Case C273/24 [Naski] [i]

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

18 April 2024

Referring court:

Sąd Najwyższy (Poland)

Date of the decision to refer:

1 December 2023

Appellant:

X.Y.

Interveners:

Prokurator Generalny zastępowany przez Prokuraturę Krajową

Rzecznika Praw Obywatelskich

Subject matter of the main proceedings

This case concerns a legal issue presented for consideration by a panel of seven judges of the Sąd Najwyższy (Supreme Court, Poland) by a three-person panel from that same court, in relation to an application for the exclusion of judges sitting in the Izbie Kontroli Nadzwyczajnej i Spraw Publicznych (the Chamber of Extraordinary Control and Public Affairs, Poland) from hearing Case I NO 47/18. That case concerns the appeal by X.Y. against the resolution of the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; 'the KRS') to discontinue the proceedings in the matter of his appeal against the decision of the President of the Sądu Okręgowego w Krakowie (Regional Court, Kraków).

[i] The name of this case is fictitious and not the real name of any of the parties to the proceedings.

Subject matter and legal basis of the request

The purpose of this proceeding is to ensure that the preliminary ruling of the Court of Justice is taken into account by a bench of a national court or tribunal that is independent, impartial and established by law within the meaning of EU law – Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and Article 267 TFEU, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

Question referred for a preliminary ruling

(1) In a situation in which the court of last instance of a Member State (Sąd Najwyższy (Supreme Court, Poland) – following an interpretation of EU law by the CJEU as to the legal consequences of a breach of the fundamental rules of the law of that State concerning the appointment of judges of the Supreme Court, consisting of:

(a) the President of the Republic of Poland handing out letters of appointment to the position of judge of the Supreme Court despite the fact that the resolution of the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; 'the KRS'), which includes the proposal for appointment of judges, was previously challenged before the national court having jurisdiction (Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland)), that the Supreme Administrative Court suspended the implementation of that resolution in accordance with national law, and that the appeal proceedings were not concluded, after which proceedings the Supreme Administrative Court set aside the challenged resolution of the KRS due to its unlawfulness, permanently removing it from the legal order, thereby depriving the process used to appoint judges of the Supreme Court of the legal basis required by Article 179 of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland), which basis consists of a proposal by the KRS for appointment to the position of judge,

(b) pre-appointment proceedings being conducted without regard to the principles of transparency and fairness by a national body (the KRS) which, given the circumstances surrounding its establishment (the selection of judges) and the manner in which it operates, does not meet the requirements of a constitutional body upholding the independence of the courts and of judges, as it was constituted under the procedure stipulated in the ustawy z 8 grudnia 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law of 8 December 2017 amending the Law on the KRS and certain other laws) (DZ. U. of 2018, Item 3),

– is required to resolve a legal question submitted to that court by applying the interpretation of EU law adopted by the CJEU, should the provisions of Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) [TEU] and

Article 267 TFEU, in conjunction with Article 47 [of the Charter], be interpreted as precluding the participation, in the composition of the Supreme Court deciding this legal question, of any of the persons appointed as judges of the Supreme Court in breach of the rules of national law of a Member State described in point 1(a) or (b) above, and as precluding changes to the composition of the bench of the court of the Member State that made the reference for a preliminary ruling to the CJEU, where such changes take place after the CJEU has delivered its judgment in response to that question and are not justified on objective grounds (for example, death, retirement of the judge who was a member of the court that made the reference for a preliminary ruling),

– and as precluding the taking of any decision-making action in the case involving the resolution of this legal issue, including the issuing of orders as to, in particular, the composition of the Supreme Court or the date on which it is to be heard, by a person appointed as President of the Supreme Court who directs the work of the Civil Chamber and who was also appointed as a judge of the Supreme Court in breach of the rules of national law of a Member State described in points 1(a) and 1(b) above, or by any other person appointed as a judge of the Supreme Court also in breach of the rules of national law of a Member State described in points 1(a) and 1(b) above, with the result that such orders or decision-making acts must be regarded as having no legal effect,

– and as meaning that a judge of the Supreme Court, whose appointment was not vitiated by any of the shortcomings referred to in points 1(a) or (b) above, has the right and the obligation – in order to avoid a case being decided by a court that is not an independent, impartial court previously established by law, within the meaning of EU law – to refuse to sit on a collective bench of the Supreme Court in which a majority of those appointed as judges of the Supreme Court were appointed in breach of the rules of national law of the Member State referred to in point 1(a) or (b) above, and, in the event that the above question is answered in the affirmative, also as meaning that, if appointed to the office of judge of the Supreme Court without the infringements referred to in points 1(a) or 1(b) above, a judge of that court who is the Judge-Rapporteur in a case involving the legal issue in question is empowered to designate the composition of the Supreme Court that is to decide that issue, without regard to the provisions of national law conferring on the President of the Supreme Court directing the work of the Civil Chamber the power to designate the formations of the bench hearing cases heard in the Civil Chamber of the Supreme Court in order to give effect to EU law and its interpretation as adopted by the CJEU, and as precluding any person appointed as a judge of the Supreme Court in breach of the rules of national law of a Member State described in point 1(a) or (b) above or any other person appointed as a judge of the Supreme Court in breach of the rules of national law of a Member State described in point 1(a) or (b) above from holding any executive office in the Supreme Court (inter alia, that of President of that court, including the office of First President of that court or of Presidents of Chambers of the Supreme Court) and any office in the organs of the Supreme Court (such as that of member or deputy member of the College of the Supreme Court or the office of

Disciplinary Officer of Chambers of the Supreme Court), which offices may only be exercised by lawfully appointed judges of the Supreme Court, and as precluding such persons from taking any action falling within the jurisdiction of the Supreme Court judges performing the abovementioned functions, in view of their possible influence, in fact or in law, on the exercise of the jurisdictional functions of the Supreme Court?

Provisions of European Union law relied on

Article 2, Article 6(1) and (3) and second subparagraph of Article 19(1) TEU

Article 267 TFEU

Article 47 of the Charter

Provisions of national law relied on

Constitution of the Republic of Poland – Article 179,

Law of 8 December 2017 on the Supreme Court – Articles 15(1), 21, 22, 26(2), 76(1), 83(1), 87(1) and 88,

Rozporządzenie Prezydenta Rzeczypospolitej Polskiej z 14 lipca 2022 r. Regulamin Sądu Najwyższego (Decree of the President of the Republic of Poland of 14 July 2022 concerning the Rules of Procedure of the Supreme Court) – Sections 3, 4, 16, 80(7) and 84,

Ustawa z 17 listopada 1964 r. – Kodeks postępowania cywilnego (Law of 17 November 1964 – Code of Civil Procedure) – Article 51,

Succinct presentation of the facts and procedure in the main proceedings

1 A panel of three judges from the Civil Chamber of the Supreme Court (‘the Civil Chamber of the Supreme Court’) hearing, in Case III CO 121/18, the application from Judge X.Y. to exclude judges of the Supreme Court sitting in the Chamber of Extraordinary Control and Public Affairs from hearing Case I NO 47/18 relating to the appeal brought by X.Y. against the resolution of the KRS of 21 September 2018 to discontinue proceedings in the matter of his appeal against the decision of the President of the Regional Court in Kraków of 27 August 2018, was presented with an order of the Supreme Court of 8 March 2019 delivered in Case I NO 47/2018, by virtue of which the appeal brought by X.Y. against that resolution was rejected.

2 The above order of 8 March 2019 was delivered by a single-judge bench of the Supreme Court comprising Judge BD. Being aware of the circumstances under which BD was appointed as a judge of the Supreme Court – appointment at the

request of the KRS formed in accordance with the procedure laid down in the Law of 8 December 2017 amending the Law on the KRS and certain other laws ('the Law of 8 December 2017'), despite the prior challenge made to the relevant resolution of the KRS before the Supreme Administrative Court and the suspension by that court of the implementation of that resolution, and the failure to conclude the proceedings before the Supreme Administrative Court by the date of delivery of the appointment letter – and of the possible legal consequences of that order of 8 March 2019 in terms of the admissibility of further consideration of the application for exclusion of judges in Case III CO 121/18, the Supreme Court raised serious legal doubts in its examination of that application, which it expressed by formulating and submitting a legal question to a panel of seven judges of the Supreme Court for resolution in the order of 20 March 2019 (Case III CO 121/18). This legal question essentially asked whether there exists, in legal terms, a single-judge decision in which a person appointed as a judge of the Supreme Court sat in the circumstances referred to above, and whether the fact that the Supreme Administrative Court, prior to the delivery of the act appointing that judge of the Supreme Court, had suspended the execution of the resolution of the KRS is of significance in resolving that issue.

3 Considering the legal issues thus formulated, the panel of seven judges in Case III CZP 25/19, in turn, raised doubts regarding the interpretation of EU law and, by order of 21 May 2019, made a reference to the Court for a preliminary ruling. The case has been given the reference C487/19.

4 In a resolution issued by the panel of seven judges on 2 June 2022, the Criminal Chamber of the Supreme Court found that the KRS, formed in the manner laid down by the Law of 8 December 2017, is not the same as a constitutional body, for which the composition and manner of appointment are regulated by the Constitution of the Republic of Poland, in particular Article 187(1).

5 Furthermore, the interpretation adopted by the Supreme Court in the resolution of the three Joint Chambers of that court (Criminal, Civil and Labour and Social Security) of 23 January 2020 was confirmed in judgments of the European Court of Human Rights ('the ECtHR') of 22 July 2021 in Case 4344/18, *Reczkiewicz v. Poland*, and of 8 November 2021 in Cases 49868/19 and 57511/19, *Dolińska-Ficek and Ozimek v. Poland*.

6 In its judgment of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment) (C487/19, 'the W.Ż. judgment', EU:C:2021:798), the Court of Justice answered the question referred for a preliminary ruling by order of 21 May 2019.

7 After the Court of Justice had issued the W.Ż. judgment and sent the file in Case III CZP 25/19 to the Supreme Court, Judge JK – who was appointed under disputed circumstances as First President of the Supreme Court without the knowledge and agreement of Judge Karol Weitz, the Judge-Rapporteur in Case III CZP 25/19 and the then Presiding Judge of Division III of the Civil Chamber of

the Supreme Court, who had jurisdiction over Case III CZP 25/19 – used the administrative powers inherent in that position and took custody of the file on Case III CZP 25/19, preventing access to it by the Judge-Rapporteur and refusing to hand it over to him under the pretext of needing to apply to the President of the Republic of Poland for the appointment of an Extraordinary Disciplinary Officer for the purpose of considering the initiation of disciplinary proceedings against Judge BD and under the pretext of commissioning the Supreme Court's Office of Studies and Analyses to provide an opinion on the scope and consequences of the W.Ż. judgment. When implementing these actions, JK was not yet a member of the bench of the Supreme Court in Case III CZP 25/19.

8 In the period between the issuance of the order of 21 May 2019 and the issuance of the W.Ż. judgment, three judges of the seven-member panel that issued the order referred to above retired, and it was therefore necessary to supplement the panel in Case III CZP 25/19. The Judge-Rapporteur requested additional resources from the President of the Supreme Court directing the work of the Civil Chamber by order of 30 December 2021, at the same time setting the date of the hearing in Case III CZP 25/19 for 31 January 2022. As of the beginning of 2022, Case III CZP 25/19 was renumbered and designated as Case III CZP 1/22. In breach of the principle of continuity of composition and in breach of the opinion of the Supreme Court's Office of Studies and Analyses of 25 January 2022, Judge MB, as President of the Supreme Court directing the work of the Civil Chamber, issued an order on 26 January 2022 appointing a new composition of the panel for Case III CZP 1/22, consisting of Judges JK as presiding judge, KS, K. Weitz as Judge-Rapporteur, PW, WZ and CV and RX. In fact, this was a change in the composition of the panel carried out without any objective reasons and contrary to the previous practice of the Civil Chamber, whereby, in the event of an extended composition of that court being incomplete (for example, as a result of the retirement of one of the existing members of the bench), that composition was supplemented by the appointment of a new judge, rather than being reappointed in its entirety. As a result of the order of 26 January 2022, Judge TN, who had acted as the presiding judge of the panel up until that point, was removed from the panel without there being any substantive grounds for this decision. The change of composition of the panel in Case III CZP 1/22 resulted in the appointment to that panel of Supreme Court judges who had obtained judicial appointments to the Supreme Court under exactly the same circumstances in which Judge BD was appointed to that court. These judges make up most of the newly appointed panel of judges (as a result of the removal of Judge TN). Thus, taking into account the circumstances of the case – in which the subject matter of the assessment is primarily the circumstances of the appointment of Judge BD as a Supreme Court judge, which coincide with the circumstances of the appointment of Judges JK, KS, CV and RX as judges of that court, and thus all of the new members of the bench of the court representing its majority – and the circumstances and effect of that change of composition, that change may be regarded as an operation aimed at achieving a predetermined result in the form of a specific resolution of a legal issue. This impression is reinforced by the fact that this change was made by Judge MB, as the President of the Supreme Court directing the work of the Civil

Chamber, who was appointed as a Supreme Court judge under the exact same circumstances as Judge BD. Furthermore, by an order of 21 November 2023, Judge WZ, who had been a member of the seven-member panel in this case from the start of its deliberations, was removed from the panel considering Case III CZP 1/22 on the pretext of long-term absence caused by illness. In his place, Judge TN was included in the panel as a substitute judge. This change was also made for no substantive reason, as Judge WZ returned to his duties at the beginning of 2024 after a period of excused absence of one month. The return of Judge TN to the panel is therefore not a remedy for the breach resulting from the order of 26 January 2022 represented by his removal from this panel.

9 Regardless of the reservations as to the legality of the changes made to the composition of the court in Case III CZP 1/22, we should note the grounds for exclusion by operation of law in relation to the four judges newly appointed to the court as laid down in Article 48(1)(1) of the Code of Civil Procedure, according to which a judge is excluded by operation of law in cases in which he or she is a party or in which he or she has a legal relationship with one of the parties such that the outcome of the proceedings would affect his or her rights or obligations.

10 The provision cited establishes two absolute grounds for the exclusion of a judge, the first of which covers a situation where the judge is a party to a case in which he or she would have to rule *(nemo iudex in causa sua)*. This refers not only to a situation in which the judge would formally be a party to the case, but also to a situation in which the judge would or could be impacted by the effects of the ruling (such as its validity). In accepting this point of view, we should remember that, in accordance with Article 87(1) of the Law on the Supreme Court, the panel of seven judges may rule to give a resolution the force of a legal principle, with any deviation from that principle requiring a resolution of the full bench of the relevant Chamber. This means that the effects of a potential resolution of the panel of seven judges that constitutes a legal principle would extend to all judges of the Civil Chamber. In other words, those effects would also extend to the judges newly appointed to the bench, and the operation of these effects would coincide with that making the judgment final. In other words, the judges in question, by participating in the adoption of the resolution in question, would have co-determined, with binding effect for themselves and for the other judges of the Civil Chamber and other judges of the Supreme Court, the legal consequences of the defects that occurred in their appointment processes. This circumstance is all the more apparent when we consider that in Case III CZP 1/22, the subject of the assessment is precisely the circumstances of the appointment of Judge BD as a Supreme Court judge. As indicated above, these circumstances are identical to those in which Judges JK, RX, KS and CV were appointed as Supreme Court judges.

11 It is a well-established position in the case-law of the Supreme Court that an application for exclusion from the composition of a court of a person appointed as a judge by the President of the Republic of Poland at the request of the KRS formed in accordance with the procedure laid down in the Law of 8 December

2017 may not be examined by a court that includes that same judge in its composition, as otherwise a situation of prohibition as per *nemo iudex in causa sua* would arise. It is also settled case-law that an appeal measure containing allegations concerning the discussed defect in the procedure for the appointment of a judge may not be examined by a court that includes a person appointed through the same procedure (see the resolution of a panel of seven judges of the Criminal Chamber of the Supreme Court of 2 June 2022 in Case I KZP 2/22 and further case-law cited therein).

12 In the present case, there is another circumstance hindering the participation of Judges JK, RX, KS and CV in issuing a resolution, separate from the fact that they are subject to exclusion under the law itself. It was pointed out above that underlying the legal question submitted to the seven-judge panel in Case III CO 121/18 was doubt as to the existence of the Supreme Court's order of 8 March 2019, arising from the circumstances of the appointment of Supreme Court Justice BD, who issued that order on a one-man basis. Since the circumstances of the appointment of Judges JK, RX, KS and CV are the same, and they constitute the majority of the panel of judges in the present case, any potential resolution of the Supreme Court adopted with their participation would suffer from exactly the same defect as that alleged against the order of 8 March 2019. It would necessarily follow that such a resolution could not constitute an effective resolution of the legal issue presented, as it would itself give rise to an identical legal issue.

13 Despite the circumstances presented justifying their exclusion, Judges JK, RX, KS and CV have so far failed to notify the Supreme Court of the basis for their exclusion. In addition, Judge CV has not notified the Supreme Court that he is in a personal litigation dispute with a party to the proceedings in the present case: X.Y., who filed an action before the Supreme Court to establish that CV is not a judge of this court.

14 Applications for the exclusion of Judges JK, RX and KS were still filed in January 2022 by W.Ż's legal counsel. Consideration of these applications was however actually blocked for a period of over one year by JK and MB. As of the time of issue of this order, these applications for exclusion have not been heard.

15 Given all of the circumstances of this case, we need to consider yet another issue. The order of 26 January 2022 determining the panel in Case III CZP 1/22 was issued by Judge MB as a single-person court, acting as the President of the Supreme Court directing the work of the Civil Chamber. Since Judge MB was appointed as a Supreme Court judge under exactly the same circumstances as Judge BD, the circumstances justifying the exclusion by operation of law in this case of Judges JK, RX, KS and CV also apply to Judge MB. Similarly, the concerns as to the existence of the order of 8 March 2019 underlying the legal issue in Case III CZP 1/22 also refer directly to the issue of the existence of the order of 26 January 2022.

16 Potential confirmation that the order of 26 January 2022 does not exist in legal terms is of no significance to the status of Judge Karol Weitz as Judge-Rapporteur and member of the panel in Case III CZP 1/22. If we accept the above assumption, Judge Karol Weitz remains Judge-Rapporteur and a member of the panel under the order of 2019, in which the then-President of the Supreme Court directing the work of the Civil Chamber appointed the original panel in Case III CZP 25/19. That order never expired and it was not affected by the order of 26 January 2022. This is even more relevant if we accept that the order of 26 January 2022 does not exist in a legal sense.

17 In the Supreme Court, according to its Rules of Procedure, the power to schedule hearings in individual cases is generally vested in the Judge-Rapporteur (Section 84(1) and (2) of the Rules of Procedure of the Supreme Court). Originally, the power to schedule hearings was held by the Judge-Rapporteur. After the Judge-Rapporteur began refusing to schedule hearings in cases in which so-called mixed benches were appointed, namely those involving the participation of Supreme Court judges appointed at the request of the KRS formed in accordance with the procedure laid down in the Law of 8 December 2017, and thus benches that, in the light of the case-law of the ECtHR and the Supreme Court, do not meet the EU and Convention standard of an independent and impartial court established by law (see, among others, judgments of the ECtHR of 22 July 2021, Case 43447/19, *Reczkowicz v. Poland*, in particular §§ 227-284; of 8 November 2021, Cases 49868/19 and 57511/19, *Dolińska-Ficek and Ozimek v. Poland*, in particular §§ 290-320, 340-350, 353-357 and 368; and of 3 February 2022, Case 1469/20, *Advance Pharma Sp. z o.o. v Poland*, in particular §§ 313-321, 336-346, 349-351, 352-353 and 364, and judgments of the Court of Justice of 26 March 2020, C-542/18 RX-II and C543/18 RX-II, *Erik Simpson* v *Council of the European Union* and *HG* v *European Commission*, paragraphs 72 et seq.; of 6 October 2021, C-487/19, *X.Y.*, paragraphs 123 et seq.; and of 29 March 2022, C132/20, *BN*, *DM*, *EN* v *Getin Noble Bank S.A.*, paragraphs 116 et seq.), the President of the Republic of Poland amended the Rules of Procedure of the Supreme Court in such a way that now a hearing of a case, if not scheduled by the Judge-Rapporteur, may be scheduled against the will of that individual by the President of the Supreme Court directing the work of the relevant Chamber or by the President of the Division within whose jurisdiction the case falls (Section 84(3) of the Rules of Procedure of the Supreme Court). In Case III CZP 1/22, Judge-Rapporteur Karol Weitz, challenging the legality and method of formation of the bench by the order of 26 January 2022, never scheduled a sitting with the composition determined by that order despite the inclusion of sittings in this case in the schedules of sittings of the Civil Chamber by the President of the Supreme Court directing its work. Hearings have been scheduled in this case on several occasions, using the authorisation referred to above, by the current President of Division III in the Civil Chamber, by Judge GC, who was appointed as a Supreme Court judge under the same circumstances as Judge BD, or by Judge MB acting as President of the Supreme Court directing the work of the Civil Chamber. The hearings scheduled in this way were cancelled due to the excused absence of the Judge-Rapporteur or another member of the bench. Each time they were scheduled under this

alternative procedure, it was an attempt to administratively compel the Judge-Rapporteur to sit in a mixed formation as defined by the order of 26 January 2022.

Succinct presentation of the reasoning in the request for a preliminary ruling

18 The Court's answer to the question referred for a preliminary ruling will be a prerequisite for determining whether the formation of the court designated in Case III CZP 1/22 is correct and has been validly designated, and how and by whom it should and may be designated. If the Court finds that Judges JK, RX, KS and CV cannot be members of the bench in Case III CZP 1/22 and that neither Judge MB nor any judge of the Supreme Court appointed to his or her post under the circumstances described in the question referred for a preliminary ruling can take any decision in Case III CZP 1/22, including issuing orders as to the composition of the court or the timing of hearings, and that the orders issued in that case by those judges therefore have no legal effect, and that, consequently, the composition of Case III CZP 1/22 may be ordered, in disregard of the provisions of national law conferring competence in that regard on the President of the Supreme Court directing the work of the Civil Chamber, the Judge-Rapporteur in Case III CZP 1/22, whose appointment as a judge of the Supreme Court is not vitiated by the abovementioned defects, will order the composition of Case III CZP 1/22 and set a date for the hearing of the case, which will pave the way for the adoption by the Supreme Court of a resolution disposing of the legal question at issue in the case by applying the interpretation of EU law adopted by the Court in the X.Y. judgment. This will therefore bring the proceedings in Case III CZP 1/22 and the underlying Case III CO 121/18 to a conclusion.

19 The European Union is a legal union in which the task of guaranteeing judicial review within its legal system is entrusted not only to the Court of Justice but also to courts in the Member States. Member States must provide remedies that are sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. According to the case-law of the Court of Justice, 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. The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law. Every Member State must 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 that law, meet the requirements of effective judicial protection [judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C64/16, EU:C:2018:117, paragraphs 33-37, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C216/18 PPU, EU:C:2018:586, paragraphs 49-52 and the case-law cited therein)].

20 When assessing whether a given body meets the requirements to be classified as a 'court or tribunal' as defined by the second subparagraph of Article 19(1) TEU,

we need to consider in particular such criteria as the legal basis for the body's action, its independence, and the people passing judgment in it as judges [judgments: of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 38, 42-43, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C216/18 PPU, EU:C:2018:586, paragraph 53]. This coincides fully with the requirements in terms of the notion of 'court' laid down in the second paragraph of Article 47 of the Charter, in the context of the right to an effective remedy and access to an impartial tribunal [judgments: of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C64/16, EU:C:2018:117, paragraph 41, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 53] (judgment C64/16, *Associação Sindical dos Juizes Portugueses p. Tribunal de Contas*, paragraph 41; judgment C216/18 PPU, *LM*, paragraph 53; judgment of 23 January 2018, *FV/Rada*, T-639/16 P, EU:T:2018:22, paragraph 67). The above is also in keeping with the standard of an independent and impartial tribunal established by law and laid down in Article 6(1) of the European Convention on Human Rights and Basic Freedoms ('the ECHR') (see, on this point, Article 52(3) and (7) of the Charter and Article 6(3) TEU).

21 The links between Case III CZP 1/22 and EU law are clear. First, in the present case, the panel of seven judges of the Supreme Court should resolve the legal issue by applying the interpretation of EU law adopted by the Court of Justice in the X.Y. judgment and thereby give effect to that judgment. It is therefore necessary to determine whether the bench of the Supreme Court designated in the order of 26 January 2022 is correct and has been effectively appointed and whether the X.Y. judgment may therefore be implemented. Second, the circumstances of Case III CZP 1/22 show how the exercise of jurisdictional functions by the Supreme Court's Civil Chamber and the Supreme Court itself is impaired in a situation in which the jurisdictional functions of that court are exercised or performed by Supreme Court judges appointed to their offices under a flawed procedure. It should be borne in mind, however, that the activities of the Supreme Court and its Civil Chamber very often involve cases in which issues of interpretation and application of EU law arise, making it necessary to determine whether such functioning of the Supreme Court and its Civil Chamber is consistent with EU and Convention standards.

22 The exercise of the jurisdictional functions of the Supreme Court in fact and in law is conditioned by the exercise of their powers by the judges of this court who perform various executive functions in the Supreme Court or who are members of the organs of this court, which may significantly affect the independence of the judges of the Supreme Court. For example, the President of the Supreme Court directing the work of a given chamber has the power to appoint formations to hear cases and, in certain situations, to schedule hearings in those cases in place of the Judge-Rapporteur. These are measures that are used to force judges of the Supreme Court whose appointment as Supreme Court judge is not affected by the defects indicated to rule in formations with judges appointed as Supreme Court

judges through a defective procedure. Furthermore, the President of the Supreme Court directing the work of a given chamber as the head of all administrative and judicial staff active in that chamber, can and does influence the willingness or ability of those staff to carry out the instructions and orders of individual judges. In the circumstances of this case, we should also consider the fact that the First President of the Supreme Court has broad administrative and organisational powers. In particular, he or she directs the work of the Supreme Court and is the head of all judicial and administrative staff of the court, thus having a decisive influence on the circulation of documents in the court and the access of the judges of that court to court records. By virtue of the Rules of Procedure of the Supreme Court, the First President of that Court is the presiding judge of each collegiate panel within the court on which he or she sits, and by virtue of the Law on the Supreme Court may request that the Disciplinary Officer of the Supreme Court initiate disciplinary proceedings against any judge of that court. This means that the influence of the First President of the Supreme Court on the exercise of jurisdiction by individual judges of that court can be, and indeed is, significant, as the circumstances of this case illustrate. In addition, it should be noted that important functions in the day-to-day operation of the Supreme Court are fulfilled by its College, as it has wide-ranging consultative and decision-making powers (such as the election of the Disciplinary Officer of the Supreme Court and requests to initiate disciplinary proceedings against Supreme Court judges). The College is currently comprised predominantly of Supreme Court judges appointed to serve as judges of this court under a flawed procedure, and, in addition, an election of new members of the College will take place in the Civil Chamber of the Supreme Court on 12 January 2024, which is likely to be dominated by those judges.

23 It is already well-established in the case-law of the ECtHR and the Supreme Court that the consideration of a case by a panel of the Supreme Court involving the participation of judges appointed to that Court at the request of the KRS formed under the procedure laid down in the Law of 8 December 2017 violates the right of a party to have a case heard by an independent and impartial court established by law within the meaning of Article 6(1) of the ECHR (see in particular the judgments of the ECtHR of 22 July 2021, Case 43447/19, *Reczkowicz v. Poland*, in particular §§ 227-284; of 8 November 2021, Cases 49868/19 and 57511/19, *Dolińska-Ficek and Ozimek v. Poland*, in particular §§ 290-320, 340-350, 353-357 and 368; and of 3 February 2022, Case 1469/20, *Advance Pharma Sp. z o.o. v. Poland*; and the resolution of three Joint Chambers of the Supreme Court (Civil, Criminal and Labour and Social Security) of 23 January 2020, in case BSA 1-4110-1/20)]. This means that any composition of the Supreme Court including judges appointed to that court through a flawed procedure does not meet the standard of an independent and impartial court established by law within the meaning of the ECHR and EU law.

24 It is paradoxical that no panel of the court that includes Supreme Court judges appointed to that position through a flawed procedure meets the cited standard, while at the same time judges appointed through such a procedure currently hold

almost all of the most important executive positions in the Supreme Court, as well as being part of the College of the Supreme Court, thus retaining a significant influence over the exercise of the court's jurisdictional functions. In the Supreme Court's view, this paradoxical, almost pathological state of affairs is clearly and manifestly contrary to Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU and Article 267 TFEU.

25 For these reasons, and taking into account the principle of effectiveness of EU law, the Supreme Court ruled as in the operative part of this order.