Case C-197/23

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:

24 March 2023

Referring court:

Sąd Apelacyjny w Warszawie (Poland)

Date of the decision to refer:

28 April 2022

Appellant:

S. S.A.

Respondent:

C. sp. z o.o.

Subject matter of the main proceedings

Appeal against the judgment of the court of first instance dismissing a claim for payment of an amount of PLN 4 572 648.00 plus interest, brought by S. S.A. against C. sp. z o.o. pursuant to Article 15(1)(4) of the Ustawa z 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji (Law of 16 April 1993 on combating unfair competition).

Subject matter and legal basis of the request

Interpretation of Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) of the Treaty on European Union, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union. The questions are referred pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU).

Questions referred for a preliminary ruling

1. Must Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) of the Treaty on European Union, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that a court of first instance of a Member State of the European Union, the formation of which is composed of a single judge of that court assigned to hear a case in flagrant breach of the provisions of national law on the allocation of cases and the appointment and modification of the formations of a court, does not constitute an independent and impartial tribunal previously established by law which ensures effective legal protection?

2. Must Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) of the Treaty on European Union, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as precluding the application of provisions of national law, such as the second sentence of Article 55(4) of the Ustawa z 27 lipca 2001 r. Prawo o ustroju sądów powszechnych (Law of 27 July 2001 on the system of ordinary courts, consolidated text, Dz.U. of 2020, item 2072, as amended), in conjunction with Article 8 of the Ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw z 20 grudnia 2019 r. (Law amending the Law on the system of ordinary courts, the Law on the Supreme Court and certain other laws of 20 December 2019, Dz.U. of 2020, item 190), in so far as they prohibit a court of second instance from declaring invalid, pursuant to Article 379(4) of the Ustawa z 17 listopada 1964 r. Kodeks postępowania cywilnego (Law of 17 November 1964 establishing the Code of Civil Procedure, consolidated text, Dz.U. of 2021, item 1805, as amended), proceedings before a national court of first instance in an action brought before that court on the grounds that the composition of that court was contrary to the law, the court was improperly composed, or a person not authorised or competent to adjudicate participated in the decision, as a legal sanction ensuring effective legal protection where a judge is assigned to hear a case in flagrant breach of the provisions of national law on the allocation of cases and the appointment and modification of the formations of a court?

Provisions of European Union law relied on

Treaty on European Union: Article 2, Article 6(1) and (3), and the second subparagraph of Article 19(1)

Treaty on the Functioning of the European Union: Article 267

Charter of Fundamental Rights of the European Union: Article 47

Provisions of national law and case-law relied on

Ustawa z 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji (Law of 16 April 1993 on combating unfair competition) (consolidated text, Dz.U. of 2022, item 1233): Article 15(1)(4)

Ustawa z 17 listopada 1964 r. Kodeks postępowania cywilnego (Law of 17 November 1964 establishing the Code of Civil Procedure) (consolidated text, Dz.U. of 2021, item 1805, as amended; 'Code of Civil Procedure): Articles 47(1), Article 59, second sentence of Article 232, Article 323, Article 378(1), Article 379(4), and Article 386

Under Article 379(4) of the Code of Civil Procedure cited in Question 2, 'proceedings shall be invalid if the composition of the adjudicating court is contrary to the law or if the case was heard in the presence of a judge subject to exclusion by operation of law'.

Ustawa z 27 lipca 2001 r. Prawo o ustroju sądów powszechnych (Law of 27 July 2001 on the system of ordinary courts) (consolidated text, Dz.U. of 2020, item 2072, as amended; 'Law on the system of ordinary courts'): Article 45, Article 47a, Article 47b, and Article 55(4)

Under Article 55(4) of the Law on the system of ordinary courts cited in Question 2, 'judges may adjudicate in all cases in the place to which they are posted and also in other courts in the cases defined by law (jurisdiction of the judge). The provisions relating to the allocation of cases and to the appointment and modification of the formations of the court shall not limit a judge's jurisdiction and cannot be a basis for determining that a formation is contrary to the law, that a court is improperly composed or that a person not authorised or competent to adjudicate forms part of that court'.

Ustawa z 20 grudnia 2019 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law of 20 December amending the Law on the system of ordinary courts, the Law on the Supreme Court and certain other laws) (Dz.U. of 2020, item 190; 'the Amending Law): Article 1 (which added to Article 55 of the Law on the system of ordinary courts paragraph 4 as worded above) and Article 8

Under Article 8 of the Amending Law cited in Question 2, 'Article 55(4) of the law amended in Article 1 shall also apply to cases initiated or completed before the date of entry into force of this Law'.

Rozporządzenie Ministra Sprawiedliwości z 23 grudnia 2015 r. Regulamin urzędowania sądów powszechnych (Regulation of the Minister for Justice of 23 December 2015 laying down rules concerning the operation of the ordinary courts) (Dz.U. of 2015, item 2316; 'the 2015 rules'): Paragraph 43(1), Paragraph 49, Paragraph 52b, and Paragraph 52c

Rozporządzenie Ministra Sprawiedliwości z 18 czerwca 2019 r. Regulamin urzędowania sądów powszechnych (Regulation of the Minister for Justice of 18 June 2019 laying down rules concerning the operation of the ordinary courts) (Dz.U. of 2019, item 1141; 'the 2019 rules'): Paragraph 2(16), Paragraph 61(3), and Paragraph 138(3)

Ustawa z 26 czerwca 1974 r. Kodeks pracy (Law of 26 June 1974 establishing the Labour Code) (consolidated text, Dz.U. of 2022, item 1510): Article 167^2 and Article 167^3

Judgment of the Sąd Najwyższy (Supreme Court) of 21 November 2019, III PK 162/18; resolution of the Sąd Najwyższy of 5 December 2019, III UZP 10/19; decision of the Sąd Najwyższy 28 February 2020, III CSK 225/19; decision of the Sąd Najwyższy of 12 January 2021, IV CSK 275/20; resolution of the Sąd Najwyższy of 16 February 2021, III CZP 9/20; decision of the Sąd Najwyższy of 2 June 2021, V CSK 52/21; decision of the Sąd Najwyższy of 29 April 2022, III CZP 77/22; and resolution of the Sąd Najwyższy of 26 May 2022, III CZP 86/22

Succinct presentation of the facts and procedure in the main proceedings

1 On 27 April 2018, S. S.A. in S. brought an action against C. sp. z o.o. in W., pursuant to Article 15(1)(4) of the Law of 16 April 1993 on combating unfair competition, for payment of PLN 4 572 648.00, plus statutory interest from the dates and in the amounts listed in the claim. The respondent contended that the action should be dismissed.

2 By order of 27 September 2018, the Chair of the Sixteenth Commercial Division of the Sąd Okręgowy w W (Regional Court, W.) ordered that the case be subject to random selection by the Random Case Allocation System ('the allocation system'). According to the report on the random selection, judge E.T. was appointed by random selection as the judge-rapporteur of Case XVI GC 932/18 on 28 September 2018.

3 By order of judge E.T. of 30 January 2019, the date for the hearing was scheduled for 11 March 2019. Judge E.T. was stated as the president of the panel. By order of 7 February 2019, judge E.T. changed the date of the hearing scheduled for 11 March 2019 to 25 March 2019. The order did not state the reasons for the change of the date of the hearing or the president of the panel.

4 A hearing, presided over by judge J.K., was held on 25 March 2019. In case file XVI GC 932/18 covering the period from 28 September 2018 (the date of judge E.T.'s random selection by the allocation system) to 25 March 2019 (the date of the first hearing conducted by judge J.K.), there are no documents which provide a basis for changing the judge-rapporteur. Subsequent sessions scheduled to hear the case, namely on 8 July 2019 and 2 September 2019, were held before the court of first instance formed of judge J.K. On 16 September 2019, the Sąd Okręgowy w W., with judge J.K. sitting as a single judge, gave judgment dismissing the

action. The judge-rapporteur in Case XVI GC 932/18 was not changed by the allocation system.

5 By appeal of 27 October 2019, the appellant contested the judgment of the court of first instance in its entirety. In its response to the appeal of 31 July 2020, the respondent contended that the appeal should be dismissed.

6 As a result of the appeal brought by the appellant, file XVI GC 932/18 was sent to the court of appeal and marked with file reference VII AGa 738/20. By decision of 11 May 2021, the Sąd Apelacyjny w W. (Court of Appeal, W.) decided, pursuant to Paragraph 138(3) of the 2019 Rules, to return the file to the Sąd Okręgowy w W. (Regional Court, W.) for the following documents to be attached to the file: (1) the order of the chair of the division or deputy chair of the division pursuant which judge J.K. was appointed as of 25 March 2019 to hear the case as the judge-rapporteur thereof in place of the randomly selected judge-rapporteur E.T., and a statement of the legal basis for the transfer of that case to judge J.K., and also the reasons underlying the modification of the formation of the court; (2) the order of the chair of the division or deputy chair of the division pursuant which judge J.K. was, as substitute in the absence of judge E.T, to perform duties at the hearing on 25 March 2019, with clarification as to whether judge E.T.'s absence was due to leave of absence (rest leave, leave on request) or other justified absence; (3) the order of the chair of the division or deputy chair of the division drawing up the substitution plan for 25 March 2019; and (4) the order of judge J.K. of 25 March 2019 allocating Case XVI GC 932/18 to her.

7 In response to the decision of the Sąd Apelacyjny w W. of 11 May 2021, the Chair of the Sixteenth Commercial Division of the Sąd Okręgowy w W. presented, by letter of 24 May 2021, for the attention of the President of the Sąd Apelacyjny w W., case file XVI GC 932/18, to which she attached the following documents: (1) a memorandum of 19 May 2021 from the Head of the Secretariat of the Sixteenth Commercial Division stating that judge J.K.'s order of 25 March 2019 on the takeover of Case XVI GC 932/18 had been mistakenly attached to another case file; (2) an order of 25 March 2019 on the take-over of Case XVI GC 932/18 by judge-rapporteur J.K.; and (3) an order of 25 March 2019 on the appointment of a duty judge (J.K.) to cover the session scheduled for 25 March 2019 on account of the justified absence of judge E.T.

8 By order of 16 June 2021, the file was again returned to the regional court to comply, within three days, with point 2 of the decision of 11 May 2021 regarding clarification as to whether judge E.T.'s absence was due to leave of absence (rest leave, leave on request) or other justified absence. As a result of the failure to comply with the decision of 16 June 2021 on time, the Sąd Apelacyjny w W., by order of 29 July 2021, notified the Regional Public Prosecutor, Warsaw, deeming his participation in the case to be necessary. By letter of 5 August 2021, the Chair of the Sixteenth Commercial Division of the Sąd Okręgowy w W. clarified that judge E.T.'s absence on 25 March 2019 was due to leave on request. By letter

dated 25 August 2021, the Regional Public Prosecutor intervened in the proceedings.

9 On 20 September 2021, a hearing was held before the court of second instance. The president informed the parties of the legal issue concerning infringement, before the court of first instance, of the principle of the constant composition of court formations.

10 In order to establish the reasons for the infringement in Case XVI GC 932/18 of the principle of the constant composition of court formations, the Sąd Apelacyjny w W., required by decision of 28 September 2021, the President of the Sąd Okręgowy w W. to submit the following information within two weeks: (1) the number of cases scheduled by judge E.T. for the session on 25 March 2019 together with their file references; (2) clarification as to whether judge J.K. acted as substitute in all the cases scheduled for the session on 25 March 2019; (3) the file references of the cases scheduled for the session on 25 March 2019 which were either taken over by judge J.K. under the 2015 Rules or transferred to her caseload on another legal basis; (4) a statement as to whether judge E.T. took leave on request in 2018 and 2019 on days when she had sessions scheduled and, if so, specification of the calendar dates of those sessions, together with the file numbers of the cases assigned on each day; (5) if question 4 is answered in the affirmative, clarification as to whether, on the days when judge E. T. took leave on request and had sessions scheduled, judge J.K. deputised at the hearings; (6) if the question 5 is answered in the affirmative, a statement as to whether judge J.K, in deputising at the hearings, took over any of the cases pursuant to the 2015 Rules; and (7) the number of sessions scheduled in the months in which judge E.T. took leave on request on session days, with clarification of the dates on which sessions were scheduled in each case where judge E.T. took leave on request. The President of the Sąd Okręgowy w W. did not provide the Sąd Apelacyjny w W. with the requested information.

11 By letter of 18 October 2021, the President of the Sąd Okręgowy w W., presenting a copy of the decision of the Sąd Apelacyjny w W., asked the President of the Sąd Apelacyjny w W. to verify that the obligation to provide the above information was correct.

12 Neither the President of the Sąd Apelacyjny w W. nor the Vice-President thereof notified the court of second instance of the action relating to administrative oversight taken in relation to the abovementioned letter.

13 By letter of 1 December 2021, the Sąd Apelacyjny w W. asked the President of the Sąd Okręgowy w W. to reconsider complying with the decision of 28 September 2021. By letter of 29 December 2021, the President of the Sąd Okręgowy w W. stated that he maintained in full the position expressed in his letter to the President of the Sąd Apelacyjny w W. of 18 October 2021 and shared by the Vice-President of the Sąd Apelacyjny w W. in his letter of 27 October 2021.

14 By letter of 7 February 2022, the Sąd Apelacyjny w W. asked the Vice-President of the Sąd Apelacyjny w W. to consider taking administrative supervision action against the President of the Sąd Okręgowy w W. to ensure that the latter complied with decision the Sąd Apelacyjny w W. of 28 September 2021. The letter in question stated that the letter from the President of the Sąd Okręgowy w W. of 29 December 2021 showed that his refusal to comply with the decision of 28 September 2021 was supported by the Vice-President of the Sąd Apelacyjny w W. In a letter of 27 October 2021, the Sąd Apelacyjny w W. asked for the letter in question to be submitted on the grounds that **the substance thereof** – in the view of the adjudicating panel – **concerns interference in the conduct of the evidence-taking procedure of the authority supervising the administrative activity of a court of appeal**. In addition, it stated that court of appeal was considering referring a question to the Court of Justice of the European Union.

15 By letter of 24 February 2022, the Vice-President of the Sąd Apelacyjny, in response to the letter of 7 February 2022, in so far as it concerns the court's request for supervisory action to be taken against the President of the Sąd Okręgowy w W. to ensure that he complies with the decision of the Sąd Apelacyjny of 28 September 2021, stated that it did not appear to her that she could intervene in that regard since the information set out in the court's order was not requested by way of administrative supervision, merely requested by the court. The Vice-President also took the position that the scope of **the information** requested in the order of 28 September 2021 **concerning other court cases goes beyond the jurisdictional connection to the case under consideration, and encroaches on the jurisdiction of the president of the court**. The Vice-President did not attach the letter of 27 October 2021.

16 Having regard to the position of the Vice-President of the Sąd Apelacyjny w W., who, in the view of the court of appeal, unlawfully interfered in the conduct of the evidence-taking procedure of that court, and also the administrative supervision action against the judge-rapporteur, the court of appeal considered that further correspondence with the bodies of the court would merely result in prolonging the proceedings and not contribute to compliance with the decision of 28 September 2021.

The essential arguments of the parties in the main proceedings

17 The appellant claimed before the referring court that the proceedings before the court of first instance were invalid under Article 379(4) of the Code of Civil Procedure on the ground that the adjudicating panel of that court was contrary to the law as it infringes the principle of the constant composition of court formations in that the case was heard by judge J. K. in place of judge-rapporteur E.T., who had been randomly selected by the system. The respondent pointed out that Article 379(4) of Kodeks Postępowania Cywilnego (Code of Civil Procedure) determines the composition of the court and not the adjudicating panel, which means there are no grounds for concluding that the adjudicating panel formed in

breach of Article 47a and Article 47b of the Law on the system of ordinary courts affects per se the validity of the proceedings. The Public Prosecutor stated that there are no grounds for the court of second instance to declare the proceedings invalid under Article 379(4) of the Code of Civil Procedure having regard to the wording of Paragraph 55(4) of the Law on the system of ordinary courts, and taking a different view would lead to the setting aside of the judgment of the court of first instance, a fresh random selection, a repetition of the evidence taking already carried out, and the issuing of a ruling identical to the judgment of 16 September 2019.

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

Reasons for Question 1

18 Article 19 TEU gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, by entrusting the responsibility for ensuring the full application of EU law in all Member States and the judicial protection that individuals derive from EU law to national courts and tribunals and to the Court of Justice.

19 The principle of the effective judicial protection referred to in the second subparagraph of Article 19(1) TEU is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union (judgments of the Court of Justice of: 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51; 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 37; and 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:l 17, paragraph [35]).

20 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 (judgments of the Court of Justice 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 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph [37]).

21 The 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

the Court of Justice of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 51).

22 On the basis of that provision and under the first subparagraph of Article 19(1) TEU, it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law (judgment of the Court of Justice of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:l 17, paragraph 34).

23 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 the Court of Justice of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 53).

24 The requirement of independence comprises two aspects. The first aspect, which is external, presumes that the body concerned carries out its functions in a wholly independent manner, not occupying a hierarchical or subordinate position in relation to any other body and not taking orders or instructions from any source whatsoever (judgments of the Court of Justice of: 17 July 2014, *Torresi*, C-58/13 and C-59/13, paragraph 22; 6 October 2015, *Consorci Sanitari del Maresme*, C-203/14, paragraph 19); it is thus protected against external intervention or pressure liable to jeopardise the independent judgment of its members (judgments of the Court of Justice of: 19 September 2006, *Wilson*, C-506/04, paragraph 51; 9 October 2014, *TDC*, C-222/13, paragraph 30; and 6 October 2015, *Consorci Sanitari del Maresme*, C-203/14, paragraph 19). The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgments of the Court of Justice of: 19 September 2006, *Wilson*, C-506/04, paragraph 52; 9 October 2014, *TDC*, C-222/13, paragraph 31; and of 6 October 2015, *Consorci Sanitari del Maresme*, C-203/14, paragraph 20).

25 The requirement that a tribunal be established by law is connected to the requirement that the court be independent and impartial since the judicial system must be governed by law and be independent of the executive, and both requirements are part of the rule of law and indicate the confidence which the courts in a democratic society must inspire in the public (judgment of the ECtHR of 12 March 2019, *A. v. Iceland*, Application No. 26374/18, CE:ECHR:2019:0312JUD002637418, paragraph 99).

26 In the light of the foregoing, the uncertainty set out in Question 1 arises as to whether a court of first instance of a Member State of the European Union sitting

in single-judge formation assigned to hear a case in flagrant breach of the provisions of national law on the allocation of cases and the appointment and modification of the formations of a court constitutes an independent and impartial tribunal previously established by law which ensures effective legal protection.

27 The issue is primarily whether the concept of an independent and impartial tribunal established by law also includes the 'composition of the court' or the 'adjudicating composition of the court' as regards the way in which the composition is determined.

28 The concept of the 'composition of the court' has no statutory definition either in national law or EU law. In Polish law, the concept of composition of a court is defined by the number of members on the adjudicating panel. In proceedings before the court of first instance, the law provides as a rule for adjudication by a single judge (Article 47(1) of the Code of Civil Procedure). Exceptions are made for certain categories of cases in which a panel composed of a judge acting as president and two lay judges adjudicate (Article 47(2) of the Code of Civil Procedure) or the law confers on the president of the court the authority to order that a case be heard by a panel of three judges if he or she considers it appropriate on account of the particular complexity or precedent-setting nature of the case (Article 47(3) of the Code of Civil Procedure).

29 For a court established by law to be independent and impartial, it must be composed of judges who have the authority to adjudicate in the particular court, at the particular instance, and in the particular case. Each member of the adjudicating panel must meet the characteristics specified.

30 In national law, there is a principle of the constant composition of court formations (Article 47a(1) of the Law on the system of ordinary courts). According to that principle, cases are to be assigned to judges and trainee judges at random in particular categories of cases. It is a principle with legislative force, the essence of which lies in the constancy of the court's formation from the moment of random selection of the adjudicating panel throughout adjudication in the case (Article 323 of the Code of Civil Procedure) (see resolutions of the Sąd Najwyższy of 5 December 2019, III UZP 10/1, and of 1 July 2021, III CZP 36/20).

31 The random allocation of cases to judges and trainee judges in particular case categories is effected by an electronic system for the random allocation of cases and court tasks, operating on the basis of a random number generator (Random Case Allocation System) (Paragraph 43(1) of the 2015 Rules and Paragraph [2](16) of the 2019 Rules).

32 Derogations from the principle of the constant composition of randomly determined court formations are strictly defined in law (namely in Article 47b of the Law on the system of ordinary courts, under which a change in the composition of a court may take place only where it is impossible for that court to

examine the case in its current composition or if there is a lasting obstacle to the examination of the case by that court in its current composition) and in the implementing provisions (Paragraphs 49 and 52c of the 2015 Rules). The case-law of the Sąd Najwyższy indicates that a mere deviation from the rules on the appointment of a judge in a case does not mean that the composition of the court not contrary to the law (see resolution of the Sąd Najwyższy of 16 February 2021, III CZP 9/20).

33 Underlying that view is the assumption that the composition of the court is determined by law, whereas the 2015 Rules and the 2019 Rules relate only to the manner in which the composition of the adjudicating panel is determined by selecting a judge through the electronic system for random allocation of cases and court tasks. Every judge of a particular court has the authority to adjudicate on a case regardless of how he or she is appointed to hear it. Therefore, despite the defects associated with the composition of the court, the court is still a court established by law since the judge is still a judge, and the court is composed of a judge. The assignment of hearings to judges adjudicating in civil cases in accordance with an alphabetical list of judges is merely organisational in nature, and a breach of the rules which are merely organisational and instructional in nature does not render the composition contrary to the law (see resolution of the Sąd Najwyższy of 16 February 2021, III CZP 9/20).

34 In the view of the court of appeal, it can be concluded that a customary (accidental, unconscious, unintentional, mistaken) breach of the provisions on the random selection of the composition of the adjudicating panel of a court does not constitute a condition for declaring that the composition of that court contrary to the law (Article 379(4) of the Code of Civil Procedure) and thus that it must be concluded that a court thus formed is a court previously established by law (Article 47 of the Charter of Fundamental Rights). The situation is different if the composition of the adjudicating court on which the judge assigned to hear the case sits has been appointed in flagrant (serious) breach of the provisions of national law on the allocation of cases and the appointment and modification of the formations of a court.

35 **Provisions governing the composition of a court and the manner in which that composition is to be determined are guided by the utmost objective to ensure their role of safeguarding judicial independence, and thus avoiding influence by the legislative and executive authorities in connection with the assignment of a particular judge to hear a case and on arrangements between the judges themselves of a particular court as to which of them will hear a particular case.** While Member States have discretion to choose how the composition of the court will be formed under national legislation, if such provisions of law are adopted, the independence of the court must be sufficiently guaranteed (see opinion of Advocate General Tanchev of 27 June 2019, C-585/18, C-624/18 and C-625/18, paragraph 129). Those guarantees – in the view of the court of appeal – extend not only to the legislative and executive authorities, but also to the judicial authorities.

36 In the view of the court of appeal, **the independence (autonomy and impartiality) of a court cannot reasonably be deemed to be preserved where the judges of a particular court – with the intention of pursuing their own or others' interests by using institutions of national law contrary to their purpose – themselves form the composition of court, selected at random in accordance with the law, by infringing, in a serious manner, the provisions of national law on the allocation of cases and the appointment and modification of the composition of a court**.

37 The basis of the right to a fair trial is formed by the guarantees defining access to a court established by law and concerning the formation of its composition, and infringement thereof should occur exceptionally, also in respect of non-defective acts. Therefore, it must be concluded that the right to an independent and impartial tribunal established by law also covers the composition of a court formed in accordance with national law in such a way as to ensure its independence and stability. **That condition can only be fulfilled if a judge is appointed to the panel of the court (single-member, multi-member) in accordance with the provisions of national law, whilst a change of judge is permitted within the limits set by those provisions, even though they are institutional and implementing provisions.**

38 Since the way in which a judge is appointed to the adjudicating panel and the change of judge on that panel are subject to certain rules of national law, **compliance with those rules is of fundamental importance in determining whether a court, including the selection of its composition, is a court established by law**. Although all the judges of a particular court have the appropriate powers and are equally entitled to adjudicate, it is the fact that a case remains within the caseload of judge-rapporteur to whom the case has been randomly assigned according to a fixed allocation of work by an IT tool based on a random number generator, which is most relevant and important to the parties in terms of guarantee. **This is first and foremost important from the point of view of guaranteeing the autonomy of the court, including its independence from the administrative element, such as the presiding judge or deputy presiding judges in the division concerned, and his or her impartiality**. Therefore, if the breach of the rules in question is flagrant, that means that those guarantees are considerably diminished. The hearing of a case by a judge assigned to hear a case in flagrant breach of the provisions of national law on the allocation of cases and the appointment and modification of the formation of a court has an impact on the confidence of citizens and society in the court as an independent and impartial body and importance to the parties as a guarantee.

39 The court of appeal finds that the modification of the composition of the court adjudicating at first instance in Case XVI GC 932/18 – because it was heard by judge J.K. in place of judge E.T. who had been randomly selected to hear it by the allocation system – occurred in flagrant breach of the provisions of national law on the allocation of cases and the appointment and modification of the formations

of a court, that is to say Article 47b(1) of the Law on the system of ordinary courts, in conjunction with Paragraph 52c(4) of the 2015 Rules.

40 First, a leave of absence of a judge-rapporteur on request on the day of an assigned session does not constitute an impossibility to hear the case in the current composition or a lasting obstacle to hearing the case in the current composition (Article 47b(1) of the Law on the system of ordinary courts). It may constitute grounds for the panel of the court appointed in accordance with the substitution plan or the duty roster to take action if the efficiency of the proceedings so requires and the composition of the court to which the case has been assigned is unable to do so (Article 47b(2) of the Law on the system of ordinary courts). The case-law of the Sąd Najwyższy accepts that planned rest leave (resolution of the Sąd Najwyższy of 16 February 2021, III CZP 9/20) or even the transfer of a judge without his or her consent to another division of the court as a result of a change in the division of duties (decision of the Sąd Najwyższy of 28 February 2020, III CSK 225/19) does not constitute grounds for departing from the principle of the constant composition of court formations.

41 In case XVI GC 932/18, there were no instances of impossibility to hear the case in the current composition or a lasting obstacle to hearing the case in the current composition. Case XVI GC 932/18 was heard on the three sittings scheduled to hear it. Even if it were to be assumed that on 25 March 2019 there was a ground for the composition of the adjudicating court appointed in accordance with the substitution plan in the person of judge J.K. to take action, there was no obstacle to the subsequent dates of the sittings scheduled for hearing being held in the composition of the court in the person of judge E.T. since her absence was due to leave on request.

42 Second, in the view of the court of appeal, judge J.K. did not submit a written statement that she had taken over the case XVI GC 932/18 pursuant to Paragraph 52c(4) of the 2015 Rules. In addition, the statement of the Head of the Secretariat of the Sixteenth Commercial Division of the Sąd Okręgowy w W. contained in the memorandum of 19 May 2021, according to which judge J.K.'s order of 25 March 2019 on taking over case XVI GC 932/18 for consideration was mistakenly attached to the file of another case, is not true.

43 Third, the change of judge-rapporteur in Case XVI GC 932/18 was not accidental. By order of 7 February 2019, the date of the hearing scheduled for 11 March 2019 was changed to 25 March 2019. On the date of the order in question was issued, the substitution plan should already have been drawn up in accordance with the law (by 31 January 2019 at the latest). There is no evidence that that plan was drawn up after the order changing the hearing dates in Case XVI GC 932/18 was issued. In other words, on the date the order of 7 February 2019 was issued, judge E.T., as Deputy Chair of the Sixteenth Commercial Division, knew that judge J.K. would be acting as a substitute according to the substitution plan on 25 March 2019. Therefore, the date for hearing XVI GC 932/18 was scheduled whilst cancelling the date scheduled previously, without stating any reason for its

cancellation (the parties did not request a change of the hearing date) and without indicating the judge-rapporteur who would be adjudicating on 25 March 2019.

44 Fourth, the change of judge-rapporteur in Case XVI GC 932/18 was deliberate. The scheduling of the hearing by judge E.T. for 25 March 2019, that is say the day of judge J.K. was substituting, and her use of leave on request, was intended to give the impression that the conditions laid down in Article 47b(1) of the Law on the system of ordinary courts had been satisfied. As a result of that action, judge J.K., as substitute, heard all the cases scheduled for the session of 25 March 2019. In such an instance, the IT tool should assign the substitute one less case in the same category. However, under the 2015 Rules the chair of the division should order that an additional case of the same category be allocated by the IT tool if the case has been completed by the substitute. In Case XVI GC 932/18, no such situations arose. It is evident from the allocation system that no change of judge-rapporteur was made. Until the judgment was given by the court of first instance, judge E.T. operated in the allocation system as a judge-rapporteur in case XVI GC 932/18.

45 Fifth, the change of judge-rapporteur in Case XVI GC 932/18 had a specific purpose. To the judiciary, such an action is clear. In the circumstances as described, as a result of judge J.K. taking over the cases scheduled for 25 March 2019 (including Case XVI GC 932/18), there was an actual reduction in the number of cases in judge E.T.'s caseload. Since an employee may take four days' leave on request per calendar year, and a district court judge hears between five and eight cases in a single session day, judge E.T.'s caseload could have been reduced by as many as 20 to 36 cases.

46 Sixth, in the actual circumstances of the case it is not possible to establish the criteria by which judge E.T. selected Case XVI GC 932/18 as the one to be scheduled for 25 March 2019 to be taken over by judge J.K.

47 At this juncture, the court of appeal points to **the danger of accepting such conduct. Theoretically, it cannot be ruled out that, in a socially highly charged case, judges will agree among themselves that a case in the caseload of one of them will be taken over by another, on the basis that it will be scheduled for the day on which the other judge is on duty, and the latter will take over the case since the judge-rapporteur selected to hear the case by the electronic system for random assignment of cases and court tasks, operating on the basis of a random number generator, has taken leave on request on that day**.

48 Seven, the court of appeal points to the unusual proceedings of the administrative authorities in relation to the procedural steps taken in civil proceedings by the judge-rapporteur in order to ascertain the reasons for the change of the adjudicating panel in Case XVI GC 932/18, such as: (1) the sending by the Chair of the Sixteenth Commercial Division of the Sąd Okręgowy w W. of the judgments of the Sąd Apelacyjny w W. for the attention the President of the Sąd

Apelacyjny; (2) the Vice-President of the Court of Appeal in W. being made familiar with the decision of 11 May 2021 in a manner not laid down in law; (3) the failure by the Chair of the Sixteenth Commercial Division of the Sąd Okręgowy w W. to clarify the reasons for the unjustified absence of judge E.T. and to do so only after the Public Prosecutor had been notified by the Sąd Apelacyjny w W.; (4) the failure to comply with the decision of the Sąd Apelacyjny w W. of 28 September 2021; (5) the interference by the Vice-President of the Sąd Apelacyjny w W. in the conduct of the evidence-taking procedure by regarding the decision of the Sąd Apelacyjny w W. of 28 September 2022 in connection with administrative supervision as going beyond the jurisdiction of the adjudicating court, providing grounds for the President of the Sąd Okręgowy w W. to refuse to comply with that decision; and (6) the announcement of the intervention of the Vice-President of the Sąd Apelacyjny w W. in connection with administrative supervision in order to verify the lawfulness of the allocation of the case to judge J.K. only after the court of appeal had made known its intention to refer a question to the Court of Justice of the European Union.

Reasons for Question 2

49 If the answer Question 1 is in the affirmative, the answer to Question 2 is revised.

50 To ensure that the court of second instance is in a position to ensure the effective judicial protection 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 (judgment of the Court of Justice 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 194).

51 The organisation of justice in the Member States falls within the competence of those Member States. However, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law. That may be the case, in particular, as regards national rules relating to appropriate judicial review of the formation of a court (see judgment of the Court of Justice of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 48).

52 The case-law of the Sąd Najwyższy accepts that the formation of an adjudicating composition in breach of the provisions on the allocation of cases and the appointment and modification of the formations of a court may constitute grounds for the application of the sanction under Article 379(4) of the Code of Civil Procedure (see resolution of the Sąd Najwyższy of 5 December 2019, III UZP 10/19, and resolution of the Sąd Najwyższy of 16 February 2021, III CZP 9/20). That sanction falls within the judicial review of the court of second instance and is the only appropriate response to ensure effective judicial protection.

53 A declaration of invalidity of the proceedings of the court of first instance by the court of second instance has the effect of setting aside the judgment under appeal by abolishing the proceedings in so far as they are invalid and declaring the procedural steps carried out before that court null and void and – contrary to the public prosecutor's view – having the case heard by judge E.T., as judge-rapporteur selected for the composition of the adjudicating court by the allocation system.

54 After the Amending Law entered into force on 14 February 2020, the Sąd Najwyższy adopted resolution III CZP 9/20 on 16 February 2021, according to which an infringement of the principle of the constant composition of a court appointed to hear an appeal, consisting in the unjustified appointment of a substitute judge who is not the judge-rapporteur, may mean that the composition of the adjudicating court is contrary to the law (Article 379(4) of the Code of Civil Procedure). It follows from the grounds for the resolution that the Sąd Najwyższy adjudicated on the basis of the legal situation prior to the date of entry into force of Article 55(4) of the Civil Procedure Code, evidently unaware of the content of Article 8 of the Amending Law.

55 The court of appeal clarifies that providing effective judicial protection to the parties in the event that the composition of the adjudicating court is formed contrary to the provisions on the allocation of cases and the appointment and modification of the formations of a court – pursuant to Article 379(4) of the Code of Civil Procedure – is impossible, as the law stands at present, having regard to Article 55(4) of the Law on the system of ordinary courts, in connection with Article 8 of the Amending Law.

56 In conclusion, it should be stated that the court of appeal has been deprived of the possibility of applying the effective legal sanction laid down in Article 379(4) of the Code of Civil Procedure if it finds that the composition of the adjudicating court has been formed in flagrant breach of the provisions of national law on the allocation of cases and the appointment and modification of the formations of a court.

57 In the light of the foregoing, the referring court considered it appropriate to refer the questions set out above to the Court of Justice of the European Union. The referring court proposes that the questions referred be answered as follows:

1. Articles 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) of the Treaty on European Union, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must interpreted as meaning that a court of first instance of a Member State of the European Union formed of a single judge assigned to hear a case in flagrant breach of the provisions of national law on the allocation of cases and the appointment and modification of the formations of a court does not constitute an independent and impartial tribunal previously established by law which ensures effective legal protection.

2. Articles 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) of the Treaty on European Union, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding the application of provisions of national law, such as the second sentence of Article 55(4) of the Ustawa z 27 lipca 2001 r. Prawo o ustroju sądów powszechnych (Law of 27 July 2001 on the system of ordinary courts) […], in conjunction with Article 8 of the Ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw z 20 grudnia 2019 (Law amending the Law on the system of ordinary courts, the Law on the Supreme Court and certain other laws of 20 December 2019) […], in so far as they prohibit a court of second instance from declaring invalid, pursuant to Article 379(4) of the Ustawa z 17 listopada 1964 r. Kodeks postępowania cywilnego (Law of 17 November 1964 establishing the Code of Civil Procedure) […], proceedings before a national court of first instance in an action brought before that court on the grounds that the composition of that court is contrary to the law, the court is improperly composed, or a person not authorised or competent to adjudicate forms part of that court, as a legal sanction ensuring effective legal protection where that a judge is assigned to hear a case in flagrant breach of the provisions of national law on the allocation of cases and the appointment and modification of the formations of a court.