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Provisional text

OPINION OF ADVOCATE GENERAL

TANCHEV

delivered on 15 April 2021([1](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footnote1))

**Case C**‑**508/19**

**M.F.**

**v**

**J.M.,**

**joined parties:**

**Prokurator Generalny,**

**Rzecznik Praw Obywatelskich**

(Request for a preliminary ruling from the Sąd Najwyższy (Supreme Court, Poland))

(Reference for a preliminary ruling – Article 2, Article 4(3), Article 6(3) and the second subparagraph of Article 19(1) TEU – Article 267 TFEU – Article 47 of the Charter of Fundamental Rights of the European Union – Rule of law – Effective judicial protection – Principle of judicial independence – Appointment to the position of Supreme Court judge by the President of the Republic on the proposal by the National Council of the Judiciary – Launch of the recruitment procedure without a ministerial countersignature – Judge appointed despite an action attacking the resolution of that council and a preliminary reference procedure – Request for a finding that there is no employment relationship between such a judge and the Sąd Najwyższy (Supreme Court) – Primacy of EU law)

1.        The present Opinion is delivered in conjunction with a separate Opinion of today (15 April 2021) in a related case (*W.Ż.*, C‑487/19, the ‘parallel Opinion in *W.Ż*.’). I consider that my analysis in those Opinions is complementary and they should be read together. Hence, where appropriate, I shall limit myself here to simply cross-referring to that Opinion.

2.        In this reference, the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court, Poland; ‘the Supreme Court’ (Labour and Social Insurance Chamber; ‘the LSI Chamber’)) seeks an interpretation of Article 2 TEU, Article 4(3) TEU, Article 6(3) TEU and the second subparagraph of Article 19(1) TEU, Article 267 TFEU and Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

3.        The reference arose in the context of an action between M.F. (the applicant) and J.M. (the defendant). M.F., who is a judge, brought the action for a declaratory judgment together with an application for an injunction against J.M., seeking to establish that the latter is not a judge of the Supreme Court because he was not appointed to the position of judge of the Supreme Court in the Disciplinary Chamber of the Supreme Court (‘the Disciplinary Chamber’).

4.        In the present Opinion, the national legal framework does not need to be reproduced since that is not strictly necessary for the purposes of the legal analysis.

I.      **The facts giving rise to the dispute in the main proceedings and the question referred for a preliminary ruling**

5.        M.F. is a judge of the Sąd rejonowy (District Court, Poland) in P. On 17 January 2019, disciplinary proceedings were instituted against her. In those proceedings it was alleged that her conduct resulted in overly lengthy proceedings and that she failed to draw up written grounds for her judgments in a timely manner. On 28 January 2019, J.M., acting as a judge of the Supreme Court performing the duties of the President of the Supreme Court who directs the work of the Disciplinary Chamber, issued an order appointing the disciplinary court competent to hear her case at first instance.

6.        However, M.F. claims that the proceedings against her cannot be continued because J.M. is not a judge of the Supreme Court, as he was not appointed to the position of Supreme Court judge in the Disciplinary Chamber. His appointment on 20 September 2018 is ineffective because he was appointed: (i) after the selection procedure had been conducted by the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; ‘the KRS’) on the basis of an announcement of the Prezydent Rzeczypospolitej Polskiej (President of the Republic of Poland, ‘the President of the Republic’) of 29 June 2018, which was signed by the President of the Republic without the countersignature of the Prezes Rady Ministrów (Prime Minister); (ii) after the resolution of the KRS which contained the motion to appoint J.M. to the position of Supreme Court judge in the Disciplinary Chamber had been appealed to the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland; ‘the Supreme Administrative Court’) on 17 September 2018 by one of the participants in the selection procedure, and before that court had ruled on the appeal.

7.        By order of 6 May 2019, the First President of the Supreme Court appointed the LSI Chamber to hear the case and to rule on the application for an injunction. M.F. brought an action before the Supreme Court for a declaratory judgment establishing that there is no service relationship between J.M. and the Supreme Court. According to the referring court, the service relationship between a judge and a court is equivalent to an employment relationship and is directly linked to the judge’s mandate. There is no service relationship without a mandate. Therefore, in order to establish that a person is not a judge, it must first be established that that person does not have a mandate.

8.        Therefore, the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour and Social Insurance Chamber)) decided to stay proceedings and refer to the Court of Justice the following questions for a preliminary ruling:

‘(1)      Should the second subparagraph of Article 19(1), Articles 2, 4(3) and 6(3) TEU, in conjunction with Article 47 of the [Charter] and the third paragraph of Article 267 TFEU, be interpreted as meaning that the court of final instance of a Member State may, in proceedings seeking a declaration that a service relationship is non-existent, declare that a person who has received a document appointing him to the position of judge in that court is not a judge in the case where that document of appointment was issued on the basis of provisions which infringe the principle of effective judicial protection or under a procedure which is incompatible with that principle, in the case where a judicial review of these matters prior to the delivery of the document of appointment has intentionally been made impossible?

(2)      Should the second subparagraph of Article 19(1), Articles 2 and 4(3) TEU and Article 47 of the [Charter], in conjunction with Article 267 TFEU, be interpreted as meaning that the principle of effective judicial protection is infringed in the case where a document appointing a person to the position of judge is delivered after a national court has requested a preliminary ruling concerning the interpretation of EU law and where that preliminary ruling will determine the compatibility with EU law of the national provisions the application of which made it possible for the document of appointment to be delivered?

(3)      Should the second subparagraph of Article 19(1), Articles 2, 4(3) and 6(3) TEU, and Article 47 of the [Charter], be interpreted as meaning that the principle of effective judicial protection is infringed by the failure to guarantee the right to effective judicial protection in the case where a document appointing a person to the position of judge of a court in a Member State is delivered following an appointment procedure carried out in flagrant breach of the laws of that Member State governing the appointment of judges?

(4)      Should the second subparagraph of Article 19(1), Articles 2 and 4(3) TEU and Article 47 of the Charter, in conjunction with the third paragraph of Article 267 TFEU, be interpreted as meaning that the principle of effective judicial protection is infringed through the establishment by the national legislature of an organisational unit within the court of final instance of a Member State which is not a court or tribunal within the meaning of EU law?

(5)      Should the second subparagraph of Article 19(1), Articles 2 and 4(3) TEU and Article 47 of the Charter, in conjunction with the third paragraph of Article 267 TFEU, be interpreted as meaning that the existence of a service relationship and the status of judge of a person who received a document appointing him to the position of judge of the court of final instance in a Member State cannot be determined by the organisational unit of that court which is competent in that matter under national law, to which unit that person has been appointed, and which unit is composed exclusively of persons whose appointment documents suffer from the defects referred to in Questions 2 to 4 and which unit for those reasons is not a court or tribunal within the meaning of EU law, but must rather be determined by another organisational unit of that court which satisfies the requirements of EU law for a court or tribunal?’

II.    **Analysis**

A.      **The jurisdiction of the Court**

9.        The Public Prosecutor submits, in essence, that the Court lacks jurisdiction as the reference concerns a purely internal case which does not fall within the scope of EU law, given that Article 47 of the Charter or the second subparagraph of Article 19(1) TEU have no link with the subject matter of the dispute. When the president of a disciplinary chamber designates the body competent as a disciplinary tribunal, that president: (i) is not ruling on the substance of an individual case in the context of an adversarial procedure and so he or she does not constitute a court or tribunal within the meaning of EU law; and (ii) is not competent to adopt any other decision pertaining to EU law.

10.      However, suffice it to point out that the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU, for instance, as regards national rules relating to the substantive conditions and procedural rules governing the adoption of decisions appointing judges and, where applicable, rules relating to the judicial review that applies in the context of such appointment procedures. ([2](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footnote2))

11.      Indeed, the Court has jurisdiction in the present case and the second subparagraph of Article 19(1) TEU is applicable in a case that raises issues such as the status of a person allegedly appointed to the disciplinary chamber of a Member State’s Supreme Court despite flagrant breaches of national law, as that person may be called on to deal with cases involving the application or interpretation of EU law and so must satisfy the requirement of effective judicial protection. It follows that the determination of the tribunal competent to rule on an internal dispute concerning the status of a judge must also comply with the requirement of effective judicial protection.

B.      **Admissibility of the questions referred**

12.      The Polish Government, the Public Prosecutor and J.M. put forward various arguments in order to contend, in essence, that all the questions referred are inadmissible in so far as a response to those questions is not necessary in order for the referring court to rule on the case in the main proceedings – the questions are hypothetical, the case is fictitious and the questions referred solely seek to instrumentalise the Court of Justice and EU law so as to create a precedent which would allow a national judge to be dismissed. Such a precedent would amount to a breach of the rule of law and would arise in a situation which is not provided for by law.

13.      Aside from the fact that several of those parties’ arguments are based on national law, rather than EU law, I consider (as do the Commission, M.F. and the Rzecznik Praw Obywatelskich (Ombudsman, Poland) that the questions referred are admissible.

14.      In relation to the first three questions, these seek in essence to determine whether the second subparagraph of Article 19(1) TEU should be interpreted as opposing the effectiveness of J.M.’s appointment to the post of judge in the Disciplinary Chamber. Indeed, it is not necessary that the court concerned by the questions referred is called upon to rule, *in the case at issue*, on the basis of EU law, given that the scope of that provision extends to all courts or tribunals with jurisdiction to rule on the application or interpretation of EU law, which is the case in respect of the Disciplinary Chamber (as follows from Article 27 of the new Law on the Supreme Court; see judgment in *A. K. and Others*, paragraphs 79 to 81 and 100). Even though the President of the Disciplinary Chamber (J.M.) is not a judicial authority per se, he designates the disciplinary tribunal with territorial competence, which is of decisive importance for the purpose of guaranteeing that that tribunal carries out an impartial examination of disciplinary cases. Moreover, that tribunal may be called upon to rule on questions concerning the application or interpretation of EU law. Furthermore, as a judge and a member of the Disciplinary Chamber, J.M. may also rule on such questions.

15.      In relation to the two final questions referred, these seek to obtain guidance on EU law for the referring court so it can give a decision on the procedural problem which it must answer *in limine litis* and which concerns its own jurisdiction to rule on the case in the main proceedings in place of the Disciplinary Chamber, in the event that the latter does not fulfil the requirements flowing from EU law (see, to that effect, judgment in *A. K. and Others*, paragraphs 99 and 100).

C.      **Substance**

1.      ***Brief summary of the arguments of the parties***

16.      M.F. and the Ombudsman – and, up to a point, the Commission –argue, in essence, that the questions should be answered in the affirmative: a national court of final instance may examine the appointment as well as the guarantees of independence and impartiality of a person appointed to the position of judge of the Supreme Court in breach of the principle of effective judicial protection.

17.      J.M. submitted no observations on the substance of the case before the Court and did not appear at the hearing.

18.      In relation to the second question referred for a preliminary ruling, the Polish Government submits, in essence, that EU law cannot be interpreted as preventing the President of the Republic from appointing J.M., due to the existence of a preliminary reference procedure, as: the Court is not ruling on the conformity of national law with EU law and the organisation of justice and of the appointment procedure for judges are not governed by EU law. Concerning the third question referred, it contends that neither of the two alleged irregularities were borne out in the present case, and even if they were, that did not result in an infringement of the principle of effective judicial protection. As regards the first question referred, the Polish Government contends that, having regard to the answers given to questions 2 and 3, that question is obsolete. It submits in relation to the fourth question, in essence, that there are no doubts that the Disciplinary Chamber is independent. In relation to the fifth question referred, the Polish Government argues that it is solely for the Disciplinary Chamber to decide on the inadmissibility of the petition in the main proceedings.

19.      Aside from arguments analogous to those of the Polish Government, the Public Prosecutor contends, in essence, that the absence of an irregularity in the appointment procedure or the conformity of that procedure with EU law are not constitutive characteristics of the appointment of a judge in their functions, but could at most have impact on whether the right of access to a court of a person falling within that judge’s jurisdiction is respected. In any event, the five questions referred must be answered in the negative also in view of the principles of legal certainty and irremovability of judges.

2.      ***Assessment***

(a)    ***Questions 1 to 3***

20.      By its first three questions – which must be addressed together – the referring court seeks to establish, in essence, whether the notion ‘right to a court or tribunal established by law’, laid down by the second subparagraph of Article 19(1) TEU in the light of Article 47 of the Charter, must be interpreted as precluding the appointment of J.M. to the position of judge of the Supreme Court in the Disciplinary Chamber in circumstances where: (i) the legal review of acts adopted in the context of that appointment procedure is limited/non-existent; (ii) the act of appointment was delivered before the Court of Justice could give a ruling on the preliminary reference (case *A. K. and Others*) concerning the interpretation of the requirements of independence of a judicial body such as the Disciplinary Chamber (that is, the judicial body where the person named in the act of appointment at issue was meant to sit as a judge); (iii) the act of appointment was delivered before the Supreme Administrative Court could rule on the action brought against KRS Resolution No 317/2018 containing the KRS’s proposal to the President of the Republic to appoint J.M.; and (iv) the President of the Republic’s communication, published on the basis of Article 31(1) of the Law on the Supreme Court opening the selection procedure seeking to fill vacant positions in the Supreme Court, including the Disciplinary Chamber, was not countersigned by the Prime Minister.

21.      First of all, as I explain in my parallel Opinion in *W.Ż.* (points 46 and 47), Article 47 of the Charter is not applicable as a standalone provision in circumstances such as those in that case. The same reasoning applies in the present case. However, I note that the Court has now clearly recognised in *A.B. and Others* (C‑824/18, EU:C:2021:153, paragraph 146), that the second subparagraph of Article 19(1) TEU ‘imposes on the Member States a clear and precise obligation as to the result to be achieved and that that obligation is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law’.

22.      I consider (as does the Ombudsman) that the connecting factors between the action in the main proceedings and the EU law provisions raised in the questions referred relate to the fact that a national judge (M.F.) who may rule on the application or interpretation of EU law is asking that she is afforded, in the context of a disciplinary action levelled against her, the benefit of the effective judicial protection guaranteed by Article 19(1) TEU in the light of Article 47 of the Charter. Such protection implies an obligation for the Member States to ‘provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions’, ([3](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footnote3)) which means that M.F. has a right to be judged by an independent and impartial court established by law. That also means that the tribunal called upon to rule on her disciplinary procedure cannot be appointed by a judge whose own appointment breached the very same provision of EU law even though he himself gives rulings relating to the application or interpretation of EU law.

23.      As I explain in detail in my parallel Opinion in *W.Ż.* (points 68 et seq.), there are two main judgments that are relevant in the present context: the Court’s judgment of 26 March 2020, *Review Simpson and HG*v*Council and Commission* (C‑542/18 RX‑II and C‑543/18 RX‑II, EU:C:2020:232) (‘the judgment in *Simpson and HG*’) and the ECtHR’s *Ástráðsson v. Iceland*, Grand Chamber judgment, (CE:ECHR:2020:1201JUD002637418).

24.      In particular, in order to determine whether an irregularity constitutes an infringement of the requirement that a court or tribunal must be established by law within the meaning of Article 19 TEU, according to paragraph 75 of the judgment in *Simpson and HG*, it is necessary to assess whether 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 [even if only at the level of appearances] in the minds of individuals as to the independence and the 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’ (emphasis added).

25.      As I explain in detail in the Opinion in *W.Ż.*, the aforementioned case-law requires the referring court, in that respect, to determine whether the breach in question was flagrant, that is, to assess the manifest and deliberate character of that breach as well as the gravity of the breach.

26.      Indeed, it follows from the order for reference that there were numerous potentially flagrant breaches of the law applicable to judicial appointments in the appointment procedure in respect of J.M.: (i) the procedure was opened without the ministerial countersignature required under the Constitution, which it is claimed renders the procedure void *ab initio*; (ii) it involved the new KRS whose members were appointed under a new legislative process, which is unconstitutional and does not guarantee independence; (iii) there were diverse deliberate impediments to the preliminary judicial review of the act of appointment, as: (a) the KRS deliberately failed to forward the action brought against its resolution to the Supreme Administrative Court, at the same time as it sent it to the President of the Republic, before the deadline to do so before that court expired; (b) the President of the Republic appointed the judges proposed in that resolution before the judicial review of that resolution was closed and without waiting for the answer of the Court of Justice to the questions referred to it in case C‑824/18, concerning the conformity of the modalities of that control with EU law. Therefore, the President of the Republic committed a potentially flagrant breach of fundamental norms of national law.

(1)    *Point (i)*

27.      The Commission argues essentially that the right to a court established by law, under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, does not require that there always must be legal remedies against acts of judicial appointment and other acts adopted in procedures for the appointment of judges to Supreme Courts.

28.      Contrary to what is argued by the Commission, and as I explain in more detail in my parallel Opinion in *W.Ż.* (points 50 to 63), that line of argument is specious and not applicable in a context such as that present in Poland.

29.      It now follows from the judgment in *A.B. and Others* (and as I also argued in my Opinion in that case) that it will be for the referring court to make an assessment on the basis of the guidance provided here and in the judgment in *A.B. and Others* and any other relevant circumstances of which it may become aware, taking account, where appropriate, of the reasons and specific objectives alleged before it in order to justify the measures concerned, whether national provisions such as those contained in Article 44(1a) to (4) of the Law on the KRS, are such as to give rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed on the basis of the KRS resolutions to external factors and, in particular, to the direct or indirect influence of the Polish legislature and executive, and as to their neutrality with respect to any interests before them which may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

30.      Subject to the above proviso, to my mind the retrograde impact of those national provisions on the effectiveness of the judicial remedy available against the resolutions of the KRS proposing the appointment of judges to the Supreme Court infringes the second subparagraph of Article 19(1) TEU. In order to be effective, the judicial review needs to cover at least whether there was no ultra vires or improper exercise of authority, error of law or manifest error of assessment (judgment in *A. K. and Others*, paragraph 145). As the Ombudsman pointed out, effective judicial review is particularly necessary where, as in this instance, it appears that the State, by way of its conduct, is interfering in the process of appointing judges in a manner which risks compromising the future independence of those judges.

31.      Indeed, as the referring court pointed out, first, what is relevant in this respect is that the appointment to the position of judge in the present case was made on the basis of provisions and/or according to a procedure contrary to the principle of effective judicial protection. Secondly, the legislature and/or the executive appear to have deliberately and intentionally brought about the situation in the present case by preventing (or attempting to prevent) a judicial review of the compatibility with EU law of the applicable national laws or procedures prior to the delivery of judicial appointments.

(2)    *Point (ii)*

32.      By its second question, the referring court asks whether the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, read in conjunction with Article 267 TFEU, require that the President of the Republic refrains from delivering an act of appointment to the position of judge of the Disciplinary Chamber, in a case where a reference for a preliminary ruling was sent to the Court of Justice on 30 August 2018 concerning the interpretation of the requirements of independence in the context of the establishment of the Disciplinary Chamber and that case is still pending (case *A. K. and Others*).

33.      The Commission argues that that question should be answered in the negative.

34.      Unlike the Commission, I consider that this is an extension of the answer given to the first question and, as follows from my Opinion and from the judgment in *A.B. and Others*, an executive authority of a Member State is required to refrain from delivering a document of appointment to the position of judge until a national court, taking into account the judgment given by the Court of Justice on the reference for a preliminary ruling, has ruled on the compatibility of national law with EU law with respect to the procedure for appointing members of a new organisational unit in the court of final instance of that Member State. Failure to do so would be an infringement of the principle of effective judicial protection, since at the very least it creates a serious risk that judicial authorities which do not meet EU standards will be established, even if only temporarily. I agree with the Ombudsman that it would also potentially infringe Articles 4(3) TEU and 267 TFEU, as the President of the Republic would limit the *effet utile* of the preliminary ruling procedure and would circumvent the binding character of the decisions of the Court.

35.      National courts should have a remedy to treat as a qualified breach of the principle of effective judicial protection any actions taken by the authorities of a Member State following a request for a preliminary ruling made by a national court where the purpose or effect of such actions might be to nullify or limit the principle of the retroactive (*ex tunc*) effect of preliminary rulings given by the Court.

36.      What is important in the context of the present case, and as was pointed out by the referring court, is that the delivery of the document of appointment to the position of judge in the Disciplinary Chamber may constitute an intentional infringement of the principle of effective judicial protection. Moreover, this was, it seems, accompanied by the conviction, stemming from previous national case-law, that the appointment to the position of judge of the Supreme Court is irreversible. As follows from the answer to the first question, that conviction is wrong.

37.      In addition, I agree with the referring court that a person appointed to the position of judge of the Supreme Court in such circumstances may well remain dependent on how the authorities involved in his appointment assess his judicial activity during the period in which he performs his judicial mandate. The referring court states that in its view such dependence exists, especially on the executive, that is, the President of the Republic.

(3)    *Point (iii)*

38.      By its third question, the referring court seeks to establish whether ‘the right to a tribunal established by law’, under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, requires that the national court rules – in the context of a procedure seeking a finding that there is (no) employment relationship in respect of a person appointed to the position of judge – that the act of appointment is ineffective due to flagrant breaches of national provisions governing the appointment procedure.

39.      I consider that this question is closely linked to the question referred in C‑487/19, *W.Ż.* (see my parallel Opinion, points 50 to 63 and point 106). As I concluded in that Opinion – and, again, contrary to what is argued by the Commission here – the right to a tribunal established by law, affirmed by the second subparagraph of Article 19(1) TEU in the light of Article 47 of the Charter, must be interpreted in the sense that a court, such as the court composed of J.M., does not meet the requirements to constitute such a tribunal established by law in a situation where the judge concerned was appointed to that position in flagrant breach of the laws of the Member State applicable to judicial appointments to the Supreme Court, which is a matter for the referring court to establish. The referring court must, in that respect, assess the manifest and deliberate character of that breach as well as the gravity of the breach and must take into account the fact that J.M. was appointed despite a prior appeal to the competent national court against the resolution of the KRS, which included a motion for the appointment of that person to the position of judge and which was still pending at the relevant time.

(4)    *Point (iv)*

40.      As regards the fact that the communication of the President of the Republic, opening the selection procedure seeking to fill vacant positions on the Supreme Court, including the Disciplinary Chamber, was published without the countersignature of the Prime Minister, it is incumbent on the referring court to assess whether such a countersignature was required under Article 144(3)(17) of the Constitution and whether the fact that it was not affixed to the President’s communication, published under Article 33(1) of the Law on the Supreme Court, constitutes a manifest, intentional and grave breach of national rules governing the appointment procedure for judges of the Supreme Court.

(b)    ***Questions 4 and 5***

41.      By its fourth and fifth questions, which should be addressed together, the referring court asks, essentially, whether Article 2 TEU, the second subparagraph of Article 19(1) TEU, Article 267 TFEU and Article 47 of the Charter should be interpreted to the effect that a chamber of a Member State’s Supreme Court, such as the Disciplinary Chamber in the present case, which is called on to rule on cases falling within EU law, satisfies: – in view of the conditions in which it was constituted and of the appointment of its members – (i) the requirements of independence and impartiality; and (ii) the right to a tribunal established by law, which are required under the above provisions of EU law. If that is not the case, the referring court wishes to know whether the principle of the primacy of EU law should be interpreted as meaning that it obliges it to disapply national provisions which reserve competence to rule on such cases to the Disciplinary Chamber.

(1)    *The independence of the Disciplinary Chamber*

42.      In the judgment in *A. K. and Others*, paragraph 171, the Grand Chamber of the Court of Justice ruled as follows on questions which were essentially identical to those raised in the present case: ‘Article 47 of the Charter and Article 9(1) of [Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16)] must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of the former provision. That is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber of the … Supreme Court … If that is the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the abovementioned chamber, so that those cases may be examined by a court which meets the abovementioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field.’

43.      Even though here, contrary to what was the case in *A. K. and Others*, the relevant provision of EU law for the purpose of answering the fourth and fifth questions referred is not Article 47 of the Charter, but the second subparagraph of Article 19(1) TEU, according to the Court, ‘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 which is now enshrined in Article 47 of the Charter, so that the former provision requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of the latter provision, in the fields covered by EU law’ (judgment in *A. K. and Others*, paragraph 168).

44.      It may be pointed out that in the judgment of 5 December 2019, the Supreme Court (in its formation as the LSI Chamber ruling on one of the cases giving rise to the judgment in *A. K. and Others*) held – on the basis of the judgment in *A. K. and Others* – that the KRS was not, in its current composition, an independent body and that the Disciplinary Chamber was not a court for the purposes of Article 47 of the Charter, Article 6 ECHR and Article 45(1) of the Polish Constitution. As regards the KRS, that judgment referred, inter alia, to defects in the process of electing its members, its subservience to the political authorities and its activities which ran counter to judicial independence.

45.      Moreover, as regards the Disciplinary Chamber, that judgment indicated, in particular, that all judges appointed to the Disciplinary Chamber have strong ties to the legislative or executive authorities, the conditions of the competition for the appointment of those judges were changed in the course of the proceedings, the lack of participation of the Supreme Court in the process of appointment, the activities of the Disciplinary Chamber aimed at the withdrawal of references for preliminary rulings and the fact that the disciplinary cases decided by that chamber demonstrated that a judge can be accused of disciplinary offences as a result of the adoption of judicial decisions, whereas that was not previously the case.

46.      In its judgments of 15 January 2020, the Supreme Court (ruling in the same formation on the other cases giving rise to the judgment in *A. K. and Others*) held on similar grounds that the Disciplinary Chamber is not an independent and impartial court due to the conditions regarding its establishment, powers and composition, along with the involvement of the KRS in the selection of its members.

47.      By the interpretative resolution of 23 January 2020, the Supreme Court (ruling in the formation of the combined Civil Chamber, Criminal Chamber and Labour and Social Insurance Chamber) agreed with the Supreme Court’s judgment of 5 December 2019 that the KRS and the Disciplinary Chamber are not independent bodies (Resolution, paragraphs 31 to 45). In particular, that resolution stated that the KRS is subordinate to the political authorities, so that competitions to the office of judge carried out by it are defective, thus creating fundamental doubts as to the motivation for the appointment of persons to the office of judge. ([4](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footnote4)) Likewise, by reason of its organisation, system, appointment procedure and autonomy from the Supreme Court, judgments issued by formations of judges of the Disciplinary Chamber are not judgments issued by a duly appointed court (Resolution, paragraph 45). Consequently, according to that resolution, court formations were unlawfully composed when they delivered rulings with the participation of judges selected by the newly constituted KRS.

48.      Thus, it follows from paragraphs 114 to 166 of the judgment in *A. K. and Others*, that the answer to the first part of the fourth question and the fifth question referred is that the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter, must be interpreted as meaning that a body does not constitute an independent and impartial court, within the meaning of those provisions, where the objective circumstances in which that body was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that body to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that body not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a body such as the Disciplinary Chamber of the Supreme Court. If that is the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the abovementioned chamber, so that those cases may be examined by a court which meets the abovementioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field.

(2)    *On whether the Disciplinary Chamber is a ‘court established by law’*

49.      As I point out in my parallel Opinion in *W.Ż.*, the right to a court established by law is directly connected to judicial independence, and that it is also one of the requirements that must be met for the purposes of constituting a ‘court or tribunal’, within the meaning of EU law, under Article 267 TFEU. ([5](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footnote5)) It is apparent from the case-law that the Court of Justice interprets the requirement of judicial independence on the basis of Article 267 TFEU in the light of what is set out in the second subparagraph of Article 19(1) TEU. ([6](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footnote6)) It would therefore also seem to hold true for the requirement of a court established by law.

50.      As the Court has held, ([7](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footnote7)) 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. The Court of Justice has also recognised that, according to the ECtHR’s case-law, the reason for the introduction of the term ‘established by law’ in 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.

51.      For the rest, in this context, the referring court can apply *mutatis mutandis* the reasoning developed in my parallel Opinion in *W.Ż.*

52.      In any case, to the extent the fifth question referred concerns the consequences flowing from the answer to the fourth question, the answer should not be different to that given to the first part of the fourth question.

53.      To conclude, any national provision or legislative, administrative or judicial practice which diminishes the effectiveness of EU law by precluding the competent judge from applying that law, and from doing, in the context of that application, all that is necessary to disapply national legislation potentially constituting an obstacle to the full effectiveness of directly applicable EU law, such as, in the present case, the second subparagraph of Article 19(1) TEU, without any need to request or await the annulment of the act concerned by the legislature or by any other constitutional process infringes EU law (see the judgment in *A. K. and Others*). Even though the principle of the primacy of EU law mainly applies to national general and abstract norms, it is also applicable to individual and specific administrative acts. ([8](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footnote8)) In view of the fact that the review of the validity of J.M. (the defendant judge)’s appointment cannot be carried out in any other national procedure and that the only possibility to examine that status as judge is in the context of a disciplinary procedure exposing M.F. (the applicant judge) to sanctions which is not compliant with the requirements of the principle of effective judicial protection, ([9](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footnote9)) the referring court should be able to rule that that appointment did not exist in law even where national law does not authorise it to do so.

54.      In that respect, I consider (as does the Ombudsman) that the national authorities may not take refuge behind arguments based on legal certainty and irremovability of judges. Those arguments are just a smokescreen and do not detract from the intention to disregard or breach the principles of the rule of law. It must be recalled that law does not arise from injustice (*ex iniuria ius non oritur*). If a person was appointed to such an important, institution in the legal system of a Member State as is the Supreme Court of that State in a procedure which violated the principle of effective judicial protection, then he or she cannot be protected by the principles of legal certainty and irremovability of judges.

III. **Conclusion**

55.      For the reasons set out above, I propose that the Court of Justice should answer the questions referred for a preliminary ruling by the Sąd Najwyższy (Supreme Court, Poland) as follows:

The right to a tribunal established by law, affirmed by the second subparagraph of Article 19(1) TEU in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted in the sense that, in circumstances such as those of the main proceedings, a person appointed to the position of judge of the Sąd Najwyższy (Supreme Court), Disciplinary Chamber, does not comply with that requirement if his act of appointment was delivered in flagrant breach of national rules governing the procedure for the appointment of judges of the Supreme Court, which is a matter for the referring court to establish. In the context of that assessment, the referring court must appraise the manifest and intentional character as well as the gravity of the breaches in question.

The second subparagraph of Article 19(1) TEU in the light of Article 47 of the Charter must be interpreted as meaning that a court chamber does not constitute an independent and impartial tribunal, within the meaning of those provisions, when the objective conditions in which it was created, its characteristics as well as the manner of appointment of its members are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that chamber to external factors, and, in particular, to the direct or indirect influence of the legislature and the executive, and as to its neutrality with respect to the interests before it and, thus, whether they may lead to that chamber not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court).

In such a situation, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply national law provisions which reserve jurisdiction to rule on actions, such as the one in the main proceedings, to such a chamber, so that those actions may be examined by a court which fulfils the requirements of independence and impartiality referred to above and which would have jurisdiction were it not for those provisions.

[1](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footref1)      Original language: English.

[2](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footref2)      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, paragraphs 134 to 139 and 145) (‘the judgment in *A. K. and Others*’).

[3](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footref3)      Judgment of 5 November 2019, C‑192/18, *Commission* v *Poland* (EU:C:2019:924, paragraph 114).

[4](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footref4)      Resolution, paragraph 42. That resolution has the force of law. In paragraph 41 of that resolution, the Supreme Court criticised the Minister for Justice’s actions, through disciplinary officers appointed by him, to persecute judges for their decisions to clarify uncertainties regarding the competition procedure for judges carried out by the KRS. See also legal literature, which argues that the Disciplinary Chamber is established contrary to the Polish Constitution: Wróbel, W., *The Disciplinary Chamber of the Supreme Court as an exceptional court in the meaning of Article 175(2) of the Polish Constitution*, Palestra, No. 1‑2, 2009 (http://themis-sedziowie.eu/wp-content/uploads/2020/01/Włodzimierz-Wróbel\_Disciplinary-Chamber-as-exceptional-court\_def.pdf).

[5](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footref5)      See, for example, judgment of 24 May 2016, *MT Højgaard and Züblin* (C‑396/14, EU:C:2016:347, paragraph 23).

[6](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footref6)      See judgments of 21 January 2020, *Banco de Santander* (C‑274/14, EU:C:2020:17, paragraph 56), and of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)* (C‑658/18, EU:C:2020:572, paragraph 45).

[7](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footref7)      Judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C‑542/18 RX‑II and C‑543/18 RX‑II, EU:C:2020:232), paragraph 73. See also Opinion of Advocate General Sharpston in *Review Simpson* v *Council and Review HG* v *Commission* (C‑542/18 RX‑II and C‑543/18 RX‑II, EU:C:2019:977, point 67); Opinion of Advocate General Hogan in *Repubblika* (C‑896/19, EU:C:2020:1055, point 53); Opinion of Advocate General Bobek in Joined Cases *Ministerul Public – Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie – Direcţia Naţională Anticorupţie and Others* (C‑357/19 and C‑547/19, EU:C:2021:170, points 137 to 139).

[8](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footref8)      See judgment of 29 April 1999, *Ciola* (C‑224/97, EU:C:1999:212).

[9](https://curia.europa.eu/juris/document/document.jsf?text=&docid=239898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2482046" \l "Footref9)      See judgment of 13 March 2007, *Unibet* (C‑432/05, EU:C:2007:163, paragraph 64).

Fine modulo