ECLI:EU:C:2021:798

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

6 October 2021 (*)

(Reference for a preliminary ruling – Rule of law – Effective legal protection in the fields covered by EU law – Second subparagraph of Article 19(1) TEU – Principles of the irremovability of judges and judicial independence – Transfer without consent of a judge of an ordinary court – Action – Order of inadmissibility made by a judge of the Sąd Najwyższy (Izba Kontroli Nadzwyczajnej i Spraw Publicznych) (Supreme Court (Chamber of Extraordinary Control and Public Affairs), Poland) – Judge appointed by the President of the Republic of Poland on the basis of a resolution of the National Council of the Judiciary, despite a court decision ordering that the effects of that resolution be suspended pending a preliminary ruling of the Court – Judge not constituting an independent and impartial tribunal previously established by law – Primacy of EU law – Possibility of finding such an order of inadmissibility to be null and void)

In Case C-487/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber), Poland), made by decision of 21 May 2019, received at the Court on 26 June 2019, in the proceedings brought by

W.Ż.

intervening parties:

Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokurator Prokuratury Krajowej Bożena Górecka,

Rzecznik Praw Obywatelskich,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal (Rapporteur), M. Vilaras, E. Regan, M. Ilešič, L. Bay Larsen, A. Kumin and N. Wahl, Presidents of Chambers, D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos and N. Jääskinen, Judges,

Advocate General: E. Tanchev,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 22 September 2020,

after considering the observations submitted on behalf of:

– W.Ż., by S. Gregorczyk-Abram and M. Wawrykiewicz, adwokaci,

– the Prokurator Generalny zastępowany przez Prokuraturę Krajową, by R. Hernand, A. Reczka, S. Bańko, B. Górecka and M. Słowińska,

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

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

– the European Commission, by K. Herrmann, P. Van Nuffel and H. Krämer, and subsequently by K. Herrmann and P. Van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2, Article 6(1) and (3) 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’).

2 The request has been made in proceedings brought by the judge W.Ż. concerning a resolution by which the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; ‘the KRS’) declared that there was no need to adjudicate on the challenge brought by W.Ż. against the decision of the President of the Sąd Okręgowy w K. (Regional Court of K., Poland) ordering that W.Ż. be transferred from one division of that court to another (‘the resolution at issue’), against which resolution W.Ż lodged an appeal before the Sąd Najwyższy (Supreme Court, Poland), accompanied by an application for the recusal of all judges sitting in the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs, Poland) (‘the Chamber of Extraordinary Control and Public Affairs’), which is to examine that appeal.

Polish law

The Constitution

3 According to Article 7 of the Constitution:

‘Public authorities shall act in accordance with and within the limits of the law.’

4 Article 10 of the Constitution provides:

‘1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislature, executive and judiciary.

2. The Sejm [Lower Chamber of the Polish Parliament] and the Senat [Upper Chamber of the Polish Parliament] shall have legislative authority. The President of the Republic and the Council of Ministers shall have executive authority. The courts and tribunals shall have legislative authority.’

5 Article 45(1) of the Constitution provides:

‘Everyone is entitled to a fair and public hearing, without undue delay, by an independent and impartial tribunal with jurisdiction.’

6 Article 60 of the Constitution provides:

‘Polish citizens enjoying their full rights as citizens shall have the right of access, under equal conditions, to public office.’

7 Under Article 77(2) of the Constitution:

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

8 Article 179 of the Constitution provides:

‘Judges shall be appointed for an indefinite period by the President of the Republic on a proposal [of the KRS].’

9 Article 184 of the Constitution provides:

‘The [Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland)] and other administrative courts shall exercise, within the limits which are established by law, control over the performance of public administration. …’

The new Law on the Supreme Court

10 On 20 December 2017, the President of the Republic of Poland signed the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5; ‘the new Law on the Supreme Court’). That law entered into force on 3 April 2018.

11 The new Law on the Supreme Court, inter alia, established the Chamber of Extraordinary Control and Public Affairs within the Sąd Najwyższy (Supreme Court).

12 Under Article 26 of the new Law on the Supreme Court:

‘The areas of jurisdiction of the [Chamber of Extraordinary Control and Public Affairs] include extraordinary complaints, electoral disputes and challenges concerning the validity of national or constitutional referendums, and determination of the validity of elections and referendums, as well as other cases in the field of public law, including disputes relating to the protection of competition, energy regulation, telecommunications and rail transport, and appeals against decisions of the

Przewodniczy Krajowej Rady Radiofonii i Telewizji (President of the National Television and Radio Broadcasting Council, Poland) as well as complaints concerning the excessive duration of proceedings before ordinary and military courts and the [Sąd Najwyższy (Supreme Court)].'

13 Article 29 of the new Law on the Supreme Court provides that judges of the Sąd Najwyższy (Supreme Court) are to be appointed by the President of the Republic acting on a proposal of the KRS.

The Law on the KRS

14 The KRS is governed by the ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011 (Dz. U. of 2011, No 126, item 714), as amended, 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 sądów 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').

15 Article 37(1) of the Law on the KRS 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 presenting one appointment proposal to the position of judge in respect of all candidates.'

16 Under Article 43 of that law:

'1. A [KRS] resolution shall become final if no appeal lies against it.

2. Unless all the participants in the procedure have challenged the resolution referred to in Article 37(1), that resolution shall become final for the part comprising the decision not to present the proposal for appointment to the office of judge of the participants who did not lodge an appeal, subject to the provisions of Article 44(1b).'

17 Article 44 of the Law on the KRS provided:

'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 of 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 before 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 the proposal for appointment to a position of judge of 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 of the [Sąd

Najwyższy (Supreme Court)], that resolution becomes final in the part containing the decision to present the proposal for appointment to the office of judge of the [Sąd Najwyższy (Supreme Court)] and in the part comprising the decision not to present the proposal for appointment to the office of judge to that court for participants in the procedure who did not lodge an appeal.

…

3. The provisions [of the Code of Civil Procedure] … relating to an appeal on a point of law, shall be applicable to proceedings before the [Sąd Najwyższy (Supreme Court)] and the [Naczelny Sąd Administracyjny (Supreme Administrative Court)]. The provisions of Article 87^1 of that law shall not apply.

4. In individual cases concerning appointment to the office of judge of the [Sąd Najwyższy (Supreme Court)], the annulment by the [Naczelny Sąd Administracyjny (Supreme Administrative Court)] of the [KRS] resolution not to present the proposal for appointment to the office 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)], for a position for which, on the date of delivery of the judgment of the [Naczelny Sąd Administracyjny (Supreme Administrative Court)], the procedure before [the KRS] has not ended or, in the absence of such a procedure, for the next vacant position of judge in the [Sąd Najwyższy (Supreme Court)] which is the subject of the announcement.'

18 Paragraph 1a of Article 44 of the Law on the KRS was inserted into that article by the Law of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws, which entered into force on 17 January 2018, and paragraphs 1b and 4 were inserted into that article by the Law of 20 July 2018 amending the Law on the system of ordinary courts and certain other laws, which entered into force on 27 July 2018. Prior to the insertion of those amendments, the appeals referred to in that paragraph 1a were to be lodged with the Sąd Najwyższy (Supreme Court) in accordance with Article 44(1).

19 By judgment of 25 March 2019, the Trybunał Konstytucyjny (Constitutional Court, Poland) declared Article 44(1a) of the Law on the KRS incompatible with Article 184 of the Constitution, on the grounds, in essence, that the jurisdiction conferred on the Naczelny Sąd Administracyjny (Supreme Administrative Court) by paragraph 1a was not justified in the light of either the nature of the cases concerned, the organisational characteristics of that court or the procedure applied by that court. In that judgment, the Trybunał Konstytucyjny (Constitutional Court) also stated that that declaration of unconstitutionality 'necessarily leads to the termination of all pending court proceedings based on the repealed provision'.

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

'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. It is not possible to bring an appeal in individual cases relating to an appointment to the office of judge at the [Sąd Najwyższy (Supreme Court)].'

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

The Law on the organisation of the ordinary courts

22 The ustawa – Prawo o ustroju sądów powszechnych (Law on the organisation of the ordinary courts) of 27 July 2001, as amended (Dz. U. of 2019, item 52), provides in Article 22a:

'…

4b The transfer of a judge to another division shall not be subject to the consent of that judge:

1. in the event of transfer to another division handling cases in the same field;

…

4c The provisions of Article 4b(1) … shall not be applicable to a judge who, over a period of three years, was transferred to another division without his or her consent. …

5. A judge or assistant judge whose allocated activities have been changed in a manner resulting in a change in the scope of his or her duties, in particular where this involves a transfer to another court division, may appeal to the [KRS] within seven days of the date of being informed of the scope of his or her new duties. He or she shall not be entitled to appeal in the event of:

1. a transfer to a division which examines cases in the same area;

…'

The Code of Civil Procedure

23 Under Article 49 of the ustawa – Kodeks postępowania cywilnego (Law on the Code of Civil Procedure) of 17 November 1964, as amended (Dz. U. of 2018, item 1360) ('the Code of Civil Procedure'):

'…the court shall allow a judge to recuse him or herself upon his or her request or upon an application of a party, if there is a circumstance such as to cast reasonable doubt on the impartiality of that judge in a given case.'

24 Article 50(3) of the Code of Civil Procedure states:

'Until a decision has been made on the application for recusal of a judge:

1. the judge concerned by the request may continue the proceedings;

2. No decision or measure putting an end to the proceedings may be made.'

25 Article 365(1) of that code provides:

‘A final decision shall bind not only the parties and the court which made that decision, but also other courts, other public authorities and administrative bodies, and, in cases provided for by law, other persons.’

26 Article 388(1) of that code provides:

‘In the event of an appeal on a point of law, where the enforcement of the decision is capable of causing irreparable harm to a party, the court of second instance may suspend the enforcement of the contested decision until the appeal proceedings are closed … The decision may be made in closed session. …’

27 Under Article 391(1) of that code:

‘The rules of procedure before the first instance court shall apply by analogy to the procedure before the second instance court, where no specific provisions govern it. …’

28 Article 398^{21} of the Code of Civil Procedure states:

‘The rules of procedure before the first-instance court shall apply by analogy to the procedure before the [Sąd Najwyższy (Supreme Court)], where no specific provisions govern it, …’

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

29 W.Ż. holds office as a judge at the Sąd Okręgowy w K. (Regional Court of K.). By decision of 27 August 2018, the president of that court decided, by virtue of Article 22a(4b)(1) of the Law on the organisation of the ordinary courts, to transfer W.Ż. from the division of that court in which he held office to another division of the same court.

30 W.Ż. brought an action against that decision before the KRS on the basis of Article 22a(5) of that law. By the resolution at issue, the KRS ruled that there was no need to adjudicate on that action.

31 On 14 November 2018, W.Ż. lodged an appeal against the resolution at issue before the Sąd Najwyższy (Supreme Court), within which court the examination of that appeal should fall to the Chamber of Extraordinary Control and Public Affairs. In that context, W.Ż., however, also submitted an application for the recusal of all the judges comprising the Chamber of Extraordinary Control and Public Affairs on the ground that, given the manner of their appointment, they did not offer the required guarantees of independence and impartiality. The Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber)), sitting as a panel of three judges, is responsible for examining that application.

32 As regards the manner of the appointment, the referring court, namely the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber)), ruling in extended composition with a panel of seven judges, states that Resolution No 331/2018 of the KRS of 28 August 2018 proposing that the President of the Republic appoint the persons concerned to positions of judges of the Chamber of Extraordinary Control and Public Affairs was the subject of appeals brought, on the basis of Article 44(1a) of the Law on the KRS, before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) by candidates not proposed for appointment by the KRS in that resolution.

33 By a final order of 27 September 2018, the Naczelny Sąd Administracyjny (Supreme Administrative Court) ordered, on the basis of the combined provisions of Articles 388(1) and 398[21] of the Code of Civil Procedure and Article 44(3) of the Law on the KRS, that Resolution No 331/2018 be suspended.

34 Notwithstanding the existence of those appeals and that order, the President of the Republic, on 10 October 2018, appointed, to positions of judges of the Chamber of Extraordinary Control and Public Affairs, certain candidates who had been put forward by the KRS in Resolution No 331/2018.

35 Subsequently, the Naczelny Sąd Administracyjny (Supreme Administrative Court), by decisions of 22 November 2018, stayed the appeals before it pending a ruling by the Court on the questions referred for a preliminary ruling by the same national court by decision of 21 November 2018 in the case giving rise to the judgment of 2 March 2021, *A.B. and Others – (Appointment of judges to the Supreme Court – Actions)* (C-824/18, 'the judgment in *A.B and Others*', EU:C:2021:153), concerning another resolution of the KRS presenting to the President of the Republic the candidacy of certain persons for appointment to positions as judges in the Civil and Criminal Chambers of the Sąd Najwyższy (Supreme Court). By those questions, the Naczelny Sąd Administracyjny (Supreme Administrative Court) asked, in essence, whether EU law is contrary to provisions such as those contained in Article 44(1a) to (4) of the Law on the KRS.

36 On 20 February 2019, the President of the Republic appointed, as a judge in the Chamber of Extraordinary Control and Public Affairs a candidate also proposed by the KRS in its Resolution No 331/2018 ('the judge concerned').

37 On 8 March 2019, the judge concerned, ruling as a single judge, without access to the case file which was then in the possession of the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber)), sitting as a panel of three judges, and without having heard W.Ż, made an order dismissing the latter's appeal against the resolution at issue as inadmissible ('the order at issue').

38 By decision of 20 March 2019, the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber)), sitting as a panel of three judges, held that the order at issue had been made in breach of Article 50(3)(2) of the Code of Civil Procedure, stressing that that provision precludes the delivery of a final judgment in a case while no ruling has been given on an application for recusal of a judge submitted by another judge. In that decision, that court, moreover, noted that that order infringed W.Ż's rights of defence, for the purposes of Article 45(1) of the Constitution, Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR') and Article 47 of the Charter, since that order had been made by a court not in possession of the case file and without W.Ż's having had an opportunity to be informed of the position of the public prosecutor.

39 In that decision, that court also examined the question whether the judge concerned indeed had the status of a judge, failing which, it would be necessary to conclude that the order at issue was legally non-existent. That court stated that that issue is relevant to the outcome of the recusal proceedings pending before that court in so far as, if the existence of the order at issue were established, those proceedings would have to be terminated by a decision that there is no need to adjudicate on account of lack of purpose, whereas if that order were non-existent, it would be necessary to rule on the application for recusal made by W.Ż. It is in those circumstances that the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber)), sitting as a panel of three judges, decided to address the following questions to the referring court:

‘1. Does the order dismissing the appeal brought before the Sąd Najwyższy (Supreme Court) against a resolution of the KRS, delivered by a panel consisting of a single judge appointed as a judge of the Sąd Najwyższy (Supreme Court), despite an appeal brought previously before the Naczelny Sąd Administracyjny (Supreme Administrative Court) against the resolution of the KRS proposing the appointment to the office of judge of the Supreme Court of that person and even though the proceedings before the Supreme Administrative Court were still pending on the date of notification of the act of appointment, exist legally and does it terminate the proceedings initiated by the bringing of the appeal in question?

2. Is the suspension of the effects of the resolution of the KRS that by virtue of the combined provisions of Articles 388(1) and 398^{21} of the [Code of Civil Procedure] and of Article 44(3) of the [Law on the KRS], the Naczelny Sąd Administracyjny (Supreme Administrative Court) issued before the notification of the act of appointment to the post of judge of the Sąd Najwyższy (Supreme Court) relevant to the answer to question 1?’

40 The referring court considers that the answer to the questions thus addressed to it will depend, inter alia, on whether a judge appointed in such circumstances constitutes an independent and impartial tribunal established by law, within the meaning of the second subparagraph of Article 19(1) TEU, Article 267 TFEU, the second subparagraph of Article 47 of the Charter, and Article 6(1) ECHR.

41 According to the referring court, the second subparagraph of Article 19(1) TEU, requires Member States to guarantee that their national courts and tribunals called upon to rule in areas covered by EU law, satisfy such requirements, which means in particular that the judges concerned should be appointed in a proper manner.

42 First, the referring court states that the Chamber of Extraordinary Control and Public Affairs is inter alia called upon to rule in cases in fields covered by EU law such as those relating to the protection of competition and energy regulation. Second, the order at issue was issued in a case concerning the status of and the protection of the independence of a judge of a national court, itself called upon to rule in areas covered by EU law, which requires, at each stage of the main proceedings, compliance with the requirements set out in the second subparagraph of Article 47 of the Charter.

43 Moreover, the referring court considers that the judge concerned was appointed in flagrant and deliberate breach of the fundamental provisions of Polish law governing the procedure for the appointment of judges.

44 First, according to the referring court, that appointment was made even though the Naczelny Sąd Administracyjny (Supreme Administrative Court) had been seised of an appeal against Resolution No 331/2018 proposing the appointment of the person concerned. It follows from Article 179 of the Constitution that such a proposal is essential, so that, so long as the legal existence of that resolution remains uncertain on account of that appeal, any appointment is deprived of its legal basis, since such an action seeks to ensure safeguarding of the right of access to the civil service for persons participating in the appointment procedure under conditions of equality and to a tribunal, in accordance with Article 45(1), Article 60 and Article 77(2) of the Constitution.

45 The provisions of Article 44(1b) and (4) of the Law on the KRS are not capable of affecting the foregoing. As noted in paragraph 35 of the present judgment, the Naczelny Sąd Administracyjny (Supreme Administrative Court) referred a question to the Court of Justice for a preliminary ruling in the case giving rise to the judgment in *A.B. and Others* on account of doubts on the part of that

national court concerning the compatibility of those provisions with EU law. The referring court thus points out that it is in the light of the clarifications provided to it by the Court in that case that the Naczelny Sąd Administracyjny (Supreme Administrative Court) must rule on that compatibility or ensure that those provisions are interpreted in accordance with EU law.

46 Second, according to the referring court, by making the appointment at issue in spite of the definitive decision by which the Naczelny Sąd Administracyjny (Supreme Administrative Court) ordered that the application of Resolution No 331/2018 be suspended, the President of the Republic infringed the provisions of Article 365(1), Article 391(1) and Article 398^{21} of the Code of Civil Procedure in conjunction with Article 44(3) of the Law on the KRS. In addition, the appointment of the judge concerned appears also to disregard Articles 7 and 10 of the Constitution, since the President of the Republic did not observe the judicial authority conferred on the Naczelny Sąd Administracyjny (Supreme Administrative Court).

47 Furthermore, the referring court submits that such an improper appointment takes place in a more general context of multiple measures seeking to hinder the effective judicial review of resolutions of the KRS proposing appointments to positions of judges of the Sąd Najwyższy (Supreme Court).

48 The referring court maintains that the same applies, first, to the adoption of Article 44(1b) and (4) of the Law on the KRS whose compliance with EU law is, as has been previously noted, the subject of the questions referred to the Court of Justice in the case giving rise to the judgment in *A.B. and Others* second, to the bringing, by the KRS and a group of senators, of actions before the Trybunał Konstytucyjny (Constitutional Court) which led that court to declare in a judgment of 25 March 2019 that Article 44(1a) of the Law on the KRS was contrary to the Constitution and that all appeals brought against such resolutions pending before the Naczelny Sąd Administracyjny (Supreme Administrative Court) should, consequently, be closed and, third, to the adoption of the Law of 26 April 2019 which declared that there was no need to adjudicate in those appeals and ruled out all such appeals in the future.

49 In addition, the referring court indicates that are other defects surrounding the appointment of the judge concerned, including the fact that the 15 members of the current KRS holding office as judges were appointed by the Sejm (Lower Chamber of the Polish Parliament) and not, as was previously the case, by their peers, and the fact that the appointment of those members of the KRS took place by reducing the constitutionally guaranteed term of office of the members of the previous KRS. Those aspects are, in turn, the subject of the questions referred to the Court for a preliminary ruling in the joined cases giving rise to 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).

50 Having regard to all the conditions under which the judge concerned was thus appointed, the referring court considers that that judge does not offer the necessary guarantees concerning his independence and impartiality. The referring court maintains that those conditions are such as to give rise to doubts in that regard, on the part of individuals, and to expose that judge to external pressures from the authorities which appointed him and then took action to ensure that his appointment could no longer be challenged before the courts. Those same conditions also give rise to a risk of partiality in the context of the dispute in the main proceedings, as shown by the adoption of the order at issue by the judge concerned.

51 It is in those circumstances that the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber)), sitting in extended composition as a panel of seven judges, decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Should Articles 2, 6(1) and (3) and the second subparagraph of Article 19(1) [TEU], in conjunction with Article 47 [of the Charter] and Article 267 [TFEU], be interpreted as meaning that a court composed of a single person who has been appointed to the position of judge in flagrant breach of the laws of a Member State applicable to judicial appointments – which breach included, in particular, the appointment of that person to the position of judge despite a prior appeal to the competent national court [the Naczelny Sąd Administracyjny (Supreme Administrative Court)] against the resolution of a national body [the KRS], which included a motion for the appointment of that person to the position of judge, notwithstanding the fact that the effects of that resolution had been suspended in accordance with national law and that proceedings before the competent national court [the Naczelny Sąd Administracyjny (Supreme Administrative Court)] had not been concluded before the delivery of the appointment letter – is not an independent and impartial tribunal previously established by law within the meaning of EU law?'

Procedure before the Court

The application for an expedited procedure

52 In its order for reference, the referring court requested that the present reference be dealt with under an expedited procedure pursuant to Article 105 of the Rules of Procedure of the Court of Justice. In support of its request, that court maintains that such a procedure is justified in the light of the fact that, beyond the present main proceedings, the answer to the question referred to the Court for a preliminary ruling could have repercussions concerning the judicial activity of a certain number of other judges recently allocated to various chambers of the Sąd Najwyższy (Supreme Court) whose appointment took place in conditions similar or identical to those surrounding the appointment of the judge in question.

53 Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his 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.

54 It must be borne in mind that such an expedited procedure is a procedural instrument intended to address matters of exceptional urgency. Furthermore, it is also apparent from the case-law of the Court 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, *Asociaţia '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).

55 In the present case, the President of the Court decided, on 20 August 2019, having heard the Judge-Rapporteur and the Advocate General, that it was appropriate to reject the request referred to in paragraph 52 of the present judgment.

56 It is apparent from the order for reference that the dispute in the main proceedings concerns, in essence, an action by which a judge challenges the decision to transfer him from one division of

the court in which he sat to another division of the same court, an appeal in conjunction with an application for the recusal of the judges called upon to rule on that action. A dispute of that kind is not in and of itself such as to create a situation of exceptional urgency.

57 Moreover, while the question referred indeed relates to fundamental provisions of EU law, it is of a complex and highly sensitive nature and forms part of a relatively complex national legal and procedural context and thus does not lend itself to a procedure derogating from the ordinary rules of procedure. Furthermore, it was also important to take into account the fact that, as is clear from paragraphs 45, 48 and 49 of the present judgment, some of the concerns of the referring court on which the question referred is based were also the subject of other references for preliminary rulings which are being handled at fairly advanced stages.

The oral part of the procedure and the request to reopen it

58 Following the written part of the procedure, the parties concerned and, inter alia, the Polish Government presented oral argument at a hearing on 22 September 2020. The Advocate General delivered his Opinion on 15 April 2021, the date on which the oral part of the procedure, as a consequence, was closed.

59 By document lodged at the Court Registry on 7 May 2021, the Polish Government requested that the oral part of the procedure be reopened.

60 In support of that request, that Government relied on the fact that there were differences in the views expressed in, on the one hand the Opinion of the Advocate General in the present case and, on the other hand, the Opinion of Advocate General Hogan in *Repubblika* (C-896/19, EU:C:2020:1055) and the judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311), concerning the assessment of the process for appointing judges in the different Member States in the light of EU law.

61 The Polish Government also considers that reopening of the oral part of the procedure is justified in the present case on the ground that, in his Opinion, with which that government disagrees, the Advocate General did not take sufficient account of its arguments, with the result that that Opinion lacks objectivity.

62 In that regard, it must be noted, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court make no provision for the interested parties referred to in Article 23 of the Statute to submit observations in response to the Advocate General's Opinion (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 26 and the case-law cited).

63 Second, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. The Court is not bound either by the Advocate General's submissions or by the reasoning which led to those submissions. Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he or she examines in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 27 and the case-law cited).

64 As regards the Polish Government's assertions relating to an alleged lack of objectivity in the Opinion of the Advocate General, it suffices to note that the fact that that government considers that its arguments have not, in the present preliminary ruling procedure, been sufficiently taken into account in that opinion, is not, in any event, capable of establishing such a lack of objectivity.

65 In accordance with Article 83 of its Rules of Procedure, the Court may, moreover, 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.

66 In the present case, the Court considers, however, after hearing the Advocate General, that it has, following the written 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 to reopen the oral part of the procedure made by the Polish Government does not disclose any new fact which is of such a nature as to be a decisive factor for the decision of the Court in that case.

67 Accordingly, there is no need to order that the oral part of the procedure be reopened.

Consideration of the question referred

68 According to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it (judgment of 15 July 2021, *Ministrstvo za obrambo*, C-742/19, EU:C:2021:597, paragraph 31 and the case-law cited).

69 In the present case, it is apparent from the order for reference that the referring court is called upon to answer the questions put to it by the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber)), sitting as a panel of three judges, as reproduced in paragraph 39 of the present judgment. By those questions, the latter court wishes to know whether it is justified in disregarding the order at issue and, consequently, required to examine the application for recusal of which it is seised in the context of the main proceedings, or whether it must declare that there is no need to adjudicate on that application, on the ground that that order terminated the dispute in the main proceedings by declaring the appeal brought by W.Ż. before the Sąd Najwyższy (Supreme Court) against the resolution at issue to be inadmissible.

70 Furthermore, it must be stressed that, by that resolution, the KRS declared that there was no need to adjudicate on an action brought by W.Ż against the decision by which the President of the Sąd Okręgowy w K. (Regional Court of K.), to which W.Ż. was attached as a judge, transferred him, without his consent, from the division of that court in which he sat to another division of that court.

71 In those circumstances, it must be held that, by its question, the referring court asks, in essence, whether the second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law must be interpreted as meaning that a national court seised of an application for recusal as an adjunct to an action by a which a judge challenges a decision to transfer him, without his consent from one division of the court to which he is attached to another, must declare null and void an order by which a court, ruling at last instance and comprising a single judge, dismissed that action,

on the ground that, in the light of the circumstances in which the appointment of the judge sitting in that court took place, the latter does not constitute an independent and impartial tribunal previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU.

72 As regards those circumstances, the referring court stresses, in particular, in its question, the fact that, on the date of the appointment of the judge concerned, the resolution of the KRS, proposing that judge for appointment, was the subject of a legal action, and the Naczelny Sąd Administracyjny (Supreme Administrative Court), hearing that action, had ordered that that the effects of that resolution be suspended.

73 As is clear from paragraphs 45, 48 and 49 of the present judgment, in the grounds of the order for reference, the referring court also refers to its doubts, in that context, as regards, first, the successive modifications affecting the national rules governing such legal actions and the jurisdiction of the Naczelny Sąd Administracyjny (Supreme Administrative Court) to hear them, and, second, the apparent lack of independence of the KRS, while noting that both these issues were, moreover the subject of references for a preliminary ruling referred to the Court, in the case giving rise to the judgment in *A.B. and Others* and in the joined cases giving rise to 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 jurisdiction of the Court

74 According to the Prokurator Generalny (Public Prosecutor General, Poland), the applicable procedural rules concerning the appointment of judges and the conditions for the validity of such appointments fall within the exclusive competence of the Member States, outside the scope of EU law. Therefore, in his view, those questions do not fall within the jurisdiction of the Court of Justice.

75 In that regard, it must be noted that, as is apparent from settled case-law, although it is true that 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 and, that that may be the case, in particular, as regards national rules relating to the adoption of decisions appointing judges and, where applicable, rules relating to the judicial review that applies in the context of such appointment procedures (see, to that effect, the judgment in *A.B. and Others*, paragraph 68 and the case-law cited, and judgment of 20 April 2021, *Reppublika*, C-896/19, EU:C:2021:311, paragraph 48).

76 Moreover, the line of argument thus put forward by the Public Prosecutor General, in fact, relates to the actual scope and, therefore, to the interpretation of the provisions of EU primary law mentioned in the questions referred, that interpretation clearly falling within the jurisdiction of the Court under Article 267 TFEU (see, to that effect, 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 111 and the case-law cited).

77 For its part, the Polish Government maintains that the purpose of the question referred is not to obtain an interpretation of EU law, but seeks merely to bolster the view of the referring court that the judge concerned is not independent and impartial, or legally appointed, which involves both an interpretation of the provisions of national law governing the procedure for appointing judges and consideration of the facts in the light of those provisions, as well as examination of whether such a breach of national law entailed a breach of EU law. These questions do not fall within the jurisdiction of the Court when giving a preliminary ruling.

78 In that regard, it must, however, be noted, first, that, although in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law (see, inter alia, judgment of 26 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraph 37 and the case-law cited), the fact remains that it is for the Court, by contrast, to provide the national court that referred a question for a preliminary ruling with guidance on the interpretation of EU law that may be necessary for the outcome of the case in the main proceedings, while taking into account the indications contained in the order for reference as to the national law applicable to that case and to the facts characterising the latter.

79 It should also be borne in mind that, although similarly it is not for the Court, in such a preliminary ruling procedure, to rule upon the compatibility of provisions of national law with the legal rules of the European Union, the Court does, however, have jurisdiction to give the national court full guidance on the interpretation of EU law in order to enable it to determine the issue of compatibility for the purposes of the case before it (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 30 and the case-law cited).

80 It follows from the foregoing that the Court has jurisdiction to rule on the present request for a preliminary ruling.

Admissibility

81 The Polish Government and the Public Prosecutor General maintain that the request for a preliminary ruling is inadmissible in various respects.

82 In the first place, the Public Prosecutor General maintains, that, by ruling on an appeal such as that in the main proceedings against a resolution of the KRS, the Sąd Najwyższy (Supreme Court) is acting not as a court ruling on an appeal, but rather as an ‘organ of legal protection’ intervening in a procedure relating to an ‘abstract’ resolution.

83 In that regard, it should be noted that the conditions in which the Court performs its duties in respect of preliminary rulings are independent of the nature and objective of the proceedings brought before the national courts. Article 267 TFEU refers to the judgment to be given by the national court without laying down special rules in terms of the nature of such judgments (judgment of 16 December 1981, *Foglia*, 244/80, EU:C:1981:302, paragraph 33).

84 As is apparent from settled case-law, national bodies may refer a question to the Court if there is a case pending before them and if they are called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, to that effect, judgment of 31 January 2013, *Belov*, C-394/11, EU:C:2013:48, paragraph 39).

85 That is clearly the case here.

86 As is apparent from the order for reference, in the case in the main proceedings, the Sąd Najwyższy (Supreme Court) is called upon to rule on an appeal by which W.Ż. challenges a resolution of the KRS finding that there was no need to adjudicate on the action he brought before that body against a decision transferring him, without his consent, from one division to another of the court to which he is assigned as a judge.

87 In the second place, the Polish Government alleges that the provisions of EU law of which interpretation is, in the present case, sought, are not applicable to the dispute in the main

proceedings and that they many not, in particular, impose obligations on a Member State where it sets out conditions of transfer applicable to judges or the procedure for appointing those judges, or require the President of the Republic to suspend the issue of acts of appointment of judges pending a ruling of the Naczelny Sąd Administracyjny (Supreme Administrative Court) on an appeal brought against a resolution of the KRS. According to the Polish Government, all these questions fall within the sole competence of the Member States, in accordance with Article 5 TEU, read in conjunction with Articles 3 and 4 TFEU.

88 Moreover, the Polish Government maintains that the referring court has no jurisdiction, under national law, to adopt a decision having de facto equivalence to the expiry of the term of office of the judge concerned and any creation of such jurisdiction on the basis of EU law or a judgment of the Court would infringe certain fundamental national constitutional provisions in breach of Article 4(2) TEU and the principles of the rules of law, the irremovability of judges and legal certainty.

89 In that regard, it has, first, already been observed, in paragraph 75 of this judgment, that, when exercising their competence, in particular that relating to the enactment of national rules governing the process of appointing judges and subjecting that process to judicial review, the Member States are required to comply with their obligations deriving from EU law.

90 Moreover, it must be stated that the arguments thus put forward by the Polish Government relate, in essence, to the scope and, therefore, to the interpretation of the provisions of EU law to which the question referred relates, and to the effects which may flow from those provisions, in the light, in particular, of the primacy of EU law. Such arguments, which relate to the substance of the question referred, cannot therefore, by their very nature, lead to the inadmissibility of the question (see, to that effect, the judgment in *A.B. and Others*, paragraph 80).

91 In the third place, the Polish Government and the Public Prosecutor General consider that an answer from the Court to the question referred for a preliminary ruling is not necessary in the context of the dispute in the main proceedings.

92 Those parties concerned submit, first, that, since the appeal brought by W.Ż against the resolution at issue was dismissed by the order at issue, there is no longer any dispute to be settled in the main proceedings, with the result that the application for recusal pending before the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber)) sitting as a panel of three judges, is now devoid of purpose.

93 In that regard, it must, however, be noted, that, as the referring court set it out, an answer from the Court to the question referred for a preliminary ruling is necessary in order to allow that national court to reply to the questions addressed to it by the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber)), sitting as a panel of three judges, which seek specifically to determine whether that court should find the order at issue to be null and void and accordingly remain called upon to rule on the application for recusal before it.

94 It follows that, in the present case, an answer from the Court is required in order to allow the referring court and, then, the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber)), sitting as a panel of three judges, to settle the questions raised *in limine litis*, before that court can, as required, rule on the substance of the case in the main proceedings (see, to that effect, judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraphs 51 and the case-law cited). In those circumstances, the objection of the Polish Government and of the Public Prosecutor General must be rejected.

95 Second, the Public Prosecutor General submits that the application for recusal pending in the main proceedings should have been declared inadmissible in accordance with national legislation since it concerned judges who had not yet been assigned to hear the case concerned.

96 In that regard, it suffices, however, to recall that it follows from settled case-law that, in the context of the preliminary ruling procedure set out in Article 267 TFEU, it is not for the Court to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and their procedure (judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 26 and the case-law cited) or, in particular, to examine whether an application pending before a referring court is admissible under those rules (see, to that effect, judgment of 7 December 2000, *Schnorbus*, C-79/99, EU:C:2000:676, paragraphs 21 to 22).

97 Third, according to the Public Prosecutor General, although the question referred for a preliminary ruling is based on an assertion that the rules governing the national procedure for appointing judges have been disregarded in the present case, no such infringements of national law have been established.

98 In that regard, it has however already been noted in paragraph 78 of the present judgment that, in the context of the procedure referred to in Article 267 TFEU, it is not for the Court to rule on the interpretation and application of national legislation or to assess the facts.

99 In the fourth and last place, the Public Prosecutor General maintains that the reasoning contained in the request for a preliminary ruling does not meet the requirements resulting from Article 94 of the Rules of Procedure of the Court. The Public Prosecutor General submits that the provisions of the applicable national law set out in that order for reference are selective and do not substantiate the alleged infringements of the national procedure for appointing judges, while the reasons behind the choice of the provisions of EU law for which interpretation is sought, which are relevant to establishing the required link between those provisions and the applicable national legislation in the main proceedings, are not further clarified by that court.

100 In that regard, it must, however, be noted that it follows from the matters referred to in paragraphs 3 to 28 and 40 to 50 of the present judgment that the request for a preliminary ruling includes all the elements necessary, in particular those relating to the content of the national provisions that may apply in the present case, to the reasons leading the referring court to ask the Court for an interpretation of the second subparagraph of Article 19(1) TEU, and the links that that court establishes between that provision and the abovementioned national rules, with the result that the Court is in a position to rule on the question referred to it.

101 It follows from all the foregoing considerations that the request for a preliminary ruling is admissible.

Substance

102 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 legal 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 ECHR, and which is now reaffirmed by Article 47 of the Charter (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 190 and the case-law cited). That provision must, therefore, be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU (see, to that effect, judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 45 and the case-law cited).

103 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 (judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 50 and the case-law cited, and of 18 May 2021, *Asociaţia '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 192 and the case-law cited).

104 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 in *A.B. and Others*, paragraph 112 and the case-law cited).

105 As regards the case in the main proceedings, it must be noted, at the outset, that the appeal brought by W.Ż. before the Sąd Najwyższy (Supreme Court) is directed against a resolution of the KRS declaring that there is no need to adjudicate on the action brought by the party concerned before that body concerning a decision of the President of the Sąd Okręgowy w K. (Regional Court of K.) transferring W.Ż., without his consent, from the division of that court in which he sat to another division of the same court.

106 In the present case, it is not in dispute that an ordinary Polish court such as a sąd okręgowy (regional court) may, in that capacity, be called upon to rule on questions relating to the application or interpretation of EU law and that, therefore, as 'courts or tribunals' within the meaning of EU law, they fall within the Polish system of legal remedies in the 'fields covered by Union law', within the meaning of the second subparagraph of Article 19(1) TEU (see, to that effect, judgment of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 104, and of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 55).

107 To ensure that such a body is in a position to ensure the effective legal protection thus required under the second subparagraph of Article 19(1) TEU, maintaining its independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy (judgments of 18 May 2021, *Asociaţia '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 194 and the case-law cited, and of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 57).

108 That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (judgment of 20 April 2021,

Repubblika, C-896/19, EU:C:2021:311, paragraph 51 and the case-law cited, and of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 58).

109 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 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 53 and the case-law cited).

110 In that regard, it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence. 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 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 197 and the case-law cited).

111 The freedom of judges from all external intervention or pressure, which is essential, requires, inter alia, certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office (judgment of 5 November 2019, *Commission* v *Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 112 and the case-law cited).

112 Having regard to the cardinal importance of the principle of irremovability an exception to that principle is acceptable only if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the courts concerned to external factors and their neutrality with respect to the interests before them. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed (see, to that effect, judgment of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 113 and 115 and the case-law cited).

113 In that regard, according to settled case-law, the requirement of judicial independence arising from the second subparagraph of Article 19(1) TEU means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (judgments 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 198 and the case-law cited, and of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 61).

114 Transfers without consent of a judge to another court, or, as is the case in the main proceedings, the transfer without consent of a judge between two divisions of the same court are also potentially capable of undermining the principles of the irremovability of judges and judicial independence.

115 Such transfers may constitute a way of exercising control over the content of judicial decisions because they are liable not only to affect the scope of the activities allocated to judges and the handling of cases entrusted to them, but also to have significant consequences on the life and career of those persons and, thus, to have effects similar to those of a disciplinary sanction.

116 Having examined various international instruments dealing with the issue of judicial transfers, the European Court of Human Rights thus noted that such instruments sought to confirm the existence of a right of members of the judiciary to protection from arbitrary transfer, as a corollary to judicial independence. In that regard, that court inter alia stressed the importance of procedural safeguards and the possibility of a judicial remedy concerning decisions affecting the careers of judges, including their status, and in particular decisions to transfer them without their consent, in order to ensure that their independence is not compromised by undue external influences (see, to that effect, ECtHR, 9 March 2021, *Bilgen v. Turkey*, CE:ECHR:2021:0309JUD000157107, §§ 63 and 96).

117 In the light of the foregoing, it must be held that the requirement of judicial independence arising from second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter, requires that the rules applicable to transfer without the consent of such judges present, like the rules governing disciplinary matters, in particular the necessary guarantees to prevent any risk of that independence being jeopardised by direct or indirect external interventions. It follows that the rules and principles recalled in paragraph 113 of the present judgment relating to the disciplinary regime applicable to judges must, *mutatis mutandis*, also apply so far as concerns such rules concerning transfers.

118 It is thus important that, even where such transfer measures without consent are, as in the context of the case in the main proceedings, adopted by the president of the court to which the judge who is the subject of those measures belongs outside the disciplinary regime applicable to judges, those measures may only be ordered on legitimate grounds, in particular relating to distribution of available resources to ensure the proper administration of justice, and that such decisions may be legally challenged in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence.

119 As regards the context of the case in the main proceedings, the Rzecznik Praw Obywatelskich (Ombudsman, Poland), inter alia, submitted to the Court, first, that the transfer decision challenged by W.Ż is considered by the latter to constitute an unjustified demotion, since he was transferred from a civil division of a regional court ruling on appeal to a civil division of the same court ruling at first instance, second, that W.Ż was a member of and spokesperson for the former KRS and was known for having publicly criticised the recent Polish justice reforms and, third, that the president of the court who decided on the transfer at issue in the main proceedings was appointed by the Minister for Justice on a discretionary basis under Article 24(1) of the Law on the organisation of the ordinary courts, as a replacement for the previous president of that court whose term of office was however still ongoing. Noting that the action brought by W.Ż against that transfer decision was discontinued by the resolution at issue, the Ombudsman also stated, in that context, echoing the doubts expressed by the referring court in that regard, that the new KRS which adopted that resolution did not constitute an independent body.

120 Although it does not fall within the jurisdiction of the Court, hearing, as in the case, a request for a preliminary ruling, to confirm the extent to which those circumstances, or certain of them, have in fact been established, it remains, in any event, in order to ensure the possibility of an effective judicial remedy in respect of a decision to transfer a judge without consent, such as that at issue in the main proceedings, necessary for an independent and impartial tribunal established by law to be able, in accordance with a procedure that fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, to review the validity of that decision and that of the decision not to adjudicate of a body such as the KRS concerning the challenge brought against that transfer decision.

121 In the present case, the referring court, seeks, in essence, as is apparent from paragraph 71 of the present judgment, to determine whether, in the context of the case in the main proceedings, EU law requires that the order at issue by which the judge concerned dismissed the appeal brought by W.Ż. against the resolution at issue be declared null and void, taking into consideration the circumstances in which the appointment of that judge took place. According to its wording, that question concerns, more specifically whether, taking those circumstances into account, that judge may be regarded as constituting an 'independent and impartial tribunal previously established by law within the meaning of EU law'.

122 As regards those concepts, 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 102 of this judgment, 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.

123 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 (see, to that effect, judgments of 29 July 2019, *Gambino and Hyka*, C-38/18, EU:C:2019:628, paragraph 39 and the case-law cited, and of 26 March 2020, *Review Simpson and HG* v *Council and Commission,* C-542/18 RX-II and C-543/18 RX-11, EU:C:2020:232, paragraph 72).

124 In that regard, the European Court of Human Rights 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, 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 (ECtHR, 1 December 2020, *Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418, §§ 231 and 233).

125 As regards, more specifically, the process of appointing judges, The European Court of Human Rights also stated 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 (ECtHR, 1 December 2020, *Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418, §§ 227 and 232).

126 As has been held, for its part, by the Court, 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 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 57 and the case-law cited).

127 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 (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 54 and the case-law cited).

128 As noted in paragraphs 109 and 110 of this judgment, 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.

129 Furthermore, in paragraph 73 of the judgment of 26 March 2020 *Review Simpson and HG* v *Commission* (C-542/18 RX-II et C-543/18 RX-II, EU:C:2020:232), the Court recalled, echoing in that regard the settled case-law of the European Court of Human Rights, 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.

130 As regards EU law, the Court thus held, drawing, in that regard, on the case-law of the European Court of Human Rights to the effect 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 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. (see, to that effect, 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 75).

131 It will be for the referring court ultimately to rule, in the light of all the principles thus recalled, on paragraphs 126 to 130 of this judgment, and, having made the assessments required for that purpose, on whether all the conditions in which the appointment of the judge concerned took place and, in particular, any irregularities which were committed in the procedure for his appointment are such as to lead to the conclusion that the body in which such a judge, sitting as a single judge, made the order at issue, did not act as an 'independent and impartial tribunal previously established by law, within the meaning of EU law.

132 As was noted in essence in paragraph 78 of the present judgment, Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions.

133 However, according to settled case-law, the Court may, in the framework of the judicial cooperation provided for by Article 267 TFEU and on the basis of the material in the case file, provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions (see, to that effect, 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 201 and the case-law cited).

134 In the present case, the doubts of the referring court as to whether the judge concerned was an 'independent and impartial tribunal previously established by law, when he made the order at issue, arising, in the first place, from the fact that the appointment of that judge took place when Resolution No 331/2018 of the KRS proposing the person concerned for that appointment was the subject of an appeal before the Naczelny Sąd Administracyjny (Supreme Administrative Court), which, according to the referring court, means that that appointment took place in breach of the applicable national law.

135 In that regard, the Polish Government, the Prosecutor General and the European Commission have, however, maintained that the national rules in force when that appeal was lodged, and, particularly, the provisions of Article 44(1b) and (4) of the Law on the KRS, were not, on the basis of their wording, capable of suggesting that such an appeal could, ultimately, lead to calling into question the proposal for the appointment of the candidate thus made by the KRS or, accordingly, hinder the appointment of the person concerned.

136 Indeed it is obvious from the order for reference in the present case that the assessment of the referring court to the effect that the appointment of the judge concerned took place in breach of the national provisions governing the appointment of judges results not from the fact that the provisions of Article 44(1b) and (4) of the Law on the KRS were, in the present case, disregarded, but rather from the fact that, according to that court, those national provisions themselves disregard certain provisions of the Constitution and of EU law.

137 In those circumstances, if the referring court were ultimately to consider that, in the light of the national law in force on the date on which the appointment of the judge concerned took place, the mere fact that an appeal such as that referred to in paragraph 134 of the present judgment was pending before the Naczelny Sąd Administracyjny (Supreme Administrative Court) was not clearly such as to prevent the President of the Republic from making that appointment, it cannot be considered that that appointment was made in manifest breach of the fundamental rules applicable

to the appointment of judges, within the meaning of the case-law recalled in paragraph 130 of the present judgment.

138 In the second place, the referring court, however, also stated, on the one hand, that the appointment of the judge concerned took place in breach of the final decision of the Naczelny Sąd Administracyjny (Supreme Administrative Court) ordering, as a precautionary measure, that the effects of Resolution No 331/2018 be suspended, even though such a suspension meant, according to the referring court, that the President of the Republic was prohibited from making such an appointment.

139 In that regard, the referring court referred, as is apparent from paragraph 46 of the present judgment, to the fact that that appointment thus took place in breach of the combined provisions of Articles 365(1), 391(1) and 398[21] of the Code of Civil Procedure and of Article 44(3) of the Law on the KRS, conferring on that court the power to adopt such precautionary measures, as well as of Articles 7 and 10 of the Constitution relating to the separation of and balance between the executive and the judiciary and the limits circumscribing the action of those branches of government.

140 On the other hand, the referring court also stressed that, on the date of the appointment of the judge concerned, the Naczelny Sąd Administracyjny (Supreme Administrative Court) had, furthermore, stayed the proceedings in the appeal thus lodged against Resolution No 331/2018, pending the ruling to be made by the Court following the reference for a preliminary ruling made by the same national court in the case giving rise to the judgment in *A.B. and Others*. It should be noted, in that regard, that, by that reference for a preliminary ruling, the Naczelny Sąd Administracyjny (Administrative Court) sought specifically to obtain clarification from the Court as to the compliance with EU law and the right to an effective judicial remedy guaranteed by that law, of the abovementioned provisions of Article 44(1b) and (4) of the Law on the KRS.

141 It follows from the foregoing that, when the appointment of the judge concerned took place, it could not, first of all, be ignored that the effects of Resolution No 331/2018 proposing the appointment of the person concerned had been suspended by a final judicial decision of the Naczelny Sąd Administracyjny (Supreme Administrative Court). Next, it was clear that such a suspension was to apply, in the present case, until the Court ruled on the question referred for a preliminary ruling submitted by the same national court by decision of 22 November 2018 in the case giving rise to the judgment in *A.B. and Others* and that that question specifically concerned whether EU law precluded provisions such as those set out in Article 44(1b) and (4) of the Law on the KRS. In those circumstances, it was, finally, also clear that the answer expected from the Court in that case was capable of requiring the Naczelny Sąd Administracyjny (Supreme Administrative Court), in accordance with the principle of the primacy of EU law, to set aside those national provisions and, if necessary, to annul that Resolution of the KRS in its entirety.

142 In that regard, it should be noted that it follows from the Court's case-law that the full effectiveness of EU law requires that a national court seised of a dispute governed by EU law must be able to grant interim relief in order to ensure the full effectiveness of the judgment to be given. If a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice, the effectiveness of the system established by Article 267 TFEU would be impaired (see, to that effect, judgments of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257, paragraphs 21 and 22, and of 9 November 1995, *Atlanta Fruchthandelsgesellschaft and Others (I)*, C-465/93, EU:C:1995:369, paragraph 23 and the case-law cited). The effectiveness of that system would also be compromised if the

authority attaching to such interim relief could be disregarded, in particular, by a public authority of the Member State in which those measures were adopted.

143 Thus, the appointment of the judge concerned in breach of the authority attaching to the final order of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 27 September 2018, without awaiting the Court's judgment in the case giving rise to the judgment in *A.B. and Others*, undermined the effectiveness of the system established in Article 267 TFEU. In that regard it is furthermore necessary to note that the Court held, in the operative part of its judgment in *A.B. and Others*, in reliance, in that respect, on the considerations set out in paragraphs 156 to 165 of that judgment that the second subparagraph of Article 19(1) TEU must be interpreted as precluding provisions amending the state of national law in force under which:

– notwithstanding the fact that a candidate for a position as judge at a court such as the Sąd Najwyższy (Supreme Court) lodges an appeal against the decision of a body such as the KRS not to accept his or her application, but to put forward that of other candidates to the President of the Republic, that decision is final inasmuch as it puts forward those other candidates, with the result that that appeal does not preclude the appointment of those other candidates by the President of the Republic and that any annulment of that decision inasmuch as it did not put forward the appellant for appointment may not lead to a fresh assessment of the appellant's situation for the purposes of any assignment of the position concerned, and

– moreover, such an appeal may not be based on an allegation that there was an incorrect assessment of the candidates' fulfilment of the criteria taken into account when a decision on the presentation of the proposal for appointment was made,

where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those provisions are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges thus appointed, by the President of the Republic, on the basis of the decisions of the KRS, to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, 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.

144 In the same judgment in *A.B. and Others*, the Court likewise held that where it is proved that the second subparagraph of Article 19(1) TEU has been infringed, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply those provisions and to apply instead the national provisions previously in force while itself exercising the judicial review envisaged by those latter provisions.

145 In the third place, as is apparent from paragraph 49 of the present judgment, the referring court also expressed, as regards the conditions in which the appointment of the judge concerned took place on the basis of Resolution No 331/2018, doubts concerning the independence of the KRS which proposed the person concerned for that appointment.

146 Those doubts arose, first, from the fact that the ongoing term of office of four years, laid down in Article 187(3) of the Constitution, of certain of the members then composing the KRS had been reduced and, second, that, as a consequence of modifications recently made to the Law on the KRS, the 15 members of the KRS acting as judges, who had been previously elected by their peers, were, as regards the new KRS, designated by a branch of the Polish legislature with the result that

23 of the 25 members comprising the KRS in that new composition were designated by the Polish executive and legislature or are members of those branches of government.

147 In that regard, the Court has had occasion to state, in several recent judgments, that the mere fact that the judges concerned are appointed by the President of the Republic does not give rise to a relationship of subordination of those judges to the latter or to doubts as to the judges' impartiality, if, once appointed, they are free from influence or pressure when carrying out their role (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, paragraph 133; *A.B. and Others*, paragraph 122; and of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges),* C-791/19, EU:C:2021:596, paragraph 97).

148 In those judgments, the Court also stated that it was still necessary to ensure that the substantive conditions and procedural rules governing the adoption of those appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges, and that it is important, inter alia, in that perspective, that those conditions and procedural rules are drafted in a way which meets the requirements set out in paragraphs 109 and 110 of the present judgment (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, paragraph 134; *A.B. and Others*, paragraph 123; and of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 98 and the case-law cited).

149 Having noted that, under Article 179 of the Constitution, the judges of the Sąd Najwyższy (Supreme Court) are to be appointed by the President of the Republic on a proposal from the KRS, that is to say the body empowered under Article 186 of the Constitution to ensure the independence of the courts and of the judiciary, the Court stated that the participation of such a body, in the context of a process for the appointment of judges, may, in principle, be such as to contribute to making that process more objective, by circumscribing the President of the Republic's discretion in exercising the powers of his or her office, while indicating, however, that that that is only the case provided, inter alia, that that body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal. (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, paragraphs136 to 138; *A.B. and Others*, paragraphs 124 and 125; and of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraphs 99 and 100 and the case-law cited).

150 The Court has recently held that the two situations referred to by the referring court, as addressed in paragraph 146 of this judgment, combined with the fact that they belonged to a context in which it was expected that several positions would soon become vacant in the Sąd Najwyższy (Supreme Court), could give rise to legitimate doubts, in so far as concerns the independence of the KRS and its role in the appointment process leading to those appointments to positions of judges at the Sąd Najwyższy (Supreme Court) (see, to that effect, judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraphs 104 to 108).

151 In the fourth place, and as regards the specific circumstances in which the judge concerned was appointed by the President of the Republic as a judge in the Chamber of Extraordinary Control and Public Affairs and was then prompted to make the order at issue, it must be noted that it is apparent from the order for reference, first, that that appointment and order were both made even though the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber)) had been seised, in the

context of the dispute in the main proceedings, of an application for the recusal of all the judges then sitting in the Chamber of Extraordinary Control and Public Affairs. Second, it also follows from the statements made in that decision that the grounds put forward in support of that application for recusal inter alia concerned the circumstances in which the appointments of the judges comprising that chamber took place, that is to say circumstances that are similar in many respects to those surrounding the appointment of the judge concerned himself.

152 Viewed together, the circumstances referred to in paragraphs 138 to 151 of the present judgment are, subject to the final assessments to be made, in that regard, by the referring court, such as to lead, on the one hand, to the conclusion that the appointment of the judge concerned took place in clear disregard of the fundamental procedural rules for the appointment of judges to the Sąd Najwyższy (Supreme Court) forming an integral part of the establishment and functioning of that judicial system concerned, within the meaning of the case-law referred to in paragraph 130 of the present judgment.

153 On the other hand, subject to the same proviso, all those circumstances may also lead the referring court to conclude that the conditions in which the appointment of the judge concerned thus took place undermined the integrity of the outcome of the appointment process at issue in the main proceedings by serving to create in the minds of individuals, reasonable doubts as to the imperviousness of that judge to external factors and as to his neutrality with respect to the interests before him as well as a lack of appearance of independence or impartiality on his part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals.

154 If the referring court draws such conclusions, it will then be necessary to consider that the conditions in which the appointment of the judge concerned thus took place are, in the present case, such as to prevent satisfaction of the requirement which arises from the second subparagraph of Article 19(1) and according to which when a body, such as that in which that judge, in the present case, sat as a single judge, is called upon to rule on a measure for the transfer without consent of a judge who, like W.Ż., is liable to be called upon to interpret and apply EU law, such a body must constitute an independent and impartial tribunal previously established by law, for the purposes of that provision.

155 In that case, it will remain for the referring court to state, in the answers which it is required to give to the questions put to it by the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber)), sitting as a panel of three judges, that that court must, in accordance with the principle of the primacy of EU law, declare the order at issue to be null and void, without any provision of national law being able to preclude this.

156 In that regard, it is important to note that, by virtue of settled case-law, the principle of the primacy of EU law establishes the pre-eminence of EU law over the law of the Member States. That principle therefore requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those provisions in the territory of those States (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 244 and the case-law cited).

157 By virtue of the principle of the primacy of EU law, a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. In accordance with well-established case-law, the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, inter alia,

provisions of domestic law, including constitutional provisions, being able to prevent that (see, to that effect, 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 245 and the case-law cited).

158 In that regard, any national court, hearing a case within its jurisdiction, has, as a body of a Member State, more specifically the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it (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 248 and the case-law cited).

159 Thus, given 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 obligation is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law, the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber)), sitting as a panel of three judges, will be required to ensure, within the limits of its jurisdiction, the full effectiveness of that provision (see, to that effect, 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 250 and the case-law cited), which, in the present case and subject to the assessments still to be made by the referring court, will require, taking into account what has been set out in paragraph 39 of the present judgment, that that order be declared null and void.

160 In that regard, it must also be stated that if the referring court considers that such an order was made by an body that does not constitute an independent and impartial tribunal previously established by law, within the meaning of EU law, no consideration relating to the principle of legal certainty or the alleged finality of a decision can, in the present case, be successfully relied on in order to prevent a court such as the Sąd Najwyższy (Izba Cywilna)) (Supreme Court (Civil Chamber)), sitting as a panel of three judges, from declaring such an order to be null and void.

161 In the light of the foregoing considerations, the answer to the question referred is that the second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law must be interpreted as meaning that a national court seised of an application for recusal as an adjunct to an action by which a judge holding office in a court that may be called upon to interpret and apply EU law challenges a decision to transfer him without his consent, must – where such a consequence is essential in view of the procedural situation at issue in order to ensure the primacy of EU law – declare to be null and void an order by which a court, ruling at last instance and comprising a single judge, has dismissed that action, if it follows from all the conditions and circumstances in which the process of the appointment of that single judge took place that (i) that appointment took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned, and (ii) the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned, with the result that that order may not be regarded as being made by an independent and impartial tribunal previously established by law, within the meaning of the second subparagraph of Article 19(1) TEU.

Costs

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

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

The second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law must be interpreted as meaning that a national court seised of an application for recusal as an adjunct to an action by which a judge holding office in a court that may be called upon to interpret and apply EU law challenges a decision to transfer him without his consent, must – where such a consequence is essential in view of the procedural situation at issue in order to ensure the primacy of EU law – declare to be null and void an order by which a court, ruling at last instance and comprising a single judge, has dismissed that action, if it follows from all the conditions and circumstances in which the process of the appointment of that single judge took place that (i) that appointment took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned, and (ii) the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned, with the result that that order may not be regarded as being made by an independent and impartial tribunal previously established by law, within the meaning of the second subparagraph of Article 19(1) TEU.

[Signatures]

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* Language of the case: Polish.