Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

29 March 2022 *

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

In Case C-132/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Supreme Court, Poland), made by decision of 18 December 2019, received at the Court on 10 March 2020, in the proceedings

BN,

DM,

EN

v

Getin Noble Bank S.A.,

intervening parties:

Rzecznik Praw Obywatelskich,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, A. Prechal, K. Jürimäe, C. Lycourgos, I. Jarukaitis (Rapporteur), I. Ziemele and J. Passer, Presidents of Chambers, M. Ilešič, T. von Danwitz, A. Kumin and N. Wahl, Judges,

Advocate General: M. Bobek,

* Language of the case: Polish.

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 2 March 2021,

after considering the observations submitted on behalf of:

– the Rzecznik Praw Obywatelskich, by M. Taborowski and P. Filipek,

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

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

after hearing the Opinion of the Advocate General at the sitting on 8 July 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2, Article 4(3), Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU, Article 38 and the first and second paragraphs of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), the third paragraph of Article 267 TFEU as well as Article 7(1) and (2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The request has been made in a dispute between BN, DM and EN, on the one hand and Getin Noble Bank S.A., a bank, on the other, concerning the alleged unfairness of a term in a loan agreement concluded by BN, DM and EN with that bank.

Legal context

European Union law

3 Article 7(1) and (2) of Directive 93/13 provides:

'1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.'

Polish law

The Constitution

4 Article 179 of the Constitution provides:

‘The President of the Republic shall appoint judges, on a proposal of the Krajowa Rada Sądownictwa [(National Council of the Judiciary, Poland) (“the KRS”)], for an indefinite period.’

5 According to Article 180(1) of the Constitution, judges are irremovable.

6 Under Article 186(1) of the Constitution:

‘The [KRS] shall be the guardian of the independence of the courts and of the judges.’

7 Article 187 of the Constitution provides:

‘1. The [KRS] shall be composed of:

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

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

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

…

3. The term of office of the elected members of the [KRS] shall be four years.

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

8 Article 190(1) of the Constitution states:

‘The decisions of the [Trybunał Konstytucyjny (Constitutional Court, Poland)] are binding *erga omnes* and final.’

The Decree Law of 6 February 1928 on the organisation of the ordinary courts

9 The rozporządzenie z mocą ustawy – Prawo o ustroju sądów powszechnych (Decree Law on the organisation of the ordinary courts) of 6 February 1928, in the version in force until 1 September 1985, relevant in the dispute in the main proceedings (Dz. U. of 1964, No 6, item 40; 'the Decree Law of 6 February 1928 on the organisation of the ordinary courts'), provided, in its Article 2:

'In the Polish People's Republic, the administration of justice seeks to protect:

(a) the people's democratic system and its development towards socialism;

…'

10 Pursuant to Article 53 of that decree law, judges of the ordinary courts were appointed by the Rada Państwa (Council of State) of the Polish People's Republic on the proposal of the Minister for Justice.

11 In accordance with Article 57 of that decree law, when taking up office, a judge appointed by the Council of State of the Polish People's Republic would take an oath before the president of the relevant court using the prescribed wording, but would not take a new oath when taking up a new position.

12 The wording of the oath was laid down in dekret o rocie ślubowania ministrów, funkcjonariuszów państwowych, sędziów i prokuratorów oraz funkcjonariuszów służby bezpieczeństwa publicznego (Decree on the swearing-in of ministers, public officials, judges and public prosecutors as well as officials of public security services) of 6 October 1948 (Dz. U. of 1948, No 49, item 370). Under paragraph C of Article 1 of that decree, judges would be sworn in using the following terms:

'I solemnly swear that I will contribute …, in the position of judge that has been entrusted to me, in my field of activity and with all my strength, to consolidating the freedom, independence and power of the democratic Polish State, to which I pledge my everlasting loyalty; I will protect and strengthen the order based on the social, economic and political constitutional principles of the Polish People's Republic; I will resolutely uphold the law, by treating all citizens equally; I will strengthen respect for the law and loyalty towards the democratic Polish State; I will zealously and scrupulously perform the duties pertaining to my position, deliver justice impartially as dictated by my conscience and in accordance with the law, while observing professional secrecy, and be guided, in proceedings, by the principles of dignity, probity and social justice.'

13 Under Article 59(1) of the Decree Law of 6 February 1928 on the organisation of the ordinary courts, the Council of State of the Polish People's Republic, on the proposal of the Minister for Justice, would remove a judge if the latter did not provide every assurance that he or she will properly perform the duties incumbent on a judge.

The Law of 20 June 1985 on the organisation of the ordinary courts

14 The ustawa – Prawo o ustroju sądów powszechnych (Law on the organisation of the ordinary courts) of 20 June 1985 (Dz. U. No 31, item 137), in the version in force until 29 December 1989, provided, in its Article 6(2):

'Judges shall be appointed and removed by the Council of State [of the Polish People's Republic] on the proposal of the Minister for Justice.'

15 Article 59 of that law was worded as follows:

'1. Upon taking office, the judge shall take the following oath before the Minister for Justice:

"I solemnly swear that I will contribute, in the position of judge that has been entrusted to me, in my field of activity and with all my strength, to consolidating the freedom, independence and development in all fields of the Polish People's Republic, to which I pledge my everlasting loyalty; I will protect its political, social and economic structure, safeguard the workers' achievements, collective property as well as the rights of citizens and their interests protected by law; I will ensure the people's rule of law and consolidate the citizens' awareness of the law; I will zealously and scrupulously perform the duties pertaining to my position, deliver justice impartially as dictated by my conscience and in accordance with the law, while observing State secrets and professional secrecy, and be guided, in proceedings, by the principles of dignity, probity and social justice."

…

3. A judge who takes up a new position shall not take a new oath; this shall not apply to the appointment to the position of judge of the Supreme Court [of the Polish People's Republic].'

16 Article 61 of that law specified:

'1. The Council of State [of the Polish People's Republic], on the proposal of the Minister for Justice, shall remove a judge if the latter did not provide every assurance that he will properly perform the duties incumbent on a judge. Before submitting its proposal, the Minister for Justice shall hear the judge's explanations, unless this is impossible. …

…

3. A judge shall lose the right to rule as soon as the resolution concerning his removal is notified to him.'

The Law of 12 May 2011 on the KRS

17 Article 11(1) to (5) of the ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011 (Dz. U. No 126 of 2011, item 714; 'the Law of 12 May 2011 on the KRS') provided:

'1. The general assembly of judges of the Supreme Court shall choose from among the judges of that court two Council members.

2. The general assembly of judges of the Supreme Administrative Court, together with the representatives of the general assemblies of the regional administrative courts shall choose from among the judges of the administrative courts two Council members.

3. The assembly of representatives of the assemblies of judges of the appeal courts shall choose from among its members two Council members.

4. The assembly of representatives of the general assemblies of judges of the national courts shall choose from among its members eight Council members.

5. The assembly of judges of the military courts shall choose from among its members one Council member.'

18 Article 12 of that law was worded as follows:

'1. The general assemblies of judges of the regional administrative courts shall choose from among their members two representatives.

2. The representatives of the general assemblies of judges of the administrative courts shall be chosen at the latest in the month preceding the expiry of the term of office of the Council members, chosen from among the judges of the administrative courts. Representatives shall be chosen for a term of four years.'

19 Article 13 of that law provided:

'1. The assemblies of judges of the appeal courts shall chose the representatives of the assemblies of judges of the appeal courts from among their members for one fifth of the number of judges of a given appeal court.

2. The general assemblies of judges of the regional courts shall chose the representatives of the general assemblies of judges of the regional courts from among their members for one fiftieth of the number of judges of a given regional court.

3. The representatives referred to in paragraphs 1 and 2 shall be chosen at the latest in the month preceding the expiry of the term of office of the Council members, chosen from among the judges of the ordinary courts. Representatives shall be chosen for a term of four years.

…'

The Law on the KRS

20 The Law of 12 May 2011 on the KRS was amended, inter alia, 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) and by the ustawa o zmianie ustawy – Prawo o ustroju sád ó w powszechnych oraz niektórych innych ustaw (Law amending the Law on the organisation of the ordinary courts and certain other laws) of 20 July 2018 (Dz. U. of 2018, item 1443) ('the Law on the KRS').

21 Article 9a of the Law on the KRS states:

‘1. The [Lower Chamber of the Polish Parliament] shall elect, from among the judges of the [Sąd Najwyższy (Supreme Court)] and of the ordinary, administrative and military courts, 15 members [of the KRS] for a collective term of four years.

…’

22 Article 37(1) of that law provides:

‘If several candidates have applied for a single position of judge, [the KRS] shall examine and evaluate all the applications lodged together. In that case, [the KRS] shall adopt a resolution including its decisions for the purposes of putting forward one proposal for appointment to the position of judge in respect of all candidates.’

23 Under Article 44 of that law:

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

1a. In individual cases concerning appointment to the office of judge at the [Sąd Najwyższy (Supreme Court)], an appeal may be lodged with the [Naczelny Sąd Administracyjny (Supreme Administrative Court)]. In those cases, it is not possible to lodge an appeal with the [Sąd Najwyższy (Supreme Court)]. An appeal before the [Naczelny Sąd Administracyjny (Supreme Administrative Court)] may not be based on an allegation that there was an incorrect assessment of the candidates’ fulfilment of the criteria taken into account when making a decision on the presentation of a proposal for appointment to the position of judge at the [Sąd Najwyższy (Supreme Court)].

1b. Unless all the participants in the procedure have challenged the resolution referred to in Article 37(1) in individual cases concerning appointment to the office of judge at the [Sąd Najwyższy (Supreme Court)], that resolution becomes final in the part comprising the decision to present the proposal for appointment to the position of judge at the [Sąd Najwyższy (Supreme Court)] and in the part comprising the decision not to present the proposal for appointment to the position of judge at that court for participants in the procedure who did not lodge an appeal.

2. Appeals shall be lodged through the offices of the President [of the KRS], within two weeks of notice of the resolution with its statement of reasons. …

…

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

The Law on the Civil Code

24 Article 385[1](1) of the ustawa – Kodeks cywilny (Law on the Civil Code) of 23 April 1964 (Dz. U. of 1964, No 16), in its version applicable to the dispute in the main proceedings, provides:

'The terms of a contract concluded with a consumer which have not been individually negotiated shall not be binding on the consumer if his rights and obligations are set forth in a way that is contrary to good practice and grossly infringes his interests (unlawful terms). This provision shall not apply to terms setting out the principal obligations of the parties, including price or remuneration, so long as they are worded clearly.'

The Code of Civil Procedure

25 Under Article 367 of the ustawa – Kodeks postępowania cywilnego (Law on the Code of Civil Procedure) of 17 November 1964, in its version applicable to the dispute in the main proceedings ('the Code of Civil Procedure'):

'1. Appeals against the judgment of a court of first instance may be brought before a court of second instance.

2. Appeals brought against the judgment of a district court shall be examined by the regional court, and appeals brought against a judgment of the regional court at first instance shall be examined by [the Sąd Apelacyjny (Court of Appeal, Poland)].

3. 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.'

26 Article 379 of that code provides:

'Proceedings shall be invalid:

…

(4) 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 …'

27 Article 398[3] of that code states:

'1. A party may base an appeal in cassation on the following grounds:

…

(2) breach of procedural provisions where that defect may have had a real impact on the outcome of the dispute.'

28 Under Article 398[13](1) of the Code of Civil Procedure, 'the [Sąd Najwyższy (Supreme Court)] shall examine the appeal in cassation within the scope of the form of order sought and the grounds of appeal; however, within the scope of the form of order sought, it shall take into consideration of its own motion the invalidity of the proceedings.'

29 In accordance with Article 398[15] of that code:

‘1. If it upholds the appeal in cassation, the [Sąd Najwyższy (Supreme Court)] shall annul the judgment under appeal in its entirety or in part and shall refer the case back to the court that delivered the judgment or another court at the same level for further examination. …

2. Where the case is referred back for further examination, the court shall examine the case in a different formation.’

30 Article 401 of the Code of Civil Procedure states:

‘It is possible to request the reopening of the procedure for invalidity:

(1) 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.

…’

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

31 By request of 28 February 2017, brought on 3 March 2017 before the Sąd Okręgowy w Świdnicy (Regional Court, Świdnica, Poland), BN, DM and EN claimed that Getin Noble Bank should be ordered to pay them jointly and severally the sum of 175 107.10 zlotys (PLN) (approximately EUR 39 485), together with statutory default interests, relying on the unfair nature of the loan indexation mechanism contained in a mortgage loan agreement indexed to a foreign currency, namely the Swiss franc (CHF), and that of the package insurance clause in the event of a refusal to establish a mortgage during the first three months of the loan.

32 By judgment of 21 August 2018, that court ordered Getin Noble Bank to pay the applicants in the main proceedings a total of PLN 16 120.12 (approximately EUR 3 634), together with statutory default interests, and found that the contractual terms of the loan agreement at issue in the main proceedings which allowed that bank to determine the exchange rate of the Swiss franc in an arbitrary manner, rather than take account of the average rate determined by the Narodowy Bank Polski (National Bank of Poland) were unlawful, without, however, invalidating the indexation mechanism in its entirety.

33 The applicants in the main proceedings brought an appeal against that judgment before the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław, Poland). By judgment of 28 February 2019, that court confirmed the said judgment.

34 The applicants in the main proceedings brought an appeal in cassation against that judgment before the referring court, the Sąd Najwyższy (Supreme Court), by which they claimed, in essence, that the said judgment infringes Article 385[1] of the Law on the Civil Code, in its version applicable to the dispute in the main proceedings, in that it does not recognise that the unfairness of the indexation clause contained in the agreement at issue in the main proceedings renders the entire indexation mechanism contained in that agreement inapplicable between the parties.

35 As part of the examination of admissibility of that appeal, the referring court, composed of one judge of the Civil Chamber of the Sąd Najwyższy (Supreme Court, Poland), notes that, pursuant to Article 7(1) and (2) of Directive 93/13, Member States must provide for the possibility of bringing proceedings, whether administrative or judicial, to determine whether contractual terms are unfair and that Polish law provides that such an action is judicial in nature. Consequently, the referring court is of the view that the national body which examines the unfairness of contractual terms must satisfy all the conditions to be considered to be a 'court or tribunal' within the meaning of EU law.

36 In that regard, the referring court notes that the panel of judges of the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław) who delivered the judgment of 28 Feburary 2019 which is under appeal before the referring court ('the judgment under appeal') included three judges, namely FO, GP and HK, whose independence could be called in question, given circumstances surrounding their appointments as judges.

37 The referring court explains, first of all, that FO's initial appointment to the position of judge resulted from a resolution of 9 March 1978 of the Council of State of the Polish People's Republic, then that judge was appointed to the position of judge in a Sąd Wojewódzki (regional court, Poland) by resolution of 18 April 1984 of the Council of State of the People's Republic of Poland, and finally he was appointed to the position of judge at the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław) by decision of the President of the Republic of Poland of 23 January 1998, adopted on a proposal of the KRS. As regards GP and HK, they were appointed to the position of judge at the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław) by decisions of the President of the Republic of Poland of 12 March 2015 and 16 April 2012 respectively.

38 The referring court notes that FO was thus appointed to his first position of judge at a time when the Polish People's Republic ('the PPR') was a communist State and considers that his subsequent appointment to the position of judge at the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław) resulted from an earlier decision of bodies that were neither democratic nor impartial. In addition, after the PPR communist regime ended, no review was carried out with regard to whether, for the period during which that regime was in place, the judges appointed by that same regime complied with the principle of judicial independence.

39 The referring court also states that in 1998, when FO was appointed to the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław), not only did the resolutions of the KRS not have to be substantiated but, in addition, they were not open to challenge before the courts.

40 Moreover, the referring court notes that the Trybunał Konstytucyjny (Constitutional Court), in a judgment of 20 June 2017, found that between 2000 and 2018 the KRS did not operate transparently and that the composition of its panels was contrary to the Constitution. According to the referring court, it is at that time that GP and HK were appointed to the office of judge at the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław).

41 In that context, the referring court asks whether, in order to guarantee compliance with the right to effective judicial protection, it is obliged to assess *ex officio* whether the panel of judges of the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław) who delivered the judgment under appeal complies with the requirement of independence and impartiality, despite the constitutional provisions guaranteeing the irremovability of judges.

42 According to the referring court, factual and legal factors in connection with the appointment of a judge should be subject, at each stage of the court proceedings, to examination in order to establish the independence of the court formation to which that judge is attached. Compliance with the requirements of independence and impartiality should thus be assessed *in concreto*, that is to say by taking account of the possible impact on the case under examination of the way in which judges were appointed.

43 The referring court argues that if the question whether a court or tribunal is independent or whether a judge was appointed properly were to be assessed *in abstracto*, namely without examining whether the process for appointing the judge concerned had any impact on the case under examination, this could create the possibility of circumventing the rules on the irremovability of judges, which, generally, are laid down in constitutional provisions. In that regard, the referring court points out that it is in principle impossible in the light of the Constitution and Polish constitutional case-law to challenge a judicial appointment.

44 Thus, according to the referring court, only an examination *in concreto* of the 'individual characteristics' of a judge, such as his or her position ethically, in the context of the assessment of that judge's independence, would safeguard the confidence of individuals in judicial institutions.

45 However, the referring court takes the view that, in the light of the 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), the questions whether a court or tribunal is independent and whether a judge was appointed properly can be assessed only *in abstracto*.

46 In that regard, the referring court states that, by judgment of 5 December 2019, the Sąd Najwyższy (Supreme Court) followed that judgment of the Court of Justice and held, first, that the KRS was not an impartial body independent of the legislature and the executive, and, second, that the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court) was not a court or tribunal within the meaning of EU law or national law.

47 On 23 January 2020, the Civil, Criminal and Labour Law and Social Security Chambers of the Sąd Najwyższy (Supreme Court) adopted, without the participation of the judge constituting the referring court, a joint resolution by which the case-law arising from the judgment of 5 December 2019 mentioned in the preceding paragraph was confirmed.

48 However, that resolution, according to that judge, is incompatible with another resolution, of 8 January 2020, which is also binding, of the Extraordinary Control and Public Affairs Chamber of that court. It follows from that resolution, first, that when the Sąd Najwyższy (Supreme Court) is seised of an action brought against a resolution of the KRS concerning a candidate for a judicial position, it must examine whether the KRS is independent in the light of the 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) and, second, that the Sąd Najwyższy (Supreme Court) can annul such a resolution of the KRS only in two cases, namely, if the applicant shows that the bias of the KRS had an impact on the substance of the said resolution or, where the judge at issue has already been appointed and given the constitutional impossibility of assessing the validity of the instrument of appointment of a judge, if the applicant shows that the court or tribunal in which the judge concerned sits is not impartial and independent.

49 In those circumstances, the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 2, Article 4(3), Article 6(1) and (3) and the second subparagraph of Article 19(1) [TEU] in conjunction with the first and second paragraphs of Article 47 of the [Charter] and the third paragraph of Article 267 TFEU, Article 38 of the Charter and Article 7(1) and (2) of [Directive 93/13] be interpreted as meaning that a body which includes a person appointed to the position of judge for the first or a subsequent time (to a higher court) by a political body within the executive branch of a State characterised by a totalitarian, undemocratic and communist system of power (“the Council of State of the Polish People’s Republic”) at the request of the Minister for Justice of that State, is a duly qualified independent and impartial tribunal within the meaning of EU law, in particular given … the lack of transparency of the appointment criteria, … the possibility that the judge may be removed from office at any time, and the lack of participation in the appointment procedure of … judicial self-government or … suitable public authorities elected through democratic elections, all of which could undermine the confidence which the judiciary should inspire in a democratic society?

(2) Is it relevant for resolving the issue referred to in Question 1 that appointment to the position of judge in subsequent posts (in higher courts) could take place due to the acknowledgement of an appropriate period of work (length of service) and on the basis of an assessment of work in the post to which that person was appointed at least for the first time by the political body referred to in Question 1 and on the basis of the procedure described therein, which could undermine the confidence which the judiciary should inspire in a democratic society?

(3) Is it relevant for resolving the issue referred to in Question 1 that appointment to the position of judge in subsequent posts (in higher courts, not including the Sąd Najwyższy (Supreme Court)) was not conditional upon taking a judicial oath to respect the values of a democratic society, and that when appointed for the first time the person concerned promised to uphold the political system of the communist State and the “people’s rule of law”, which could undermine the confidence which the judiciary should inspire in a democratic society?

(4) Must Article 2, Article 4(3), Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU in conjunction with the first and second paragraphs of Article 47 of the Charter and the third paragraph of Article 267 TFEU, Article 38 of the Charter and Article 7(1) and (2) of Directive 93/13 be interpreted as meaning that a body which includes a person appointed to the position of judge for the first or a subsequent time (to a higher court) in flagrant breach of the constitutional provisions of a Member State of the European Union, since the composition of the body selecting that person as a candidate for subsequent appointment to the position of judge (the Krajowa Rada Sądownictwa (National Council of the Judiciary)) does not comply with the constitution of the Member State, as established by the constitutional court of that Member State, and which could consequently undermine the confidence which the judiciary should inspire in a democratic society, is a duly qualified independent and impartial tribunal within the meaning of EU law?

(5) Must Article 2, Article 4(3), Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU in conjunction with the first and second paragraphs of Article 47 of the Charter and the third paragraph of Article 267 TFEU, Article 38 of the Charter and Article 7(1) and (2) of Directive 93/13 be interpreted as meaning that a body which includes a person appointed to the position of judge for the first or a subsequent time (to a higher court) who was selected as

a candidate for appointment to that office in proceedings before the body which assesses candidates (the National Council of the Judiciary), where those proceedings did not fulfil the criteria of open and transparent rules for the selection of candidates, which could undermine the confidence which the judiciary should inspire in a democratic society, is a duly qualified independent and impartial tribunal within the meaning of EU law?

(6) Must Article 2, Article 4(3), Article 6(3) and the second subparagraph of Article 19(1) TEU in conjunction with the first and second paragraphs of Article 47 of the Charter and the third paragraph of Article 267 TFEU, Article 38 of the Charter and Article 7(1) and (2) of Directive 93/13 be interpreted as meaning that the court of last instance of a Member State of the European Union (the Sąd Najwyższy (Supreme Court)), in order to ensure effective judicial protection as a means of preventing the continued use of unfair terms in contracts concluded by sellers and suppliers with consumers, is obliged to assess *ex officio* at each stage of the proceedings:
   (a) whether the court referred to in Questions 1 and 4 fulfils the criteria of a duly qualified independent and impartial tribunal within the meaning of EU law, regardless of the impact the assessment of the criteria set out in those questions has on the substance of the decision as to whether a contractual term is unfair and, in addition,
   (b) whether the proceedings before the court referred to in Questions 1 and 4 are valid?

(7) Must Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU in conjunction with the first and second paragraphs of Article 47 of the Charter and the third paragraph of Article 267 TFEU, Article 38 of the Charter and Article 7(1) and (2) of Directive 93/13 be interpreted as meaning that the constitutional provisions of a Member State of the European Union concerning the organisation of courts or the appointment of judges which make it impossible to assess the effectiveness of a judicial appointment may, in accordance with EU law, prevent determination of the lack of independence of a court or the lack of independence of a judge sitting in that court by reason of the circumstances referred to in Questions 1 to 5?'

The application for an expedited procedure and the benefit of priority treatment

50 The referring court requested that the Court deal with the present case under an expedited procedure pursuant to Article 105 of the Rules of Procedure of the Court of Justice. In support of that request, it argued that the initiation of such a procedure was justified, in essence, not only in order to assess the validity of the judgment under appeal, but also by the need to establish the permissibility of challenging, in the light of EU law, the constitutional status of many Polish judges and thus to establish the nature and effects of rulings delivered by a court formation including those judges. Furthermore, the referring court claims that such a procedure is justified by the fact that the Court's judgment in the present case would supplement the interpretation of EU law in such a way as to avoid a conflict between the Constitution and EU law, as interpreted in the 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), and the decisions of the Polish courts delivered on the basis of that judgment.

51 Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his or her own motion, the President of the Court may decide, after hearing the Judge-Rapporteur and the Advocate General, that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure where the nature of the case requires that it be dealt with within a short time.

52 It must be borne in mind, in that regard, that such an expedited procedure is a procedural instrument intended to address matters of exceptional urgency. Furthermore, it is also apparent from the Court's case-law that the expedited procedure may not be applied where the sensitive and complex nature of the legal problems raised by a case does not lend itself easily to the application of such a procedure, in particular where it is not appropriate to shorten the written part of the procedure before the Court (judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 103 and the case-law cited).

53 In the present case, by decision of 8 May 2020, the President of the Court, after hearing the Judge-Rapporteur and the Advocate General, refused the request that the present case be determined pursuant to an expedited procedure. Although there is, in principle, no correlation between the degree of difficulty of a case and any urgency in proceeding to judgment, it must be held that the sensitive and complex nature of the legal problems raised by the present case does not lend itself easily to the application of the expedited procedure (see, by analogy, order of the President of the Court of Justice of 18 October 2017, *Weiss and Others*, C-493/17, not published, EU:C:2017:792, paragraph 13). Furthermore, it should be noted that the order for reference was received by the Court almost three months after its delivery, which is an indication that the present case does not concern matters of exceptional urgency.

54 That said, in the light of the arguments put forward by the referring court, the President of the Court decided, on 8 May 2020, that the present case should be given priority pursuant to Article 53(3) of the Rules of Procedure.

The request that the oral part of the procedure be reopened

55 By document lodged at the Court Registry on 29 December 2021, the Polish Government requested that the oral part of the procedure be reopened.

56 In support of that request, that government relied on the fact that, by a decision of 13 December 2020, the Sąd Najwyższy (Supreme Court) annulled a decision of that same court, but in a different formation, on the ground, inter alia, that there was no guarantee that the latter had complied with the standard of independence and impartiality required of the courts. According to that government, the substance of that decision and the consequences flowing from it reinforce the arguments which it has already presented to the Court in the present case and, consequently, should be taken into consideration in the context of that case.

57 In that regard, it should be borne in mind that, in accordance with Article 83 of its Rules of Procedure, the Court may, at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court.

58 In the present case, the Court considers, however, after hearing the Advocate General, that it has, following the written part of the procedure and the hearing which was held before it, all the information necessary in order to rule on the present request for a preliminary ruling. It notes, moreover, that the request of the Polish Government that the oral part of the procedure be reopened does not disclose any new fact which is of such a nature as to have an influence on the decision that the Court is thus called upon to deliver in the present case.

59 The Polish Government does not argue that the decision of 13 December 2020 of the Sąd Najwyższy (Supreme Court) has any bearing on the main proceedings. It merely submits that the grounds set out in that decision 'reinforce the arguments' which it has already presented to the Court in the present case.

60 In those circumstances, there is no need to order the reopening of the oral part of the procedure.

Admissibility of the request for a preliminary ruling

61 The Rzecznik Praw Obywatelskich (Ombudsman, Poland) submits that the request for a preliminary ruling is inadmissible on account of the flaws in the appointment of the judge, constituting the referring court, to the position of judge and the doubts which may legitimately be entertained as to his independence and impartiality.

62 In that regard, the Ombudsman submits, in the first place, that, in the present case, that judge cannot be considered to be a 'court or tribunal' within the meaning of EU law. The nature and seriousness of the flaws in the appointment of the judge constituting the referring court to the position of judge have undermined the effectiveness of the appointment process and, therefore, caused that judge to lose his status as a court or tribunal. Those flaws are such that they do not support the conclusion that that judge is a validly established court satisfying the criterion of a tribunal 'established by law'.

63 In the second place, the Ombudsman claims that the assessment of all the legal and factual circumstances in connection with the process of appointing the judge constituting the referring court does not dispel all reasonable doubt as to the independence and impartiality of that judge.

64 Consequently, according to the Ombudsman, the judge constituting the referring court does not satisfy the two essential criteria for the status of 'court or tribunal' within the meaning of Article 267 TFEU, namely, being established by law and being independent and impartial. Failure to meet those requirements, whether cumulatively or individually, is sufficient for a finding that the referring court is not entitled to refer questions to the Court for a preliminary ruling under the cooperation procedure provided for in Article 267 TFEU.

65 The European Commission, without alleging that the request for a preliminary ruling is inadmissible, observes that the instrument of appointment of the judge constituting the referring court to the Sąd Najwyższy (Supreme Court) was based on a resolution of the KRS of 28 August 2018. Yet, even though the implementation of that resolution was suspended by orders of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 27 September and 8 October 2018, the President of the Republic of Poland nevertheless appointed that judge to the Sąd Najwyższy (Supreme Court). In those circumstances, the Commission considers that there is room for doubt as to whether the said judge satisfies the requirement for a 'tribunal previously established by law' under Article 19(1) TEU and Article 47 of the Charter.

66 In that regard, it should be borne in mind, first of all, that, in accordance with the settled case-law of the Court, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, and therefore to determine whether the request for a preliminary ruling is admissible, the Court takes account of a number of factors, such as, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgments of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 51 and the case-law cited, and of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraph 42).

67 In the present case, the request for a preliminary ruling was made by the Sąd Najwyższy (Supreme Court) which, before having to rule *in limine litis* on the admissibility of the appeal referred to in paragraph 34 above, is required, under national law, to examine to that end whether the panel of judges who delivered the judgment under appeal was formed properly.

68 It is not disputed that the Sąd Najwyższy (Supreme Court) as such meets the requirements set out in paragraph 66 above. What is called into question by the Ombudsman in the present case is whether the judge concerned, sitting as a single judge in the court formation which made the present request to the Court for a preliminary ruling, satisfies the requirements that a body must meet in order to be considered to be a 'court or tribunal' within the meaning of Article 267 TFEU.

69 In so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed that it satisfies those requirements, referred to in paragraph 66 above, irrespective of its actual composition.

70 It follows from settled case-law that, in the context of a preliminary ruling procedure referred to in Article 267 TFEU, it is not for the Court, in view of the distribution of functions between itself and the national courts, to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and their procedure. The Court is therefore bound by an order for reference made by a court or tribunal of a Member State, in so far as that order has not been rescinded on the basis of a means of redress provided for by national law (judgments of 14 January 1982, *Reina*, 65/81, EU:C:1982:6, paragraph 7, and of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraph 44).

71 Furthermore, it should be recalled that the keystone of the judicial system established by the Treaties is the preliminary ruling procedure provided for in Article 267 TFEU which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniformity in the interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 90 and the case-law cited).

72 The presumption set out in paragraph 69 above may nevertheless be rebutted where a final judicial decision handed down by a national or international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter.

73 In the present case, since the Court was not aware, at the time of the close of the oral part of the procedure, of the fact that the judge constituting the referring court would be the subject of such a final judicial decision, the possible flaws that may have vitiated the national procedure for the appointment of that judge are not capable of leading to the inadmissibility of the present request for a preliminary ruling.

74 It is important to point out that the presumption referred to in paragraph 69 above applies solely for the purposes of assessing the admissibility of references for a preliminary ruling under Article 267 TFEU. It cannot be inferred from this that the conditions for appointment of the judges that make up the referring court necessarily satisfy the guarantees of access to an independent and impartial tribunal previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU or Article 47 of the Charter.

75 Finally, it must be stated, as the Advocate General observed in point 77 of his Opinion, that a different assessment from that arising from paragraphs 68 to 74 above could be made in circumstances in which, beyond the personal situation of the judge or judges formally submitting a request pursuant to Article 267 TFEU, other factors were to have repercussions on the functioning of the referring court to which those judges belong and thus contribute to undermining the independence and impartiality of that court.

76 It follows from all of the foregoing that the request for a preliminary ruling is admissible.

Consideration of the questions referred

Questions 1 to 5

Preliminary observations

77 Questions 1 to 5 referred for a preliminary ruling concern the interpretation of Article 2, Article 4(3), Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU in conjunction with the first and second paragraphs of Article 47 of the Charter and the third paragraph of Article 267 TFEU, Article 38 of the Charter and Article 7(1) and (2) of Directive 93/13.

78 However, it is apparent from the grounds of the order for reference that those questions concern, in essence, the interpretation of the principle of independence and impartiality of tribunals under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. Furthermore, it should be noted that Article 7(1) and (2) of Directive 93/13 provides, in essence, that consumers may prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers, in particular by taking action before the courts having jurisdiction, and that the case in the main proceedings concerns, inter alia, recognition of the unfairness of contractual terms.

79 In those circumstances, Questions 1 to 5 must be assessed only in the light of the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 7(1) and (2) of Directive 93/13.

Questions 1 to 3

80 By its Questions 1 to 3, which it is appropriate to examine together, the referring court asks, in essence, whether the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 7(1) and (2) of Directive 93/13 must be interpreted as meaning that they preclude the formation of a court of a Member State which includes a judge whose initial appointment to such a position or subsequent appointment to a higher court resulted from a decision adopted by a body of an undemocratic regime in place in that Member State prior to its accession to the European Union, including where that judge's appointments to courts after the regime ended were based, inter alia, on the length of service acquired by that judge when that regime was in place or where the judge took a judicial oath only when first appointed to judicial office by a body of that regime, from being considered to be an independent and impartial tribunal of a Member State.

81 Questions 1 to 3 refer to three circumstances surrounding FO's appointment, who is one of the three judges in the panel of judges who delivered the judgment under appeal, which the referring court considers to be problematic in the light of the provisions referred to in paragraph 80 above.

82 First, the referring court states that FO was first appointed to the position of judge by the Council of State of the PPR, which was a political body within the executive branch of the PPR, on a proposal of the Minister for Justice at the time and pursuant to the Decree Law of 6 February 1928 on the organisation of the ordinary courts, without that appointment being based on transparent criteria, without a judicial self-regulatory body or a public authority established following democratic elections having participated in the procedure for appointing that judge and without FO's irremovability having been guaranteed.

83 Second, the referring court notes that FO could subsequently be appointed to a judicial position in higher courts on the basis of the length of service acquired by that judge when a communist regime was in place in Poland and of an assessment of his judicial functions in a position to which he had been appointed by that same regime.

84 Third, the referring court states that FO did not take a judicial oath after the PPR communist regime ended but swore, when he was first appointed to a judicial position by that regime, inter alia to uphold the political system of the communist State.

85 In that regard, it should be noted at the outset that the questions referred relate to circumstances which all occurred before 1 May 2004, the date on which the Republic of Poland acceded to the European Union.

86 It should be recalled that the Court has jurisdiction to interpret EU law only as regards its application in a new Member State with effect from the date of that State's accession to the European Union (see, to that effect, judgment of 10 January 2006, *Ynos*, C-302/04, EU:C:2006:9, paragraph 36 and the case-law cited).

87 It should be noted, however, that the subject matter of the question which the referring court is called upon in the present case to settle *in limine litis* is not a situation which produced all its effects before the accession of the Republic of Poland to the European Union (see, to that effect, judgments of 3 September 2014, *X*, C-318/13, EU:C:2014:2133, paragraph 23, and of

6 October 2016, *Paoletti and Others*, C-218/15, EU:C:2016:748, paragraph 41). It is sufficient to observe that, although appointed to the position of judge before that accession, FO currently has the status of judge and performs duties corresponding to that status.

88 That finding with regard to the jurisdiction of the Court being established, it should be borne in mind that, although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 48).

89 As the second subparagraph of Article 19(1) TEU provides, it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law. The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), and which is now reaffirmed by Article 47 of the Charter. That provision must, therefore, be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU (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 102 and the case-law cited).

90 As regards the material scope of the second subparagraph of Article 19(1) TEU, that provision refers to the 'fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter (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 103 and the case-law cited).

91 Under the second subparagraph of Article 19(1) TEU, every Member State must thus in particular ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law, meet the requirements of effective judicial protection (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 104 and the case-law cited).

92 In this instance, it is common ground that an ordinary Polish court such as the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław) which, as in the main proceedings, was called upon to rule on questions relating to the application and interpretation of provisions of EU law, namely those of Directive 93/13, falls, as a 'court or tribunal' within the meaning of EU law, within the Polish system of legal remedies in the 'fields of Union law' within the meaning of the second subparagraph of Article 19(1) TEU, with the result that it must meet the requirements of effective judicial protection.

93 To guarantee that such a court is in a position to ensure the effective legal protection thus required under the second subparagraph of Article 19(1) TEU, maintaining its independence and impartiality is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental

right to an effective remedy (judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraph 65 and the case-law cited).

94 As the Court has emphasised on several occasions, that requirement that courts be independent and impartial, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraph 66 and the case-law cited).

95 It is settled case-law that 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 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraph 67 and the case-law cited).

96 In that regard, it is necessary that judges be protected from external intervention or pressure liable to jeopardise their independence and impartiality. The rules applicable to the status of judges and the performance of their duties as a judge must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals (judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraph 69 and the case-law cited).

97 It is therefore necessary that the substantive conditions and procedural rules governing the adoption of those decisions to appoint judges are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once they have been appointed. It is important, inter alia, in that perspective, that those conditions and procedural rules should be drafted in a way which meets the requirements set out in the preceding paragraph above (see, to that effect, judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 57 and the case-law cited).

98 The requirements set out in paragraphs 94 to 97 above apply in particular to courts with jurisdiction under the law of a Member State to order that unfair terms cease to be used in contracts concluded with consumers by sellers or suppliers, in accordance with Article 7(1) and (2) of Directive 93/13. The latter provision reaffirms the right to an effective remedy thus afforded to consumers who consider themselves wronged by such terms.

99 Moreover, in the dispute in the main proceedings, the applicants seek compensation for the damage which they claim to have suffered as a result of the unfairness of the terms referred to in paragraph 31 above, for the purposes of that directive. That dispute is thus a situation governed by EU law, so that those same applicants are justified in asserting the right to effective judicial

protection afforded to them by Article 47 of the Charter (see, to that effect, 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, paragraph 81).

100 By its first three questions, the referring court asks whether the circumstances prior to the accession to the European Union of the Republic of Poland referred to in paragraphs 82 to 84 above have an impact on the independence and impartiality of a judge currently forming part of a court formation.

101 According to the referring court, such an impact would be demonstrated only if a relationship were established between the national rules under which those circumstances arose and the present emergence of legitimate and serious doubts in the minds of individuals as to the independence and impartiality of the judge concerned.

102 The referring court bases its doubts in that regard solely on the notion that judges appointed by bodies of the former undemocratic Polish regime are not 'independent' on the ground of their appointment by those bodies, the acquisition of part of their length of service when that regime was in place and the circumstance that they took a judicial oath only at that time.

103 It adds that, even though certain lustration measures were implemented after the PPR communist regime ended, the democratic constitutional order which followed that communist regime accepted that the judges appointed by bodies of the latter could, in principle, remain in office, as the Polish Government confirmed at the hearing before the Court. Thus, the first three questions concern the situation of judges who were kept in office after the undemocratic PPR regime ended.

104 In that regard, it should be noted that, in order to be able to accede to the European Union, the Republic of Poland had to satisfy criteria to be fulfilled by the States which are candidates for accession, such as those established by the European Council in Copenhagen on 21 and 22 June 1993. Those criteria require inter alia that the State which is candidate must ensure the 'stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect for and protection of minorities'. Similarly, Article 49 TEU, which provides for the possibility for any European State to apply to become a member of the European Union, states that the European Union is composed of States which have freely and voluntarily committed themselves to the common values contained in Article 2 TEU, including the value of the rule of law, which respect those values and which undertake to promote them (see, to that effect, judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 61). Thus, at the time the Republic of Poland acceded to the European Union, it was considered that, in principle, the judicial system was compatible with EU law.

105 In the context referred to in paragraphs 103 and 104 above, the referring court submits no evidence as to why the circumstances surrounding the initial appointment, which occurred before the undemocratic PPR regime ended, of a judge who was kept in office after that regime ended are such as to give rise to legitimate and serious doubts, in the minds of individuals, as to the independence and impartiality of that judge in the exercise of his or her judicial functions.

106 In particular, there is no clear and concrete explanation in the order for reference of how the circumstances surrounding the initial appointment of such a judge would be such as to enable any person, institution or body to exercise undue influence on that judge currently.

107 It follows from the foregoing that the circumstances surrounding the initial appointment of a judge to such a position, at a time when the undemocratic PPR regime was in place, such as those identified in paragraphs 82 to 84 above, cannot per se be regarded as capable of giving rise to legitimate and serious doubts, in the minds of individuals, as to the independence and impartiality of that judge in the exercise of subsequent judicial functions.

108 In the light of all the foregoing, the answer to Questions 1 to 3 is that the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 7(1) and (2) of Directive 93/13 must be interpreted as meaning that the circumstance that a judge's initial appointment in a Member State to such a position or subsequent appointment to a higher court resulted from a decision adopted by a body of an undemocratic regime in place in that Member State prior to its accession to the European Union, including where that judge's appointments to courts after the regime ended were based, inter alia, on the length of service acquired by that judge when that regime was in place or where the judge took a judicial oath only when first appointed to judicial office by a body of that regime, is not capable per se of giving rise to legitimate and serious doubts, in the minds of individuals, as to the independence and impartiality of that judge or, consequently, of calling into question the status as an independent and impartial tribunal previously established by law of a court formation which includes that judge.

Questions 4 and 5

109 By its Questions 4 and 5, the referring court asks, in essence, whether the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 7(1) and (2) of Directive 93/13 must be interpreted as precluding the formation of a court of a Member State which includes a judge whose initial appointment as a judge or subsequent appointment to a higher court was made either following that judge's selection as a candidate for a judicial position by a body composed pursuant to legislative provisions subsequently declared unconstitutional by the constitutional court of that Member State or following that judge's selection as a candidate for a judicial position by a body properly composed but following a procedure that was neither transparent nor public nor open to challenge before the courts from being considered to be an independent and impartial tribunal previously established by law.

110 As regards the first circumstance, the referring court states that the Trybunał Konstytucyjny (Constitutional Court) found, in a judgment of 20 June 2017, inter alia, that Article 13(3) of the Law of 12 May 2011 on the KRS, interpreted as meaning that the term of office of the members of the KRS selected from among the judges of the ordinary courts is of an individual nature was incompatible with Article 187(3) of the Constitution – according to which the term of office of the elected members of the KRS is four years. In those circumstances, the referring court asks, in essence, whether the fact that two members of the panel of judges who delivered the judgment under appeal were appointed to the position of judge at the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław) on the basis of resolutions adopted by the KRS in a court formation which, for a majority of its members, resulted from legislative provisions subsequently declared unconstitutional by the Trybunał Konstytucyjny (Constitutional Court) has an impact on the independence of those judges.

111 As regards the second circumstance, the referring court points out that, during the period immediately after the PPR communist regime ended, judges appointed under that regime were appointed to judicial positions in higher courts, following a procedure that took place before the newly created KRS, which procedure was neither transparent nor public, and that, incidentally, the KRS resolutions were not open to challenge before the courts until 2007. In the light of that

information, the referring court asks whether the fact that a member of the panel of judges who delivered the judgment under appeal was appointed to the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław) at that time is capable of calling into question that judge's independence.

112 In that regard, it must be stated that the Court's case-law referred to in paragraphs 89 to 97 above is also relevant for the purpose of examining Questions 4 and 5.

113 Moreover, the Court has already held that the guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial. Checking whether, as composed, a court constitutes such a tribunal where a serious doubt arises on that point is necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction (see, to that effect, judgment of 26 March 2020, Review of *Simpson* v *Council* and *HG* v *Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 57 and the case-law cited).

114 Thus, given the circumstances surrounding the appointment of the judges concerned, the question arises whether those judges may be regarded as constituting an 'independent and impartial tribunal previously established by law within the meaning of EU law'.

115 As regards that concept, it follows from the first sentence of the second paragraph of Article 47 of the Charter, which reflects, in essence and as has already been noted in paragraph 89 above, the general principle of EU law of effective judicial protection, to which the second subparagraph of Article 19(1) TEU also refers, that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law (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 122).

116 Moreover, in so far as the Charter sets out rights corresponding to rights guaranteed under the ECHR, Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed under the ECHR, without thereby adversely affecting the autonomy of EU law. According to the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), the second paragraph of Article 47 of the Charter corresponds to Article 6(1) ECHR. The Court must, therefore, ensure that the interpretation which it gives to the second paragraph of Article 47 of the Charter safeguards a level of protection which does not fall below the level of protection established in Article 6(1) ECHR, as interpreted by the European Court of Human Rights ('ECtHR') (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 123).

117 In that regard, the ECtHR inter alia stressed that while the right to a 'tribunal established by law' guaranteed in Article 6(1) ECHR constitutes an independent right, it is nevertheless very closely related to the guarantees of 'independence' and 'impartiality', within the meaning of that provision. Thus, in the judgment of the ECtHR of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418, §§ 231 and 233), that court inter alia found that, although the institutional requirements of Article 6(1) ECHR each have specific aims which render them specific guarantees of a fair trial, they have in common the fact that they seek to observe the fundamental principles of the rule of law and the separation of powers, noting, in that regard, that the need to maintain public confidence in the judiciary and to safeguard its

independence vis-à-vis the other powers underlies each of those requirements (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).

118 In particular, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must in particular be ensured in relation to the legislature and the executive (see, to that effect, judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraph 68 and the case-law cited).

119 As noted in paragraphs 95 and 96 above, the guarantees of independence and impartiality require rules, including as regards the composition of the body and the appointment of its members, in order 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 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 128).

120 As regards, more specifically, the process of appointing judges, the ECtHR also stated in its judgment of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418, §§ 227 and 232), that having regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, the 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, while noting that the independence of a tribunal within the meaning of that provision, may be measured, inter alia, by the way in which its members are appointed (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 125).

121 Furthermore, in paragraph 73 of the judgment of 26 March 2020, Review of *Simpson* v *Council* and *HG* v *Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232), the Court recalled, echoing in that regard the settled case-law of the ECtHR, that the reason for the introduction of the term 'established by law' in the first sentence of Article 6(1) ECHR is 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 in compliance with the rules governing its jurisdiction. That phrase reflects, in particular, the principle of the rule of law and covers not only the legal basis for the very existence of a tribunal, but also the composition of the bench in each case and any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular, including, in particular, provisions concerning the independence and impartiality of the members of the court concerned (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 129).

122 The Court thus held that an irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of 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 undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules

forming an integral part of the establishment and functioning of that judicial system (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 130 and the case-law cited).

123 It follows from that case-law that not every error that may take place during the procedure for the appointment of a judge is of such a nature as to cast doubts on the independence and impartiality of that judge and, accordingly, on whether a formation which includes that judge can be considered to be an 'independent and impartial tribunal previously established by law' within the meaning of EU law.

124 In the present case, as stated in paragraph 112 above, the referring court expresses doubts as to whether the panel of judges who delivered the judgment under appeal, having regard to its members, can be regarded as meeting the status of an 'independent and impartial tribunal previously established by law'.

125 As regards the first situation referred to by the referring court and mentioned in paragraph 110 above, namely that some members of the court of a Member State were appointed to that court on the basis of resolutions adopted by a body in a formation resulting from legislative provisions subsequently declared unconstitutional by the constitutional court of that Member State, it should be noted that it is apparent from the request for a preliminary ruling that, in the present case, by judgment of 20 June 2017, the Trybunał Konstytucyjny (Constitutional Court) has not ruled on the independence of the KRS. The legislative provisions which were declared unconstitutional by that judgment concerned, in essence, the individual nature of the term of office of the members of the KRS and the distribution rules on the basis of which those members were chosen within the Polish courts.

126 In those circumstances, the declaration of unconstitutionality of the legislative provisions on the basis of which the KRS was then composed, reference to which is made in paragraph 110 above, is not capable, by itself, of calling into question the independence of that body or, consequently, of giving rise to doubts, in the minds of individuals, as to the independence of the judges concerned with regard to external factors.

127 It is precisely that circumstance which distinguishes the present case from those which gave rise to the 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), and of 15 July 2021, *Commission* v *Poland (Disciplinary regime of judges)* (C-791/19, EU:C:2021:596). Unlike the legislative provisions on the basis of which the KRS was composed, whose resolutions led to the appointment of the judges at issue in the main proceedings, the legislation at issue in the cases that gave rise to those two judgments, on the basis of which the composition of the KRS was modified, reinforced the influence of the legislative and the executive on the selection of the members of the KRS in such a way as to give rise to legitimate and serious doubts, in the minds of individuals, as to the independence of the KRS at issue in those cases and its role in the process of appointment of the judges concerned in those cases and, consequently, the independence of those judges and of the court in which they sit.

128 That last finding was confirmed by the ECtHR, which held that the procedure for the appointment of the members of the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court), on a proposal of the KRS composed on the basis of the legislation at issue in the cases that

gave rise to the judgments cited in the preceding paragraph, was unduly influenced by the legislature and the executive, which is per se incompatible with Article 6(1) ECHR (see, to that effect, ECtHR, 22 July 2021, *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719, § 276).

129 Moreover, the referring court has not put forward any specific evidence to substantiate the existence of legitimate and serious doubts, in the minds of individuals, as to the independence and impartiality of the judges concerned arising from the fact that the Trybunał Konstytucyjny (Constitutional Court) declared unconstitutional the legislative provisions on the basis of which the KRS, which was involved in the procedure that led to the appointment of those judges, was composed.

130 The same conclusion applies with regard to the second situation referred to by the referring court and mentioned in paragraph 111 above, namely that one of the members of a court or tribunal of a Member State has been selected as a candidate for a judicial position by a body regarded as properly composed but following a procedure which, at the time, was neither transparent nor public nor open to challenge before the courts. It is not apparent from the order for reference that the KRS, in its composition after the undemocratic PPR regime ended, lacked independence from the executive and the legislature.

131 In those circumstances, it cannot be held that the circumstances referred to by the referring court in Questions 4 and 5, set out in paragraphs 110 and 111 above, are capable of establishing an infringement of the fundamental rules applicable to judicial appointments, for the purposes of the case-law referred to in paragraph 122 above.

132 In the light of the foregoing, the answer to Questions 4 and 5 is that the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 7(1) and (2) of Directive 93/13 must be interpreted as not precluding the formation of a court of a Member State which includes a judge whose initial appointment as a judge or subsequent appointment to a higher court was made either following that judge's selection as a candidate for a judicial position by a body composed on the basis of legislative provisions subsequently declared unconstitutional by the constitutional court of that Member State or following that judge's selection as a candidate for a judicial position by a body properly composed but following a procedure that was neither transparent nor public nor open to challenge before the courts, provided that such irregularities are not 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 undermining the integrity of the outcome of the appointment process and thus give rise to serious and legitimate doubts, in the minds of individuals, as to the independence and impartiality of the judge concerned, from being considered to be an independent and impartial tribunal previously established by law.

Questions 6 and 7

133 In the light of the answers given to Questions 1 to 5, there is no need to answer Questions 6 and 7.

Costs

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

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

1. **The second subparagraph of Article 19(1) TEU, Article 47 of the Charter of Fundamental Rights of the European Union and Article 7(1) and (2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that the circumstance that a judge's initial appointment in a Member State to such a position or subsequent appointment to a higher court resulted from a decision adopted by a body of an undemocratic regime in place in that Member State prior to its accession to the European Union, including where that judge's appointments to courts after the regime ended were based, inter alia, on the length of service acquired by that judge when that regime was in place or where the judge took a judicial oath only when first appointed to judicial office by a body of that regime, is not capable per se of giving rise to legitimate and serious doubts, in the minds of individuals, as to the independence and impartiality of that judge or, consequently, of calling into question the status as an independent and impartial tribunal previously established by law of a court formation which includes that judge.**

2. **The second paragraph of Article 19(1) TEU, Article 47 of the Charter of Fundamental Rights and Article 7(1) and (2) of Directive 93/13 must be interpreted as not precluding the formation of a court of a Member State which includes a judge whose initial appointment as a judge or subsequent appointment to a higher court was made either following that judge's selection as a candidate for a judicial position by a body composed on the basis of legislative provisions subsequently declared unconstitutional by the constitutional court of that Member State or following that judge's selection as a candidate for a judicial position by a body properly composed but following a procedure that was neither transparent nor public nor open to challenge before the courts, provided that such irregularities are not 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 undermining the integrity of the outcome of the appointment process and thus give rise to serious and legitimate doubts, in the minds of individuals, as to the independence and impartiality of the judge concerned, from being considered to be an independent and impartial tribunal previously established by law.**

[Signatures]