inter alia, findings and assessments that largely overlap with those set out in the judgment in *Dolińska-Ficek and Ozimek v. Poland* and the decisions of the Sąd Najwyższy (Supreme Court) referred to in paragraph 48 above.

55 In Sections 7.1 to 7.6 of its judgment of 21 September 2021, the Naczelny Sąd Administracyjny (Supreme Administrative Court) also found, first, that the amendments made to Article 44 of the Law on the KRS by the laws of 8 December 2017 and 20 July 2018 referred to in paragraph 18 above had, initially, deprived of all effectiveness the remedies hitherto available against resolutions of the KRS proposing candidates for appointment to the judicial posts at the Sąd Najwyższy (Supreme Court). Secondly, it noted that, although a series of appeals of that kind were brought before it, Article 44 had subsequently been amended once again by the Law of 26 April 2019, referred to in paragraphs 20 and 21 above, which had the effect of precluding such appeals from being brought in the future, and that that law had provided that appeals pending before the Naczelny Sąd Administracyjny (Supreme Administrative Court) would be discontinued by operation of law.

56 As regards those legislative amendments, the Naczelny Sąd Administracyjny (Supreme Administrative Court) considered that, assessed in their factual and legal context, the purpose of those amendments was clearly to prevent a court from examining the extent to which the combination of various factors could have resulted in the judges recently appointed to the Sąd Najwyższy (Supreme Court) on a proposal from the KRS in its new composition not meeting the requirements of the second subparagraph of Article 19(1) TEU and, in the case of the amendments introduced by the Law of 26 April 2019, to prevent the Court from ruling in that regard. The Naczelny Sąd Administracyjny (Supreme Administrative Court) also considered that such circumstances were such as to give rise to systemic doubts on the part of individuals as to whether judges thus appointed satisfied those requirements.

57 As regards the legal and factual context, mentioned in the previous paragraph, in which those legislative amendments were adopted, the Naczelny Sąd Administracyjny (Supreme Administrative Court), as is apparent from Sections 7.5 and 7.6 of its judgment of 21 September 2021, referred to a number of constituent factors. In that regard, that court, first, pointed out that, as a result of the Law of 8 December 2017, the term of office of the members of the KRS then in post had been shortened and that the composition of that body had been overhauled, resulting in a considerable increase in the influence of the legislature and the executive within it. Secondly, it noted that that overhaul of the composition of the KRS took place at a time when it was envisaged that a very large number of judicial posts at the Sąd Najwyższy (Supreme Court) would soon be available to be filled. Thirdly, it referred to the existence of doubts and a lack of transparency as regards the conditions in which the appointment of the members of the new KRS had taken place and found that, in the light of both the actual composition of that body and the activity actually carried out by it, that body had ceased to be independent of the legislature and the executive authorities. Fourthly, it emphasised that the legislative amendments referred to in paragraph 55 above had concerned only those resolutions of

the KRS proposing candidates for appointment to judicial posts at the Sąd Najwyższy (Supreme Court) and not those proposing candidates for appointment to judicial posts in other national courts.

58 In the light of the Court's own case-law on the interpretation of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter, the findings and assessments made by the European Court of Human Rights in the judgment in *Dolińska-Ficek and Ozimek v. Poland* and by the Naczelny Sąd Administracyjny (Supreme Administrative Court) in its judgment of 21 September 2021, as described in paragraphs 47 to 57 above, lead to the conclusion that, because of the manner in which its constituent judges were appointed, the panel of judges of the Chamber of Extraordinary Control and Public Affairs which made the present request for a preliminary ruling does not have the status of an independent and impartial tribunal previously established by law, for the purposes of those provisions of EU law, with the result that that panel of judges does not constitute a 'court or tribunal' within the meaning of Article 267 TFEU.

59 In that regard, it is necessary to bear in mind the inextricable links which, according to the wording of the second paragraph of Article 47 of the Charter, exist, for the purposes of the fundamental right to a fair trial, within the meaning of that provision, between the guarantees of judicial independence and impartiality as well as that of access to a tribunal previously established by law (judgment of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paragraph 55).

60 As regards, in particular, the judicial appointment procedure, the Court has held that, having regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, the procedure for the appointment of judges necessarily constitutes an inherent element of the concept of a 'tribunal established by law', within the meaning of Article 47 of the Charter, while noting that the independence of a tribunal within the meaning of that provision, may be measured, inter alia, by the way in which its members are appointed (see, to that effect, judgment of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paragraph 57 and the case-law cited).

61 As is apparent from the Court's settled case-law, the guarantees of independence and impartiality required under EU law as regards the courts called upon to interpret or apply EU law presuppose rules, particularly as regards the composition of the body and the appointment of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment in *W.Ż.*, paragraphs 109 and 128 and the case-law cited). That requirement that 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 (judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 58 and the case-law cited).

62 In that regard, it should be noted at the outset that, in the judgment in *W.Ż.*, the Court held, in the context of a case involving a decision adopted by the Chamber of Extraordinary Control and Public Affairs sitting as a single judge, that the second subparagraph of Article 19(1) TEU must

be interpreted as meaning that such a panel cannot be regarded as an independent and impartial tribunal previously established by law, for the purposes of that provision, if it follows from all the conditions and circumstances in which the process of the appointment of that single judge took place that (i) that appointment took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned, and (ii) the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned.

63 In the present case, it should be noted, in the first place, that, as is apparent from paragraph 146 of the judgment in *W.Ż.*, and in line with the findings of the European Court of Human Rights and the Naczelny Sąd Administracyjny (Supreme Administrative Court) referred to, respectively, in paragraphs 49 and 57 above, such conditions and circumstances include the fact that the judges making up the panel of the Chamber of Extraordinary Review and Public Affairs that referred questions to the Court in the present case were appointed to that Chamber on a proposal from the KRS in its new composition resulting from the implementation of Article 9a of the Law on the KRS. In paragraph 146 of the judgment in *W.Ż.*, the Court, like those two other courts, referred more specifically, in that regard, to the fact that the ongoing term of office of certain of the members then composing the KRS, the period of which was to be four years in accordance with Article 187(3) of the Constitution, had been reduced, and to the fact that, under Article 9a, the 15 members of the KRS who are judges, who were previously elected by their peers, were, as regards the new KRS, elected by the Sejm (Lower Chamber of the Polish Parliament), with the result that 23 of the 25 members of that body were designated by the Polish executive and legislature or are members of those branches of government.

64 Admittedly, it is clear from the case-law of the Court 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. However, according to that case-law, the situation is different where that fact, combined with other relevant factors and the conditions under which those choices were made, leads to such doubts being raised (see, to that effect, judgment of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paragraphs 74 and 75 and the case-law cited).

65 In that regard, the Court has already stated on several occasions that the legislative amendments referred to in paragraph 63 above were made at the same time as the adoption, by the Law of 8 December 2017, of a substantial reform of the Sąd Najwyższy (Supreme Court), including, in particular, the creation, within that court, of two new Chambers, namely the Disciplinary Chamber and the Chamber of Extraordinary Control and Public Affairs, and the lowering of the retirement age of judges of the Sąd Najwyższy (Supreme Court). As the Naczelny Sąd Administracyjny (Supreme Administrative Court) also noted in its judgment of 21 September 2021, those amendments therefore came at a time when it was expected that numerous judge's posts within the Sąd Najwyższy (Supreme Court) declared vacant or newly created would soon be available to be filled (see, to that effect, judgments of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraphs 106 and 107 and the case-law cited, and *W.Ż.*, paragraph 150).

66 In the second place, account must also be taken of the fact that the Chamber of Extraordinary Control and Public Affairs thus created *ex nihilo* within the Sąd Najwyższy (Supreme Court), and composed entirely of judges appointed on a proposal from the KRS in its new composition, was

assigned, as is apparent from Article 26(1) of the Law on the Supreme Court, and as the European Court of Human Rights also noted in the judgment in *Dolińska-Ficek and Ozimek v. Poland*, jurisdiction over particularly sensitive matters, such as electoral disputes and proceedings relating to the holding of referendums, other cases governed by public law, in particular those listed in that provision, and extraordinary appeals enabling final decisions of the ordinary courts or other Chambers of the Sąd Najwyższy (Supreme Court) to be set aside.

67 In the third place, it must be pointed out that, in parallel with the legislative amendments referred to in paragraph 63 above, the rules contained in Article 44 of the Law on the KRS concerning the judicial remedies available against resolutions of the KRS proposing candidates for appointment to judicial posts at the Sąd Najwyższy (Supreme Court) were, initially, substantially amended, as is apparent from paragraphs 17 and 18 above.

68 Ruling on amendments of that nature, the Court has emphasised the problematic nature of provisions which undermine the effectiveness of judicial remedies of that kind which previously existed, particularly where the adoption of those provisions, considered together with other relevant factors characterising the appointment process to positions of a national supreme court in a specific national legal and factual context, appear such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed at the end of that process (see, to that effect, judgment in *A. B. and Others*, paragraph 156).

69 First of all, the Court, like the Naczelny Sąd Administracyjny (Supreme Administrative Court) in its judgment of 21 September 2021, noted, in that regard, that an appeal such as that provided for in Article 44(1a) to (4) of the Law on the KRS, in the version resulting from the laws of 8 December 2017 and 20 July 2018, was devoid of any real effectiveness and thus offered only the appearance of a judicial remedy. Next, it pointed out that the restrictions thus introduced by those laws concerned only appeals brought against resolutions of the KRS relating to applications for judicial posts at the Sąd Najwyższy (Supreme Court), whereas the resolutions of the KRS relating to applications for judicial posts in other national courts remained subject to the general system of judicial review previously in force. Finally, it found that those legislative amendments had been made, as noted in paragraph 65 above, shortly before the KRS in its new composition was called upon to decide on the applications submitted in order to fill numerous judicial posts at the Sąd Najwyższy (Supreme Court) which had been declared vacant or newly created (see, to that effect, judgment in *A.B. and Others*, paragraphs 157, 162 and 164).

70 In the fourth place, in paragraphs 138 and 139 of the judgment in *W.Ż.*, the Court also noted that, when the member of the Chamber of Extraordinary Control and Public Affairs concerned by the case which gave rise to that judgment was appointed on the basis of Resolution No 331/2018, the Naczelny Sąd Administracyjny (Supreme Administrative Court), before which an action for annulment of that resolution was brought, had ordered, on 27 September 2018, that the effects of that resolution be suspended. Those circumstances – which the European Court of Human Rights also highlighted in the judgment in *Dolińska-Ficek and Ozimek v. Poland* – also pertain as regards the appointment of the three members sitting in the panel of judges of the Chamber of Extraordinary Control and Public Affairs who made the present request for a preliminary ruling.

71 In that regard, it is true that the referring body stated, in its order of 3 November 2022, that the order of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 27 September 2018 had not been served on candidates for a judicial post in the Chamber of Extraordinary Control and Public Affairs selected by the KRS in its Resolution No 331/2018 or

on the President of the Republic of Poland because they did not have the status of parties to the dispute then pending before the Naczelny Sąd Administracyjny (Supreme Administrative Court). It also stated that the grounds of the latter order had not been immediately made public.

72 However, as is confirmed, in the present case, by the information provided to the Court by L.G. and the Commission and as is also clear from the assessments of the European Court of Human Rights in the judgment in *Dolińska-Ficek and Ozimek v. Poland*, at the time when the appointments of the three referring judges in the Chamber of Extraordinary Control and Public Affairs were made, it was not possible, in particular for the President of the Republic of Poland, to be unaware that the effects of that resolution had been suspended by a final judicial decision of the Naczelny Sąd Administracyjny (Supreme Administrative Court).

73 Thus, the fact that the appointments at issue were made, as a matter of urgency and without waiting to take cognisance of the grounds of the order of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 27 September 2018, on the basis of Resolution No 331/2018, even though it had been suspended by that order, seriously undermined the principle of the separation of powers which characterises the operation of the rule of law (see, to that effect, judgment in *W.Ż.*, paragraph 127), as was also held by the European Court of Human Rights in the judgment in *Dolińska-Ficek and Ozimek v. Poland*.

74 In the fifth place, although the action for annulment of Resolution No 331/2018 had been brought before the Naczelny Sąd Administracyjny (Supreme Administrative Court) and it had stayed the proceedings pending the judgment of the Court in Case C-824/18, *A.B. and Others*, the Polish legislature adopted the Law of 26 April 2019 referred to in paragraphs 20 and 21 above.

75 As regards the amendments introduced by that law, the Court has already held, in paragraphs 137 and 138 of the judgment in *A.B. and Others*, that, particularly when viewed in conjunction with all the contextual factors set out in paragraphs 99 to 105 and 130 to 135 of that judgment, those amendments are such as to suggest that, in that case, the Polish legislature acted with the specific intention of preventing any possibility of exercising judicial review of the resolutions of the KRS which proposed the appointment of judges within the Sąd Najwyższy (Supreme Court), which the Naczelny Sąd Administracyjny (Supreme Administrative Court) has in the meantime confirmed in its judgment of 21 September 2021, as is apparent from paragraph 56 above.

76 In the sixth and last place, account must be taken of the fact that Resolution No 331/2018 was annulled by the Naczelny Sąd Administracyjny (Supreme Administrative Court) in its judgment of 21 September 2021, in particular, as is apparent from Section 10 of that judgment, in the light of the findings and assessments referred to in paragraphs 55 to 57 above. While it is true, as the referring body pointed out in its order of 3 November 2022, that the effects of that judgment of 21 September 2021 do not relate to the validity and effectiveness of the presidential acts of appointment to the judicial posts concerned, it must nevertheless be recalled, as the European Court of Human Rights did in paragraph 288 of the judgment in *Dolińska-Ficek and Ozimek v. Poland*, that, under Article 179 of the Constitution, the act by which the KRS puts forward a candidate for appointment to a judge's post at the Sąd Najwyższy (Supreme Court) is an essential condition for that candidate to be appointed to such a post by the President of the Republic of Poland (judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 101 and the case-law cited).

77 It follows from all the foregoing that, taken together, the consequence of all the factors, both systemic and circumstantial, referred to in paragraphs 47 to 57 above, on the one hand, and in paragraphs 62 to 76 above, on the other, which characterised the appointment, within the Chamber of Extraordinary Control and Public Affairs, of the three judges constituting the referring body in the present case, is that the Chamber does not have the status of an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter. The combination of all those factors is such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of the persons concerned and the panel in which they sit with regard to external factors, in particular the direct or indirect influence of the national legislature and executive and their neutrality with respect to the interests before them. Those factors are thus capable of leading to a lack of appearance of independence or impartiality on the part of those judges and that body likely to undermine the trust which justice in a democratic society governed by the rule of law must inspire in those individuals.

78 In those circumstances, the presumption referred to in paragraph 41 above must be held to be rebutted and it must therefore be held that the panel of judges of the Chamber of Extraordinary Control and Public Affairs which submitted the present request for a preliminary ruling to the Court does not constitute a 'court or tribunal' within the meaning of Article 267 TFEU, with the result that that request must be declared inadmissible.

Costs

79 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The request for a preliminary ruling from the Sąd Najwyższy (Izba Kontroli Nadzwyczajnej i Spraw Publicznych) (Supreme Court (Chamber of Extraordinary Control and Public Affairs), Poland), made by decision of 20 October 2021, is inadmissible.

[Signatures]