Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 15 December 2022[1]

Joined Cases C-181/21 and C-269/21

G.
v
M.S.,
joined parties:
Rzecznik Praw Obywatelskich,
Prokuratura Okręgowa w Katowicach
(Request for a preliminary ruling from the Sąd Okręgowy w Katowicach (Regional Court, Katowice, Poland))
and
BC,
DC
v
X,
joined parties:
Rzecznik Praw Obywatelskich,
Prokuratura Okręgowa w Krakowie

(Request for a preliminary ruling from the Sąd Okręgowy w Krakowie (Regional Court, Kraków, Poland))

(References for a preliminary ruling – Rule of law – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Appointment of judges to the ordinary courts – Role of judicial self-governing bodies in the appointment of judges – Lack of independence of the Krajowa Rada Sądownictwa (National Council of the Judiciary) – Jurisdiction of the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Extraordinary Review and Public Affairs Chamber of the Sąd Najwyższy (Supreme Court, Poland) – Whether that chamber satisfies the criteria of an independent and impartial tribunal previously established by law)

[1] Original language: English.

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I. Introduction

1. The present requests for a preliminary ruling ask the Court of Justice to rule upon the compatibility with EU law of certain aspects of the recent reform of the Polish judicial system in the novel context of the procedures for the appointment of judges to the ordinary courts in Poland. They seek to ascertain whether a court formation complies with the requirement of prior

establishment by law pursuant to the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), where certain of its members were appointed under a procedure that dispensed with the participation of judicial self-governing bodies on the basis of a resolution of the Krajowa Rada Sądownictwa (National Council of the Judiciary; 'the KRS') in its post-2018 composition [2] and where unsuccessful candidates no longer enjoyed a right of appeal to a court that fulfils the requirement of prior establishment by law. The referring courts ask whether EU law precludes the conferral of exclusive jurisdiction on the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Extraordinary Review and Public Affairs Chamber) of the Sąd Najwyższy (Supreme Court, Poland) ('the Extraordinary Chamber') to review the legality of judicial appointments to the ordinary courts since that chamber is composed exclusively of judges appointed following a procedure similar to that used to appoint judges to the ordinary courts. According to the referring courts, the Extraordinary Chamber cannot, in any event, examine any objection as to the legality of the appointment of a judge or the authority of that judge to exercise judicial functions. Given the absence of remedies in Polish law to cure the irregular appointment of judges, the referring courts also inquire as to whether they must, in order to ensure the effectiveness of EU law, apply of their own motion national rules on the automatic recusal of judges (*iudex inhabilis*) by analogy, thereby excluding judges appointed to the ordinary courts under an unlawful procedure from hearing cases.

II. Legal framework – Polish law

A. The Constitution

2. Article 179 of the Constitution of the Republic of Poland provides that the President of the Republic shall, on a proposal of the KRS, appoint judges for an indefinite period. By Article 180(1) thereof, judges are irremovable. Under Article 186(1) of the Constitution of the Republic of Poland, the KRS is the guardian of the independence of the courts and of the judges.

B. The Law on the KRS

3. Article 44(1) of the Law on the KRS provides that 'a participant in the [appointment procedure to the ordinary courts] may appeal to the [Sąd Najwyższy (Supreme Court)] on the grounds that the [KRS] resolution is unlawful, unless separate provisions provide differently. …'

C. The amended Law on the Supreme Court

4. The ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 [3] established the 'Izba Dyscyplinarna' ('the Disciplinary Chamber') and the Extraordinary Chamber as chambers within the Sąd Najwyższy (Supreme Court). So far as is relevant to these proceedings, the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie

[2] See the ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011 (Dz. U. of 2011, No 126, 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 ordinary courts and certain other laws) of 20 July 2018 (Dz. U. of 2018, item 1443) ('the Law on the KRS').

[3] Dz. U. of 2018, item 5; it entered into force on 3 April 2018.

Najwyższym oraz niektórych innych ustaw (Law amending the Law on the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws; 'the Amending Law') [4] inserted paragraphs 2 and 3 into Article 26 of the Law on the Supreme Court with effect from 14 February 2020.

5. Article 26(1) to (3) of the amended Law on the Supreme Court provides as follows:

'1. The areas of jurisdiction of the [Extraordinary Chamber] 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)].

2. The [Extraordinary Chamber] shall have jurisdiction to hear applications or declarations concerning the exclusion of a judge or the designation of the court before which proceedings must be conducted that involve complaints alleging a lack of independence of the court or the judge. The court dealing with the case shall submit forthwith a request to the President of the [Extraordinary Chamber] so that the case may be dealt with in accordance with the rules laid down in separate provisions. The submission of a request to the President of the [Extraordinary Chamber] shall not stay the ongoing proceedings.

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

D. The Law on the organisation of the ordinary courts

6. The Amending Law repealed paragraph 2 of Article 58 of the ustawa – Prawo o ustroju sądów powszechnych ('the Law on the organisation of the ordinary courts') of 27 July 2001. [5] It moreover amended paragraph 1 of Article 58 thereof to read as follows:

'1. If more than one application is made for a judicial vacancy, all the applications shall be examined at the same meeting of the assembly.

…'

7. Before the Amending Law entered into force on 14 February 2020, Article 58 of the Law on the organisation of the ordinary courts provided that:

'1. If more than one application is made for a judicial vacancy, all the applications shall be examined at the same meeting of the assembly.

2. The general assembly of appeal judges or the general assembly of [sądy okręgowe (regional judges)] shall decide on the candidates by means of a vote and shall transmit all the applications

[4] Dz. U. of 2020, item 190.

[5] Dz. U. of 2001, No 98, item 1070.

made, indicating the number of votes obtained, to the President of the [sąd apelacyjny (Court of Appeal)] or of the [sąd okręgowy (regional court)], as appropriate.

…

4. The president of the competent court shall submit to [the KRS], by means of the electronic system, the applications assessed in the manner provided for in paragraph 2, together with the assessment of qualifications and the opinion of the panel of the competent court, as well as the information obtained from the head of police of the province or the head of the Warsaw Metropolitan Police, as referred to in paragraph 3, and other documents relating to the procedure in question concerning appointment to the exercise of a judicial function, collected in the electronic system.

…'

E. The Code of Civil Procedure

8. By Article 48 of the ustawa – Kodeks postępowania cywilnego (Law establishing the Code of Civil Procedure) of 17 November 1964 ('the Code of Civil Procedure'): [6]

'1. A judge shall be excluded by operation of law:

1) from cases to which he or she is a party or in which he or she has such a legal relationship with one of the parties that the outcome of the case affects his or her rights or obligations;

…

5) from cases in which he or she took part, in a lower instance court, in the issue of the ruling under appeal, as well as from cases concerning the validity of a legal act drafted with his or her participation or reviewed by him or her, and from cases in which he or she acted as a prosecutor.

…'

9. Article 367(3) of the Code of Civil Procedure states that 'courts of second instance shall examine cases with a panel of three judges. *In camera*, the court shall rule in a single-judge formation, except when it delivers a judgment'. In accordance with point 4 of Article 379 thereof, proceedings shall be invalid 'if the composition of the court of trial does not comply with statutory provisions or if the case was heard in the presence of a judge subject to exclusion by operation of law'.

10. Point 1 of Article 401 of the Code of Civil Procedure provides that it is possible to request the reopening of the procedure for invalidity 'where the court formation included an unauthorised person or where a judge subject to exclusion by operation of law gave judgment and the party was unable to rely on the exclusion before the judgment became final'.

6 Dz. U. of 1964, No 43, item 296.

III. The facts of the main proceedings and the questions referred for a preliminary ruling

A. Case C-181/21

11. The proceedings before the Sąd Okręgowy w Katowicach (Regional Court, Katowice, Poland) concern a dispute between a consumer and a trader relating to a loan agreement governed by the national law that transposed Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.[7] Following an assignment of the trader's rights, the applicant brought an action against the consumer for the payment of 16 000.40 zlotys (PLN), together with interest and costs. The Sąd Rejonowy w Dąbrowie Górniczej (District Court, Dąbrowa Górnicza, Poland) ordered payment of the sums claimed and dismissed the consumer's challenge to that order. The consumer then brought an action before the Sąd Okręgowy w Katowicach (Regional Court, Katowice) against that second order. That action was assigned to a formation of three judges.

12. On 18 March 2021, the Sąd Okręgowy w Katowicach (Regional Court, Katowice), sitting *in camera* and composed of a single judge acting as reporting judge, expressed doubts as to the capacity of that court, sitting in a three-judge formation, to adjudicate on the matter due to the presence of Judge A.Z. in that formation. Exercising its jurisdiction under Article 367(3) of the Code of Civil Procedure, the Sąd Okręgowy w Katowicach (Regional Court, Katowice), composed of a single judge, decided to make a reference for a preliminary ruling.

13. From 1996, Judge A.Z. had been a judge at a lower court before applying for the post of judge at the Sąd Okręgowy w Katowicach (Regional Court, Katowice). The Kolegium Sądu Apelacyjnego (College of the Court of Appeal) gave its opinion on Judge A.Z.'s candidature for that post. The Assembly of Representatives of Judges of the Sąd Apelacyjny w Katowicach (Court of Appeal, Katowice, Poland) withheld its opinion on Judge A.Z.'s candidature due to concerns about the status of the KRS and the manner in which it operated in the absence of a Court of Justice ruling on the KRS's status.

14. According to the referring court, at the time of the competition to appoint judges to the Sąd Okręgowy w Katowicach (Regional Court, Katowice) in which Judge A.Z. participated, Polish law complied with a constitutional principle that required the participation of judicial self-governing bodies in the appointment process. The relevant assembly of judges' representatives had not participated in the process that led to Judge A.Z.'s appointment. The resolutions that the assembly of judges' representatives adopted show that it withheld its opinion on the candidates until the KRS's status had been resolved by bodies competent to do so, including the Court of Justice. Despite the adoption of those resolutions, the President of the Sąd Apelacyjny w Katowicach (Court of Appeal, Katowice), who presided over the assembly of judges' representatives and who had been appointed by the current Minister for Justice, initiated the procedure before the KRS to appoint Judge A.Z.[8] On foot of a resolution of the KRS, the President of the Republic thereafter appointed Judge A.Z. to the Sąd Okręgowy w Katowicach (Regional Court, Katowice).

15. The referring court observes that under Polish law an ordinary court rules in a single-judge formation save when delivering judgment. It considers that the questions in its request for a preliminary ruling are admissible notwithstanding that the three-judge formation of that court may not be a court or tribunal for the purposes of EU law. It thus considers that the referring

7 OJ 1993 L 95, p. 29.

8 See Article 58(4) of the Law on the organisation of the ordinary courts.

court, sitting *in camera* and composed of a single judge, is part of the Polish legal system and rules on cases in 'fields covered by Union law' within the meaning of the second subparagraph of Article 19(1) TEU.

B. Case C-269/21

16. Relying on the judgment in *Dziubak*,[9] the applicants sought an order against the defendant before the Sąd Okręgowy w Krakowie (Regional Court, Kraków, Poland) for payment of PLN 104 537.48 and 74 582.19 Swiss francs (CHF) – together with interest and costs – and the annulment of a housing loan agreement. That claim arose on foot of a loan agreement that the applicants, who are consumers, had concluded with a bank. The loan agreement is governed by the national law that transposed Directive 93/13. The applicants also sought interim measures, inter alia, to suspend monthly payments of the amounts stipulated in the loan agreement. According to the referring court, the suspension of the loan agreement, which is governed by an incidental procedure, is an integral part of the main proceedings since any order suspending payment affects the scope of the applicants' claim.

17. On 9 October 2020, the Sąd Okręgowy w Krakowie (Regional Court, Kraków), sitting as a single judge, granted the application for interim measures. On 1 December 2020, the defendant bank appealed that order before the same court, now sitting in a formation of three judges. That three-judge formation of the Sąd Okręgowy w Krakowie (Regional Court, Kraków), which included Judge A.T. acting as reporting judge and president, upheld the defendant's appeal and dismissed the application for interim measures. That latter decision, which is final, was referred back to the Sąd Okręgowy w Krakowie (Regional Court, Kraków). The Sąd Okręgowy w Krakowie (Regional Court, Kraków), sitting in single-judge formation, considers that the three-judge formation of the same court that included Judge A.T. may be incompatible with national and EU law such that the decision to dismiss the application for interim measures may be invalid.

18. According to the referring court, from 2009 Judge A.T. was a judge at the Sąd Rejonowy dla Krakowa – Krowodrzy w Krakowie (District Court for Kraków – Krowodrza, Kraków, Poland) before applying to become a judge at the Sąd Okręgowy w Krakowie (Regional Court, Kraków),[10] where she was the only candidate for the post. On 1 June 2020, the Kolegium Sądu Okręgowego w Krakowie (College of Regional Court, Kraków, Poland) delivered a favourable opinion on her application.[11] The majority of the members of the Kolegium Sądu Okręgowego w Krakowie (College of Regional Court, Kraków) are presidents of sądy rejonowe (district courts) and sądy okręgowe (regional courts) who are appointed by the Minister for Justice. The Zgromadzenie Sędziów SąduOkręgowego (Assembly of Judges of the Regional Court) did not examine Judge A.T.'s candidacy as its opinion was no longer required following the amendment of Article 58 of the Law on the organisation of the ordinary courts by the Amending Law. On 4 February 2021, on foot of a resolution of the KRS of 7 July 2020, the President of the Republic appointed Judge A.T. to the Sąd Okręgowy w Krakowie (Regional Court, Kraków).

19. The referring courts observe that the issues raised in Cases C-181/21 and C-269/21 relate to the procedures governing the appointment of judges to the ordinary courts in Poland. To date, the Court has been asked questions relating to the legality of the procedures for the appointment of

[9] Judgment of 3 October 2019 (C-260/18, EU:C:2019:819).

[10] Following the Minister for Justice's communication of 6 June 2019 on vacant posts for judges, published in the *Monitor Polski* (Official Journal of the Republic of Poland).

[11] 12 votes 'in favour', 6 votes 'against' and 2 abstentions.

judges to the Sąd Najwyższy (Supreme Court). The referring courts accordingly stayed the respective proceedings before them and referred the following questions to the Court for a preliminary ruling:

'(1) Must [Article 2, Article 19(1)] and Article 6(1) to (3) TEU, read in conjunction with Article 47 of the [Charter], be interpreted as meaning that:

(a) where a court includes in its composition a person appointed to a judicial post in that court as a result of a procedure which does not provide for the participation of judicial [self-governing] bodies, bodies which are appointed largely independently of the executive and the legislature, in a situation where, in the light of the constitutional *acquis* of the Member State, the participation of a judicial [self-governing] body meeting those requirements in the judicial appointment procedure is necessary, that court is not a tribunal established by law within the meaning of [EU] law, having regard to the institutional and structural context and given that:

– there was a requirement for an assembly of judges to give an opinion on the candidate's suitability for the judicial post, a requirement which was deliberately disregarded contrary to national law and the position of that judicial [self-governing] body, [12]

– there was a requirement for the college of that court – a body that was composed in such a way that most of its members were appointed by a representative of the executive (the Minister Sprawiedliwości (Minister for Justice), who is also the Prokurator Generalny (Public Prosecutor General, Poland)) – to give an opinion on candidates' suitability for the judicial post, [13]

– the current [KRS], which was elected contrary to Polish constitutional and statutory provisions, is not an independent body and no representatives of the judiciary were elected to it independently of the executive and the legislature, and therefore no motion for appointment to the post of judge was effectively lodged as required under national law,

– the participants in the competition for appointment to the post had no right of appeal to a court within the meaning of [Article 2, Article 19(1)] and Article 6(1) to (3) TEU, read in conjunction with Article 47 of the [Charter];

(b) where a court includes in its composition a person appointed to a judicial post in that court as a result of a procedure which is subject to arbitrary interference by the executive and omits the participation of judicial [self-governing] bodies, bodies which are appointed largely independently of the executive and the legislature, or of another body ensuring an objective assessment of the candidate, in view of the fact that the participation of judicial [self-governing] bodies or of another body independent of the executive and the legislature which ensures an objective assessment of the candidate in the judicial appointment procedure is, in the context of the European legal tradition which is rooted in the aforementioned provisions of the TEU and the [Charter] and which underpins a union of law such as the European Union, necessary to ensure that the national court guarantees the required level of effective judicial protection in cases governed by [EU]

[12] This part of the question relates to Case C-181/21.

[13] This part of the question relates to Case C-269/21.

law, and consequently that the principles of separation and balance of powers and of the rule of law are safeguarded, that court does not satisfy the requirements of an independent tribunal established by law?

(2) Must Article 2 and Article 19(1) TEU, read in conjunction with Article 47 of the [Charter], be interpreted as meaning that, where a court includes in its composition a person appointed in the circumstances described in [point (a) of Question 1] above:

(a) those provisions preclude the application of provisions of national law which place the review of the lawfulness of the appointment of such a person to a judicial post within the exclusive jurisdiction of a chamber of the Sąd Najwyższy (Supreme Court) which is composed exclusively of persons appointed to judicial posts in the circumstances described in [point (a) of Question 1] above and … [preclude] provisions of national law [which] also require that any objections concerning the appointment to a judicial post be disregarded, having regard to the institutional and systemic context;

(b) those provisions require, in order to ensure the effectiveness of [EU] law, provisions of national law to be interpreted in a manner that allows a court to exclude, of its own motion, such a person from hearing the case on the basis of the rules, applicable by analogy, which govern the exclusion of a judge who is incapable of deciding cases (*iudex inhabilis*)?'

IV. Procedure before the Court

20. By decision of 5 May 2021, the President joined Cases C-181/21 and C-269/21 for the purposes of the oral and written procedure and the judgment. The referring courts had also asked for expeditious treatment of the requests for a preliminary ruling in both cases pursuant to Article 105(1) of the Rules of Procedure. By that same decision of 5 May 2021, the President of the Court rejected those requests.

21. The Rzecznik Praw Obywatelskich (Ombudsperson, Poland; 'the Ombudsperson'), the Polish Government and the European Commission submitted written observations. At the hearing on 29 June 2022, the aforementioned parties, the Prokuratura Okręgowa w Katowicach (Regional Prosecutor, Katowice) and the Prokuratura Okręgowa w Krakowie (Regional Prosecutor, Kraków), represented by the Prokurator Generalny (Public Prosecutor General), the Danish and Dutch Governments presented oral argument and replied to questions put by the Court.

V. Admissibility

A. Observations submitted

22. The Polish Government advances eight grounds upon which it argues that the requests for a preliminary ruling are inadmissible.

23. First, the Polish Government considers that the ongoing reform of its judicial system falls within the exclusive competence of that Member State. It submits that the judgment in *Commission* v *Poland (Disciplinary regime for judges)*[14] is aking to a legislative act. That position is reflected to some extent in the judgment of the Trybunał Konstytucyjny (Constitutional Court, Poland) of 14 July 2021 in Case P 7/20, in which it held, inter alia, that the second subparagraph of Article 4(3) TEU, read in conjunction with Article 279 TFEU, is incompatible with Articles 2 and 7, Article 8(1) and Article 90(1) of the Constitution of the Republic of Poland, read in combination with Article 4(1) thereof. The Trybunał Konstytucyjny (Constitutional Court) thus considered that the Court of Justice had ruled *ultra vires* when it adopted interim measures directed to the Republic of Poland relating to the organisation and jurisdiction of the Polish courts and the procedures to be followed before them.

24. Second, according to the Polish Government, the questions referred are unnecessary, within the meaning of Article 267 TFEU, as EU law neither requires judicial self-governing bodies to give an opinion on candidates for judicial office nor provides a general right of appeal against decisions taken in the context of judicial appointment procedures.

25. Third, the Polish Government observes that Article 19(1) TEU and Article 47 of the Charter require Member States to ensure that an individual has access to an independent court. Whilst the individual's right to an effective remedy is of fundamental importance under both the Constitution of the Republic of Poland and EU law, the organisation of justice falls within the exclusive competence of the Member States. In that context, the Court has already unequivocally and exhaustively addressed all of the issues the questions referred raised, such that the referring courts can infer from the Court's settled case-law the information necessary to allow them to deliver judgment.[15]

26. Fourth, pursuant to Article 365 of the Code of Civil Procedure, the action for interim measures in Case C-269/21 has been finally determined by an order that binds the referring court. The referring court has no jurisdiction either to 'recuse' a judge who delivered a final decision or to challenge the order to dismiss the application for interim measures. A party may, in any event, bring a fresh application for interim measures, in the course of which it can apply to recuse a judge for lack of impartiality. The questions referred in Case C-269/21 do not resolve a genuine dispute and are, as such, hypothetical.[16]

27. Fifth, although the requests for a preliminary ruling are very detailed, the statements of the reasons that prompted the referring courts to seek an interpretation of provisions of EU law do not go beyond asking the Court to assess whether certain courts are tribunals 'previously established by law'. In the opinion of the Polish gGovernment that fails to comply with the requirements of Article 94 of the Rules of Procedure. The requests for a preliminary ruling consist of questions of a general nature about certain reforms of the Polish judicial system, notwithstanding that those reforms did not alter the qualifications required of candidates for judicial posts. The date on which judges are appointed to the ordinary courts is thus unrelated to their capabilities, the rules that govern the performance of their duties or their rights and obligations, including their independence. The Polish Government emphasises that the orders

[14] Judgment of 15 July 2021 (C-791/19, EU:C:2021:596).

[15] See judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586); of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535); and of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311).

[16] Orders of 24 March 2009, *Nationale Loterij* (C-525/06, EU:C:2009:179, paragraphs 9 and 10), and of 23 March 2016, *Overseas Financial and Oaktree Finance* (C-319/15, not published, EU:C:2016:268, paragraph 33).

for reference give no specific examples of any lack of independence on the part of a judge or of pressure being exerted on judges appointed under the post-reform regime. The questions are, thus, hypothetical in nature.

28. Sixth, the requests for a preliminary ruling in Cases C-181/21 and C-269/21 are 'excessively general'. There is no relationship between the subject matter of the questions asked and the actions in the main proceedings, which concern national consumer law transposing Directive 93/13. The referring courts even indicate on several occasions that the 'situation goes beyond the factual context of the case'.

29. Seventh, the Polish Government considers that the subject matter of the main proceedings is not directly linked to the questions on the status of the KRS or whether the Extraordinary Chamber is a 'tribunal' pursuant to Article 2, Article 19(1) and Article 6(1) to (3) TEU, read in conjunction with Article 47 of the Charter. Nor is there a direct link between the subject matter of the main proceedings and the right of participants in a judicial appointment procedure to an effective remedy. The scope of the requests for a preliminary reference is thus unacceptably broad.

30. Eighth, the Polish Government considers that in Case C-269/21 only the referring court sitting in a three-judge formation, rather than as a single judge, has jurisdiction to request a preliminary ruling. This is particularly evident as the request was made after the order of the three-judge formation to reject the application for interim measures had become final. In Case C-181/21, it submits that only the referring court sitting in a formation of three judges or its president [17] had jurisdiction to seek a preliminary ruling. The facts in the request for a preliminary ruling are explained in such a laconic manner that it is impossible to know whether the reporting judge in the case, who made the request, is also the president of the three-judge formation. The referring court thus relied on Article 367(3) of the Code of Civil Procedure with the sole aim of referring a question for a preliminary ruling.

31. At the hearing, the Commission objected to the admissibility of the questions in Case C-269/21. It considers that the referring court failed to indicate the necessity in order to resolve the dispute in the main proceedings for a ruling by the Court on the questions concerning the procedure that led to the appointment of Judge A.T.

B. Analysis

32. In accordance with the Court's settled case-law, questions on the interpretation of EU law referred by a national court enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [18]

33. It is clear from both the text and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a reference for a preliminary ruling unless a case is pending before it in which it is called upon to give a decision

[17] See Opinion of Advocate General Bobek in Joined Cases *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:403, points 48 to 65).

[18] Judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraph 20).

that is capable of taking account of that preliminary ruling. A reference for a preliminary ruling must be necessary for the effective resolution of a dispute. It is not to facilitate the delivery of advisory opinions on general or hypothetical questions. [19]

34. By its first objection to admissibility, the Polish Government contests the jurisdiction of the Court in matters pertaining to the appointment of national judges. It is settled case-law that the organisation of justice in the Member States falls within their competence. When exercising that competence, Member States are nevertheless required to comply with their obligations deriving from EU law, in particular as regards national rules governing the appointment of judges and, where applicable, the judicial review available in the context of those appointment procedures. [20] A corollary of the right to an independent and impartial tribunal previously established by law is that everyone has the possibility to invoke hat right. [21] Where the existence of an independent and impartial tribunal is disputed on a ground that does not immediately appear to be manifestly devoid of merit, [22] every court [23] is obliged to check whether, as composed, it constitutes such a tribunal. That jurisdiction is necessary to sustain the confidence that courts in a democratic society must inspire in those subject to their rulings. Such a check is thus an essential procedural requirement, compliance with which is a matter of public policy and must be verified either when raised by the parties or of the court's own motion. [24] Article 2 TEU, the second subparagraph of Article 19(1) TEU and the requirements laid down in the *Simpson* judgment have a transversal character and apply whenever a jurisdiction may be required to rule upon cases 'in fields covered by Union law'. [25] The Court thus has jurisdiction to give an interpretation of EU law in the context of such references for a preliminary ruling. I therefore advise that the Polish Government's first objection be dismissed.

35. The Polish Government's second and third objections to admissibility relate to the substance of the questions referred and the interpretation of EU law that the referring courts seek. Such objections are, by their very nature, incapable of justifying a finding that those questions are inadmissible. [26] Should the Court decide that it can reply to the questions asked by reference to its settled case-law, it may utilise the faculty provided for by Article 99 of the Rules of Procedure and do so by way of reasoned order.

[19] Judgments of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraph 38), and of 27 February 2014, *Pohotovosť* (C-470/12, EU:C:2014:101, paragraphs 28 and 29).

[20] Judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931, paragraph 36 and the case-law cited).

[21] Judgment of 26 March 2020, *Review Simpson* v *Council* and *HG* v *Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 55) ('the *Simpson* judgment').

[22] Judgment of 1 July 2008, *Chronopost* v *UFEX and Others* (C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 46).

[23] See the *Simpson* judgment (paragraph 57), and judgment of 24 March 2022, *Wagenknecht* v *Commission* (C-130/21 P, EU:C:2022:226, paragraph 15), in respect of the Court of Justice and of the General Court. See judgment 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, paragraphs 126 to 131), in respect of the courts and tribunals of the Member States.

[24] Judgment of 1 July 2008, *Chronopost* v *UFEX and Others* (C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 46), and the *Simpson* judgment (paragraphs 55 and 57).

[25] Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 29, 36 and 37).

[26] Judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraph 33 and the case-law cited).

36. By its fourth and eighth objections to admissibility, the Polish Government contests the referring courts' jurisdiction as a matter of domestic law to make the requests for a preliminary ruling. It further submits that the requests are contrived and that the referring courts could lawfully make them only when sitting in a three-judge formation. [27]

37. In the context of the preliminary ruling procedure under Article 267 TFEU, it is settled case-law that it is not for the Court, in view of the allocation of functions between it and the national 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. The Court is therefore bound to respond to an order for reference from 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. [28] The Court has thus considered admissible a request for a preliminary ruling from the president of a formation of a court on the regularity of its composition. [29]

38. In any event, whilst in Case C-181/21 the Polish Government claims that it is unclear whether the request for a preliminary ruling was made by the president of the three-judge formation and that the referring court – sitting *in camera* and composed of a single judge – artificially relied on Article 367(3) of the Code of Civil Procedure to make its request, it has not shown that the referring court did not have jurisdiction to do so.

39. In Case C-269/21, the referring court, sitting as a single judge, indicates why it considers that the decision of that court, sitting in a formation of three judges hearing an appeal on interim measures, may have an impact on the main proceedings which that single-judge formation must rule upon. It states that the decision by the three-judge formation was referred back to it and that it has reasonable doubts as to whether that three-judge formation complies with the requirements of national and EU law. The referring court observes that the validity of the decision on interim measures is essential to establish the consumer's legal situation. Certainty as to the validity of the composition of the formation that heard and determined that appeal is thus essential in order to resolve the main proceedings. [30]

40. Given the direct link the referring court describes between the decision by the three-judge formation on appeal to refuse to grant interim measures and the main proceedings, I consider that, contrary to the objections of the Polish Government and of the Commission, the Court's answer to the questions on the interpretation of EU law referred to it in Case C-269/21 may be necessary to enable the referring court to resolve issues of national procedural law before it can rule on the substance of the dispute pending before it.

[27] The Polish Government does not dispute that the Sąd Okręgowy w Katowicach (Regional Court, Katowice) and the Sąd Okręgowy w Krakowie (Regional Court, Kraków) constitute a 'court' or a 'tribunal' of that Member State for the purposes of Article 267 TFEU. The referring courts come within the Polish judicial system in the 'fields covered by Union law' pursuant to the second subparagraph of Article 19(1) TEU and must thus meet the requirements of effective judicial protection (judgment 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, paragraph 106 and the case-law cited).

[28] Judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931, paragraph 44 and the case-law cited).

[29] Judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931, paragraph 49 and the case-law cited).

[30] According to the referring court, if the interim measures are valid, the consumer must continue to pay the monthly instalments of the loan. Failure to do so may have very serious consequences for the consumer, including his or her creditworthiness, the imposition of punitive interest or the termination of the loan. The referring court also indicated that the validity of the interim measures order has a direct impact on the amount claimed in the dispute before it.

41. As for the Polish Government's fifth and sixth objections to admissibility, which overlap to some extent, I consider that the referring courts have described, to the requisite legal standard, the facts of the disputes in the main proceedings, the applicable national provisions and their doubts as to whether the procedures that led to the appointment of Judges A.Z. and A.T. comply with EU law. It is true that the reasons why the referring courts considered that an answer to the questions addressed to the Court is necessary in view of the judgments they are to deliver in the proceedings pending before them make little reference to the underlying consumer law disputes. It is nonetheless clear that those courts seek to ascertain, prior to ruling on those disputes, whether the formation of the referring courts in which Judges A.Z. and A.T. sat complied with the requirement of being a 'tribunal established by law' pursuant to EU law and, in the event they do not, what the consequences of that finding are. In particular, they wish to know whether the referring courts, sitting as a single judge, may of their own motion recuse Judges A.Z. and A.T. The fact that the impact of the interpretation of EU law that the referring courts seek may extend beyond the facts of the cases pending before them is thus irrelevant to the admissibility of the questions they have referred. [31]

42. I therefore propose that the Court dismiss all of the objections as to the admissibility of the questions asked by the referring courts.

VI. Substance

A. Preliminary observations

43. The subject matter of the infringement proceedings [32] in Case C-204/21, *Commission* v *Poland* (*Independence and private life of judges)*, [33] overlaps in part with these requests for a preliminary ruling. While infringement actions and requests for preliminary ruling are different procedures with distinct legal effects, [34] I shall refer, where appropriate, to my Opinion in those infringement proceedings, to be delivered on the same date as the present Opinion, notably points 46 to 60 thereof, which set out well-established propositions of law that I consider relevant to the resolution of these proceedings.

44. It is evident from the requests for a preliminary ruling that the referring courts seek an interpretation of the principle of prior establishment by law of a court or tribunal recognised by the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter. The questions put by the referring courts thus fall to be answered in the light of that principle exclusively.

45. According to the Commission, the constitutional role and influence that judges of the Sąd Najwyższy (Supreme Court) exercise, as compared to the judges of the ordinary courts, coupled with the lesser risk that the legislature and the executive may interfere in appointments to those courts, justify a different assessment of the legality of the appointment of a judge under the

[31] The requirements that the second subparagraph of Article 19(1) TEU imposes are transversal and apply irrespective of the nature of the proceedings in question. It is sufficient that the jurisdiction in question may be called upon to rule on cases 'in fields covered by Union law'.

[32] Pursuant to Article 258 TFEU.

[33] OJ 2021 C 252, p. 9.

[34] The different effects of judgments of the Court pursuant to Articles 258 and 267 TFEU should not be overemphasised. By way of example, in its judgment of 10 March 2022, *Grossmania* (C-177/20, EU:C:2022:175), the Court recently described the manner in which its judgments under both procedures have combined effects.

second subparagraph of Article 19(1) TEU. In the Commission's view, that assessment of the appointment of a judge of an ordinary court should be conducted on a case-by-case basis, in contrast to a systemic approach with respect to appointments to the Sąd Najwyższy (Supreme Court). The Ombudsperson and the Commission observe that, by resolution of 23 January 2020, the Civil Chamber, Criminal Chamber and Labour and Social Insurance Chamber of the Sąd Najwyższy (Supreme Court) [35] distinguished between judges of the Sąd Najwyższy (Supreme Court) and judges of the ordinary courts for the purposes of examining their independence and impartiality. The resolution considered that the appointment procedure for judges of ordinary courts is unlawful where it leads, 'in the specific circumstances', to a breach of the requirement of independence and impartiality pursuant to Article 45(1) of the Constitution of the Republic of Poland, Article 47 of the Charter and Article 6(1) of the European Convention on Human Rights ('the ECHR'). The Sąd Najwyższy (Supreme Court) accordingly held that amongst the circumstances to be examined were those relating to the participation of the judges themselves in appointment procedures before the KRS and the nature of the cases that those individual judges deal with or had dealt with. [36] By contrast, the Sąd Najwyższy (Supreme Court) did not require the conduct of such an individual examination with respect to the appointment of judges to that court. [37]

46. The questions referred relate to the requirement of prior establishment by law, not to the independence and impartiality of courts that the aforesaid resolution addressed. Given that all of these criteria are inherently linked and overlap to a considerable extent, [38] it must be emphasised that the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, does not distinguish between the supreme courts of the Member States and other courts in their respective legal orders. The fundamental requirements of independence, [39] impartiality and prior establishment by law apply without distinction to all courts or tribunals of the Member States, irrespective of the extent of their jurisdiction or their position in that State's judicial hierarchy. Were it otherwise, the standard of judicial protection could vary depending upon a court's ranking in the judicial system of which it forms part. As a matter of first principle, that proposition is manifestly incorrect. If anything, since the direct experience of the vast majority of EU citizens of their national legal systems is limited to the ordinary courts, the corresponding duty on the ordinary courts to sustain the confidence of those citizens that the rule of law applies is particularly onerous. The submission is all the more absurd in the light of the development of the European Union's legal order, which has been greatly facilitated by the important role played by supposedly 'lower' courts in the Member State's legal systems. [40] The second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, requires a uniform

35 Ref. BSA 1-4110-1/20.

36 See paragraph 47 of the resolution.

37 According to the Ombudsperson, the Sąd Najwyższy (Supreme Court) based that distinction on the different functions of the ordinary courts and of its own functions, the great variation in the scale of irregularities affecting competition procedures for posts in the ordinary courts, as compared with the Sąd Najwyższy (Supreme Court), and the possibility to review compliance by judges of the ordinary courts with the principles of independence and impartiality. The Ombudsperson considers the latter possibility to be illusory due to the Amending Law that prevents the Extraordinary Chamber from carrying out such a review. It also observes that the resolution of 23 January 2020 addresses the independence and impartiality of judges rather than the prior establishment of a tribunal by law.

38 See, by analogy, judgment 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, paragraph 124 and the case-law cited), in respect of Article 6(1) ECHR. See also judgment of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235, paragraphs 115 to 120).

39 See, by analogy, judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17), concerning the concept of an independent court or tribunal of a Member State pursuant to Article 267 TFEU. In my view, that concept and the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, is a single, uniform and autonomous concept of EU law.

40 See, for example, judgments of 5 February 1963, *van Gend & Loos* (26/62, EU:C:1963:1) (Reference for a preliminary ruling from the Tariefcommissie, the Netherlands); of 15 July 1964, *Costa* (6/64, EU:C:1964:66) (Reference for a preliminary ruling from the Giudice conciliatore di Milano, Italy); and of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49) (Reference for a preliminary ruling from the Pretura di Susa, Italy).

standard that applies independently of the level at which jurisdiction is exercised in a national legal system. An assessment as to whether those fundamental requirements are met thus requires an examination of all relevant factors, be they of a systemic and/or an individual nature.

B. First question

47. The first question seeks to establish whether the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, must be interpreted to mean that an ordinary court is a 'tribunal established by law' where a judge in a formation seised of a case was appointed under a procedure where: (a) the opinion of the assembly of judges on candidates' suitability was disregarded, contrary to national law or, following a change in national law, an opinion on a candidate's suitability was given by the college of the court composed primarily of individuals appointed by the Minister for Justice; (b) candidates were appointed to posts on the basis of a KRS resolution; and (c) the participants in the competition had no right of appeal to a court or tribunal within the meaning of the aforecited provisions of EU law. [41]

48. It follows from the Court's case-law, as developed in the light of that of the European Court of Human Rights ('the ECtHR'), that the procedure to appoint judges is an inherent element of the concept of a 'tribunal established by law', as that procedure has fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law. [42] In the judgment in *Getin Noble Bank*, [43] the Court recalled that an irregularity in the appointment of judges infringes the requirement that a tribunal be established by law, particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion, thereby undermining the integrity of the outcome of the appointment process and giving rise to a reasonable doubt in the minds of individuals as to the independence and impartiality of the judge or judges concerned. That is the case where fundamental rules that form an integral part of the establishment and functioning of that judicial system are at issue. Not every error in the procedure to appoint a judge necessarily casts doubts on his or her independence and impartiality and, accordingly, on whether a formation which includes that judge is, as a matter of EU law, an 'independent and impartial tribunal previously established by law'.

49. To reach a finding that there has been a breach of the requirement of a tribunal previously established by law and the consequences thereof requires an overall assessment of a number of factors which, taken together, give rise to reasonable doubts as to the independence and impartiality of the judges sitting on that tribunal. [44] It is therefore necessary to examine whether

[41] The Ombudsperson considers that the three factors the referring courts describe constitute a serious erosion of the rule of law in Poland since, as a result, judges are no longer appointed to the ordinary courts in accordance with Polish law, Article 19(1) TEU or Article 6(1) ECHR. This leads to the perception that courts are neither independent nor impartial. A court may thus, in the light of the direct effect of Article 19(1) TEU and the principle of the primacy of EU law, exclude a judge appointed pursuant to such an irregular procedure from ruling on cases in fields covered by EU law.

[42] 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 57 and 74 and the case-law cited). In its judgment of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418, §§ 231 and 233), the ECtHR held that the right to a 'tribunal established by law' guaranteed in Article 6(1) ECHR constitutes an independent right which is very closely related to the guarantees of 'independence' and 'impartiality' within the meaning of that provision. That court also held that the process of appointing judges necessarily constitutes an inherent element of the concept of a 'tribunal established by law' within the meaning of Article 6(1) ECHR (judgment of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418, §§ 227 and 232).

[43] Judgment of 29 March 2022 (C-132/20, EU:C:2022:235, paragraphs 122 and 123 and the case-law cited).

[44] The guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal 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 of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 53).

the substantive conditions and procedural rules that govern the appointment procedures in question 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 upon their appointment. The Court has held that those conditions and procedural rules should be drafted in such a way so as to preclude not only any direct influence, in the form of instructions, but also any types of indirect influence that are equally liable to have an effect on the decisions of the judges concerned. [45]

50. The requests for a preliminary ruling and the questions referred raise concerns of a general or systemic nature. [46] They relate not only to the procedure that led to the appointment of Judges A.Z and A.T. to the Sąd Okręgowy w Katowicach (Regional Court, Katowice) and the Sąd Okręgowy w Krakowie (Regional Court, Kraków) respectively but by implication to the procedures for the appointment of many other judges to the ordinary courts. There is nothing to indicate that the procedures that led to the appointment of Judges A.Z. and A.T. were markedly different from those used to make other recent appointments to the ordinary courts [47] or that those judges acted in an inappropriate or improper manner. In that regard, it may be observed that both Judge A.Z. and Judge A.T. have functioned as judges of the ordinary courts since their appointment in 1996 and 2009 respectively. The present proceedings do not call into question the legality of the procedures that led to their initial appointments as judges. Moreover, their professional qualifications and experience, and thus their aptitude to perform their new functions in the Sąd Okręgowy w Katowicach (Regional Court, Katowice) and the Sąd Okręgowy w Krakowie (Regional Court, Kraków), are not at issue.

51. It is settled case-law that the three factors raised by the referring courts, as set out in point 47 of the present Opinion, must first be assessed individually before their cumulative or overall effect can be assessed. Although one or other of the factors to which the referring courts refer may not, taken individually, undermine the requirements the Court has identified in the second subparagraph of Article 19(1) TEU, when taken together and assessed in the context of the conduct of that appointment procedure, those factors may cast doubt on the legitimacy of that procedure and its compliance with those requirements. [48]

52. For the sake of convenience I shall first examine the second factor, concerning the participation of the KRS in the appointment procedures.

1. Second factor

53. According to the referring courts, the KRS in its current composition does not comply with its constitutional role to defend the independence of judges and courts. [49] In that regard, they make extensive reference to the changes in the composition of the KRS and its role in the appointment procedure since 2018. [50]

[45] Judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraphs 55 and 57). See also the *Simpson* judgment (paragraphs 57 and 71).

[46] The Commission observes that, since 2018, approximately 1 360 of the 10 000 judges of the ordinary courts in Poland have been appointed on the basis of resolutions of the KRS in its new, modified composition.

[47] Save perhaps for the behaviour of the President of the Sąd Apelacyjny w Katowicach (Court of Appeal, Katowice), as outlined in point 14 of the present Opinion.

[48] See judgment of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535, paragraph 57).

[49] See Articles 179 and 186 of the Constitution of the Republic of Poland.

[50] Point 210 of my Opinion in Case C-204/21, *Commission* v *Poland* (*Independence and private life of judges)*, contains an overview of the restructuring of the KRS.

54. It is settled case-law that Article 19(1) TEU precludes national provisions relating to the organisation of justice which reduce, in the Member State concerned, the protection of the value of the rule of law, in particular guarantees of judicial independence. In that regard, the Court has stated that the reinforced influence of the legislature and the executive on the selection of the members of the KRS since 2018 gives rise to legitimate and serious doubts as to its independence, its role in the appointment of judges and, consequently, the independence of the judges so appointed and of the courts on which they sit.[51] The Court has also held that, in the light of Article 179 of the Constitution of the Republic of Poland, the KRS has a decisive role in the appointment of judges to the Sąd Najwyższy (Supreme Court).[52] It is clear from the requests for a preliminary ruling that the KRS plays a similarly decisive role in the procedure for the appointment of judges to the ordinary courts.

55. Despite this regression in the protection of the rule of law since 2018, the Court has stated that the involvement of a body such as the KRS[53] in the procedure to appoint judges does not, in itself, give rise to any doubt as to the independence of the judges appointed under that procedure. That situation may be different where the participation of a body such as the KRS, combined with other relevant factors and the conditions under which the selection of judges was made, leads to such doubts being raised.[54] That assessment applies equally to the requirement of prior establishment by law raised in the present proceedings, notably since the KRS is the guardian of the independence of the courts and judges pursuant to Article 186 of the Constitution of the Republic of Poland.

2. First factor

56. The factual circumstances in Case C-181/21 and Case C-269/21 differ with regard to the application of the first factor, relating to the lack of participation of a judicial self-governing body in the appointment procedure.

57. The request for a preliminary ruling in Case C-181/21 indicates that, at the relevant time, Polish law expressly provided for the participation of an assembly of judges in the appointment procedure.[55] In addition, the referring court stated that the assembly of judges had the exclusive power to initiate the procedure before the KRS and that its participation in the appointment procedure of judges was fundamental[56] in the light of the principle of the separation of powers under the Constitution of the Republic of Poland.[57] It considers that the exclusion of the participation of the assembly of judges thus renders the appointment procedure incompatible with the national legal and constitutional order thereby resulting in the unlawful composition of the relevant court as a matter of Polish law.

[51] See judgment of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235, paragraph 127 and, in particular, the case-law cited). See also judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596, paragraphs 104 to 108).

[52] Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 126) ('the *A.B.* judgment').

[53] Which is, for the most part, made up of members chosen by the legislature.

[54] 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 75 and the case-law cited).

[55] See Article 58(2) of the Law on the organisation of the ordinary courts.

[56] Both referring courts describe the opinion of the assembly of judges as the '*sine qua non*' of a valid appointment procedure under national law.

[57] The referring court emphasises that this is particularly the case since the KRS no longer represents the judicial branch, as per the requirement of Article 179 and Article 186(1) of the Constitution of the Republic of Poland.

58. It appears from the request for a preliminary ruling in Case C-181/21 that the assembly of judges temporarily abstained from issuing an opinion on the candidates before it due to its concerns about the status of the KRS. The appointment procedure proceeded notwithstanding that abstention and the reasons therefor. While the assembly of judges was thus not excluded from the appointment procedure but rather abstained from giving its opinion, it appears, subject to verification by the referring court that, notwithstanding the somewhat open-ended nature of that abstention and any consequential delay for judicial appointments, that at the relevant time it was contrary to national law to proceed with an appointment procedure without having ascertained the views of the assembly of judges. There is no indication in the file before the Court that any legal action was or could have been taken with a view to lawfully dispensing with the assembly's opinion or that there was any urgency that required the immediate appointment of judges without awaiting the delivery of that opinion.

59. It is settled case-law that the participation of a body, such as an assembly of judges, in the judicial appointment process may, in principle, contribute to making that process more objective, provided always that that body is itself sufficiently independent of the legislature and the executive and of the authority to which it is required to deliver its opinion.[58] The circumstances in which the assembly of judges in Case C-181/21 abstained from issuing an opinion and the actions of the President of the Sąd Apelacyjny (Court of Appeal), who presides that assembly and was appointed by the Minister for Justice, are capable of giving rise to concern. In that regard, I consider the actions of the President of the Sąd Apelacyjny (Court of Appeal), who acted contrary to the position of the relevant assembly, to be unsatisfactory, since they potentially expose that stage in the appointment process to criticism due to a possible perception on the part of the public of unlawful executive interference. In the judgment in *Getin Noble Bank*[59] the Court recalled that the term 'established by law' reflects the need to ensure that the organisation of the judicial system does not depend on the discretion of the executive, but that it is regulated by law emanating from the legislature. By the time the appointment procedure in Case C-181/21 was under way, however, the role of the assembly of judges appears to have been marginalised due to the decisive role of the KRS in the appointment process.[60] For that reason, I do not think that the first factor, viewed on its own, is sufficiently serious to call into question the legality of the judicial appointment at issue in Case C-181/21. Nevertheless, that is ultimately a matter for the referring court to decide.

60. It is clear from the request for a preliminary ruling in Case C-269/21 that, following an amendment to the law,[61] an opinion of the relevant assembly of judges on candidates was no longer required at the time of the appointment procedure under consideration. The referring court indicated that the law was amended due to the practice of assemblies of judges abstaining from issuing opinions on candidates. The college of the relevant court gave its opinion on the sole candidate in the procedure – Judge A.T. – as the Amending Law required, and that aspect of the procedure thus complied with Polish law. The referring court considers that the college, which consists of the presidents of the courts in question, half of whom are appointed by the Minister for

[58] 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, paragraphs 136 to 138 and the case-law cited), and 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, paragraph 149).

[59] Judgment of 29 March 2022 (C-132/20, EU:C:2022:235, paragraph 121).

[60] The *A.B.* judgment (paragraph 126). See also, 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 75 and the case-law cited).

[61] With effect from 14 February 2020, the Amending Law repealed paragraph 2 of Article 58 of the Law on the organisation of the ordinary courts. The Polish Government represents, inter alia, that that legislative reform was intended to ensure that an assembly of judges could no longer block the appointments procedure. An optional consultative procedure was established which, it is asserted, ensures a broader discussion on the merits of candidates for judicial posts.

Justice,[62] has ceased to be a judicial self-governing body. The Amending Law thereby removed judicial self-governing bodies from the appointment process.[63] According to the referring court, that removal is contrary to the Constitution of the Republic of Poland and the principle of the separation of powers such that a court that consists of a judge appointed without the participation of such bodies is irregularly composed. The referring court adds that the absence of self-governing judicial bodies is particularly detrimental as the KRS in its post-2018 composition no longer acts as a judicial self-governing body.

61. As for the participation of the college of the relevant court in the appointment procedure, it follows from the Court's judgment in *Land Hessen*[64] that the fact that the Minister for Justice selects half of the members of such a body does not, in itself, give rise to a lack of compliance with the requirements of the second subparagraph of Article 19(1) TEU.

62. It is clear from the request for a preliminary ruling in Case C-269/21 that the diminished role of the assembly of judges and the participation of the college of the relevant court in the judicial appointment procedure is closely linked to the enhanced role of the KRS in that procedure since 2018, thereby constituting a further regression in the protection of the rule of law in Poland.[65] Nonetheless, pursuant to the Constitution of the Republic of Poland, the KRS is the guardian of the independence of courts and judges, and not any assembly of judges or court college. Given that it is evident from the request for a preliminary ruling that the diminished role of the assembly of judges in the appointment process and the role of the college of the relevant court is part of an evolving legislative strategy operated in tandem with the restructuring of the KRS and its enhanced role in the appointment process, since 2018 in particular, those factors should be assessed together. In the light of the Court's judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*[66] on the KRS and its decisive role in the appointment process since 2018, thus prior to the entry into force of the Amending Law, I consider that the first factor does not as such render invalid the appointment procedure questioned in Case C-269/21. That is, again, ultimately a matter for the referring court to decide.

3. Third factor

63. The third factor of the first question and the second question are linked since they both involve the right of unsuccessful candidates to challenge a procedure leading to the appointment of judges to the ordinary courts before a court that complies with the requirements laid down in the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter.[67]

62 The vote of the President of the Sąd Okręgowy (Regional Court) prevails in the event of a tie.

63 The Commission observes that the role of assemblies of judges has not been removed but has been greatly diminished.

64 Judgment of 9 July 2020 (C-272/19, EU:C:2020:535, paragraphs 55 and 56).

65 The Court has stated that compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value given concrete expression by, inter alia, Article 19 TEU. The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented by refraining from adopting rules that would undermine judicial independence (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraphs 63 and 64).

66 Judgment of 22 February 2022 (C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paragraph 75 and the case-law cited).

67 The Ombudsperson also treats these matters together. It considers that the Polish legislature has adopted a series of measures which ensure that appointments of judges to the ordinary courts are not subject to effective judicial review even where there has been a manifest breach of the law. The Ombudsperson refers to three factors: first, the members of the Extraordinary Chamber were nominated by the KRS and the procedure leading to their appointment was not subject to judicial review; second, the legality of the appointment of a judge or of his or her authority to carry out judicial functions is not subject to judicial review since the adoption of the Amending Law; and third, the Extraordinary Chamber has exclusive jurisdiction to review the independence of judges.

64. As regards the third factor of the first question, the referring courts state that candidates for judicial appointment to the ordinary courts have no right to appeal to a court that fulfils the requirements laid down by the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter. In that regard, they observe that the Extraordinary Chamber, which has jurisdiction to review KRS resolutions in respect of judicial appointments pursuant to Article 26(1) of the amended Law on the Supreme Court, does not comply with those requirements.

65. The referring courts also observe that the appointment of new judges to the Sąd Najwyższy (Supreme Court), including to its Extraordinary Chamber, is vitiated as (a) the Prime Minister did not countersign the act initiating the appointment as required by Article 144(2) of the Constitution of the Republic of Poland; (b) the KRS did not examine the applications but instead conducted a superficial evaluation of candidates on the basis of a small number of documents, mostly submitted by the candidates themselves; (c) the political interest and influence of the executive in the selection process was evident as the KRS proposed only those candidates who had the support of the government; (d) the KRS resolution proposing the appointment of judges to the Sąd Najwyższy (Supreme Court) was appealed before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) by some unsuccessful candidates and was thus not legally binding. Despite the latter court suspending a number of KRS resolutions, the President of the Republic appointed the candidates the KRS had proposed. Those individuals in turn accepted the appointment knowing that the appointment procedure had been suspended. These facts affect both the professional competence and the moral integrity of the persons concerned. And, finally, the process of appointing judges to the Sąd Najwyższy (Supreme Court) was not subject to effective judicial review, either before or after the President of the Republic appointed judges to that court. [68]

66. Despite the Sąd Najwyższy (Supreme Court) finding, based on the judgment in *A. K.*, [69] that those judges' rulings are invalid, the Extraordinary Chamber continues to rule on cases. Moreover, according to the referring courts, since the adoption of its resolution of 8 January 2020, [70] the Extraordinary Chamber does not examine whether the requirement of prior establishment by law pursuant to the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, has been respected in cases coming before it. [71] The referring courts thus consider that the Extraordinary Chamber's procedure to review KRS resolutions is ineffective. In the absence of an effective judicial remedy before the Extraordinary Chamber in the event of doubts being cast on the propriety of the procedure to appoint judges to the ordinary courts, those courts are not established in accordance with law.

67. By their second question, the referring courts ask whether the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, must be interpreted as precluding the exclusive jurisdiction of the Extraordinary Chamber, composed only of persons appointed in the manner outlined in the first question, from reviewing the lawfulness of judicial appointments to the ordinary courts. According to the referring courts, pursuant to Article 26(2) of the amended Law on the Supreme Court, the Extraordinary Chamber has exclusive jurisdiction to hear applications on the 'exclusion' of judges or on the designation of the courts before which

[68] See the *A.B.* judgment.

[69] Judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982).

[70] See Ref. I NOZP 3/19, which has the force of a 'principle of law'.

[71] The judgment of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235, paragraph 48), gives further explanation of that resolution.

proceedings must be conducted that involve complaints alleging a lack of independence of a court or a judge. Article 26(3) of the amended Law on the Supreme Court nonetheless provides that a request pursuant to Article 26(2) thereof shall not be examined if it concerns the establishment or the assessment of the legality of the appointment of a judge or of his or her authority to carry out judicial functions. The referring courts thus consider that not only does the Extraordinary Chamber itself fail to comply with the requirement of prior establishment by law but also that it does not examine questions as to whether another court complies with that requirement.[72] The referring courts thus consider that they are required to set aside Article 26(2) and (3) of the amended Law on the Supreme Court in order to ensure the effectiveness of EU law. The setting aside of those provisions of national law does not, however, resolve the question of the procedural steps to be taken by a court in the situation described in the first question to ensure the effectiveness of EU law. The referring courts therefore ask whether the provisions of national law relating to the automatic exclusion of judges (*iudex inhabilis*)[73] should apply by analogy, thereby permitting a judge to exclude, of his or her own motion, a judge who was appointed in such a manner to an ordinary court from hearing a case.[74]

68. Subject to verification by the referring courts, it appears that, prior to the entry into force of the Amending Law on 14 February 2020, resolutions of the KRS in respect of the appointment of judges to the ordinary courts could be challenged before the Extraordinary Chamber pursuant to Article 44(1) of the Law on the KRS and Article 26(1) of the amended Law on the Supreme Court.

69. As points 93 to 111 of my Opinion in Case C-204/21, *Commission* v *Poland* (*Independence and private life of judges*) indicate, the conferral of exclusive jurisdiction on the Extraordinary Chamber to rule on the matter of the independence of a court, a formation or a judge pursuant to Article 26(2) of the amended Law on the Supreme Court does not in principle infringe, inter alia, the second subparagraph of Article 19(1) TEU and Article 47 of the Charter unless that provision of national law and the procedures and rules on jurisdiction laid down therein undermine the full effectiveness of those provisions of EU law and the primacy of EU law. In my view, that analysis applies by analogy to Article 44(1) of the Law on the KRS and to Article 26(1) of the amended Law on the Supreme Court. I therefore consider that the conferral of exclusive jurisdiction on the Extraordinary Chamber pursuant to Article 44(1) of the Law on the KRS and Article 26(1) and (2) of the amended Law on the Supreme Court is not, in principle, contrary to EU law.

70. Although Article 44(1) of the Law on the KRS and Article 26(1) of the amended Law on the Supreme Court appear to remain in force, the text, inter alia, of Article 26(3) of the amended Law on the Supreme Court following the entry into force of the Amending Law explicitly prohibits the Sąd Najwyższy (Supreme Court), including its Extraordinary Chamber, from establishing or assessing the legality of the appointment of a judge. It also prohibits that court from establishing or assessing the power to exercise judicial functions that derives from that

[72] Paragraph 84 of the request for a preliminary ruling in Case C-181/21 and paragraph 107 of the request for a preliminary ruling in Case C-269/21 state, in respect of Article 26(2) and (3) of the amended Law on the Supreme Court, that 'the questions relating to dispelling the referring court's doubts set out in the grounds of the first question come within [the Extraordinary Chamber's jurisdiction which] does not itself satisfy the requirements of a tribunal established by law and raises justified concerns as to its impartiality and independence. Moreover, the procedure before that body cannot have the effect of removing those doubts, since applications which raise those questions are not examined'.

[73] See, for example, Article 48 of the Code of Civil Procedure.

[74] The Polish government claims that such an interpretation is *contra legem*.

appointment.[75] The text of that provision is thus so broad as to sweep away the possibility for the Sąd Najwyższy (Supreme Court) to examine questions as to, inter alia, the prior establishment by law of a court as the *Simpson* judgment[76] requires.

71. It is clear both from the requests for a preliminary ruling and the questions in these cases that the referring courts consider that the Extraordinary Chamber cannot examine any legal objections to the appointment of a judge by the President of the Republic or whether a court is established in accordance with law.[77] Thus, while the Extraordinary Chamber continues ostensibly[78] to have power to review KRS resolutions in respect of judicial appointments to the ordinary courts, the scope of that review has been extensively and, in my view, unlawfully restricted.[79]

72. As regards Case C-269/21,[80] Judge A.T. was appointed to the Sąd Okręgowy w Krakowie (Regional Court, Kraków) on foot of a KRS resolution dated 7 July 2020, thus after the entry into force of Article 26(3) of the amended Law on the Supreme Court. The question in that case as to whether the Extraordinary Chamber complies with the requirements of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, is moot since that court had no jurisdiction to review the relevant KRS resolution as a matter of national law in order to establish the legality of the appointment of a judge or the power to exercise judicial functions that derives from that appointment.

73. It is therefore necessary to assess whether the absence of effective judicial review of KRS resolutions that led to the appointment of judges to the ordinary courts, coupled with the decisive role the KRS plays in the appointment procedure and the diminished role of the assemblies of judges is such as to give rise to reasonable doubt in the minds of individuals as to the imperviousness of a judge such as A.T. to external factors and his or her neutrality with respect to the interests before him or her.

[75] As my Opinion in Case C-204/21, *Commission* v *Poland* (*Independence and private life of judges)*, indicates in points 140 and 141, the text of that provision is not, on its face, limited to preventing a court from having jurisdiction to strike down, *erga omnes*, the act of appointment of a judge by the President of the Republic.

[76] See paragraph 55. See, by analogy, points 138 to 147 of my Opinion in Case C-204/21, *Commission* v *Poland* (*Independence and private life of judges)*.

[77] At the hearing, the Polish Government confirmed that it is not possible under Polish law for courts to examine whether a court is established in accordance with the law or the legality of a judicial appointment.

[78] This matter is subject to verification by the referring courts. In paragraph 104 of its written observations, the Polish Government referred to a number of statistics on the review of KRS resolutions on the appointment of judges to the ordinary courts.

[79] Even were one to accept that Article 44(1) of the Law on the KRS and Article 26(1) of the amended Law on the Supreme Court permit the Extraordinary Chamber to review KRS resolutions, the co-existence of those provisions with Article 26(3) of the amended Law on the Supreme Court following the entry into force of the Amending Law creates considerable legal uncertainty, particularly as to the scope of that review. Article 26(3) of the amended Law on the Supreme Court thus undermines the efficacy of the former provisions of national law, contrary to the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter. See points 133 to 147 of my Opinion in Case C-204/21, *Commission* v *Poland* (*Independence and private life of judges)*.

[80] Which, for the sake of convenience, I shall address first.

74. It follows from the *A.B.* judgment [81] that, given that the KRS does not offer sufficient guarantees of independence, it is necessary to afford unsuccessful candidates for judicial posts the possibility to challenge KRS resolutions where all of the relevant factors characterising the appointment process are such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed under that process. [82]

75. In Case C-269/21, the referring court has not put forward any specific evidence, either of a systemic nature, other than the three factors to which it refers, or of an individual nature to substantiate the existence of legitimate and serious doubts in the minds of individuals as to the independence and impartiality of the judges appointed to the ordinary courts under the appointment procedure in question, including Judge A.T. [83]

76. Subject to verification by the referring court, I do not consider that the three factors it refers to are by themselves sufficient to call into question the procedure that led to the appointment of a judge, such as Judge A.T., to the ordinary courts pursuant to the requirements of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter. Other than the elements the Court relied upon in paragraphs 128, 129 and 136 of the *A.B.* judgment, the only new element in Case C-269/21 is the absence of judicial self-governing bodies from the appointment procedure. In the light of the admittedly decisive role that the KRS plays in the appointment procedure, I do not consider that this additional factor is of itself sufficient to call into question the procedure that led to Judge A.T.'s appointment. [84]

77. In Case C-181/21, Judge A.Z. was appointed by the President of the Republic on 26 November 2020 on foot of a KRS resolution dated 7 May 2019. It would therefore appear, again subject to verification by the referring court, that the KRS resolution in question could, in principle, have

[81] See paragraphs 128 to 136.

[82] Paragraph 129 of the *A.B.* judgment holds that 'the fact that it may not be possible to exercise a legal remedy in the context of a process of appointment to judicial positions of a national supreme court may, in certain cases, not prove to be problematic in the light of the requirements arising from EU law, in particular the second subparagraph of Article 19(1) TEU'. The Court has, however, ruled on numerous occasions that effective judicial review of KRS proposals to appoint judges – including, at the very least, an examination as to whether there was an *ultra vires* or improper exercise of power, error of law or manifest error of assessment – is necessary where systemic doubts arise in the minds of individuals as to the independence and impartiality of the judges appointed under such a procedure (the *A.B.* judgment, paragraphs 128 to 136 and the case-law cited).

[83] See, by analogy, judgment of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235, paragraphs 129 to 131). By contrast, see judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596, paragraphs 89 to 94 and 104 to 107), where the Court described a number of factors, including but not limited to the decisive role of the KRS in the appointment of the members of the Disciplinary Chamber, as giving rise to reasonable doubts in the minds of individuals as to that body's independence and impartiality. The Court referred, inter alia, to the fact that the creation of the Disciplinary Chamber *ex nihilo* with exclusive jurisdiction to hear certain disciplinary cases coincided with the adoption of national legislation that undermined the irremovability and the independence of the Supreme Court judges. It observed that the Disciplinary Chamber enjoyed a particularly high degree of organisational, functional and financial autonomy within the Supreme Court in comparison with other chambers of that court. The remuneration of judges of the Disciplinary Chamber exceeded by approximately 40% that of judges assigned to the other chambers of the Sąd Najwyższy (Supreme Court) without any objective justification for such preferential treatment being advanced. Moreover, upon its establishment, the Disciplinary Chamber was required to consist exclusively of new judges appointed by the President of the Republic on a proposal from the KRS.

[84] In its *A.B.* judgment (paragraphs 133 to 135 and the case-law cited), the Court relied on other factors including, inter alia, the fact that the appointments to the Sąd Najwyższy (Supreme Court) took place in the context of a lowering of the retirement age of judges and the corresponding expectation of many new positions becoming vacant, which undermined the irremovability and independence of judges of the Sąd Najwyższy (Supreme Court).

been challenged before the Extraordinary Chamber [85] as that resolution predates both the entry into force of the Amending Law [86] and the resolution of the Extraordinary Chamber of 8 January 2020. [87]

78. As in Case C-269/21, the referring court has not put forward in Case C-181/21 any specific evidence, either of a systemic nature, other than the three factors described in the first question, or of an individual nature to substantiate the existence of legitimate and serious doubts in the minds of individuals as to the independence and impartiality of the judges appointed to the ordinary courts under the appointment procedure in question, including Judge A.Z. Given that, subject to verification by the referring court, I do not consider that the three factors it refers to are by themselves sufficient to call into question the procedure that led to the appointment of Judge A.Z. to the ordinary courts pursuant to the requirements of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, I advise that the question as to whether the Extraordinary Chamber meets those requirements is moot.

VII. Conclusion

79. In the light of the above considerations, I propose that the Court answer the questions posed by the Sąd Okręgowy w Katowicach (Regional Court, Katowice, Poland) and the Sąd Okręgowy w Krakowie (Regional Court, Kraków, Poland) as follows:

The second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, are to be interpreted to mean that

A court does not constitute a 'tribunal established by law' where a judge in the formation was appointed following a procedure in which (a) the opinion of a self-governing judicial body was not heard; (b) candidates were appointed on the basis of a resolution of a body such as the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland); and (c) candidates in the competition could not challenge the appointment procedure before a court which complies with the requirements of EU law and those factors, coupled with all other relevant factors characterising that procedure, are such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed under that process.

[85] In order to establish the legality of the appointment of a judge or the power to exercise judicial functions that derives from that appointment and thus in order to assess whether the appointment procedure complied with the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter.

[86] And thus Article 26(3) of the amended Law on the Supreme Court.

[87] There is no information in the file before the Court as to whether such a challenge was brought. To that extent, the referring court's questions in that regard are a priori hypothetical. It would nonetheless, in principle, be necessary to examine whether the Extraordinary Chamber itself complies with the requirements imposed by the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, as, were it otherwise, candidates could hardly be blamed for not seeking a review of KRS resolutions before it.