Case C-326/23

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:

25 May 2023

Referring court:

Sąd Najwyższy (Poland)

Date of the decision to refer:

15 March 2023

Appellants:

C.W.S.A.

C.O.S.A.

D. sp. z o.o.

G.S.A.

C. sp. z o.o.

C.1 S.A.

Respondent:

Prezes Urzędu Ochrony Konkurencji i Konsumentów

Subject matter of the main proceedings

Proceedings relating to appeals brought against the decision of the Chairman of the Office of Competition and Consumer Protection (UOKiK) of 8 December 2009 concerning the declaration that an agreement concluded by the appellants constitutes a practice restricting competition on the national market for the production and sale of grey cement, in breach of both national and EU law, and the imposition of fines as a result thereof. Application for an examination whether a judge of the Sąd Najwyższy (Supreme Court, Poland) satisfies the requirements relating to independence and impartiality.

Subject matter and legal basis of the request

Interpretation of the second subparagraph of Article 19(1) TEU, in conjunction with the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union (pursuant to Article 267 TFEU)

Questions referred for a preliminary ruling

1. Must the second subparagraph of Article 19(1) of the Treaty on European Union, in conjunction with [the first paragraph of] Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that the court hearing the case is required to disregard an act (application) of a party seeking to challenge the appointment of a judge, which is not subject to judicial review under national and EU law, by calling into question the capacity of that judge to adjudicate – a challenge which is not admissible under EU law and the constitution of a Member State owing to the lack of a connection between the circumstances of the procedure for appointing that judge and the circumstances of the case in question and the lack of any actual grounds for calling into question his or her impartiality and independence on the basis of circumstances other than the lawfulness of the procedure for appointing that judge called into question by the party concerned, including the conduct of that judge after his or her appointment and his or her susceptibility to influence from the legislature or executive, which, under national law, makes such an act by the party concerned equivalent to an inadmissible *actio popularis* and constitutes a flagrant and manifest abuse of national procedural law?

2. Must the second subparagraph of Article 19(1) of the Treaty on European Union, in conjunction with [the first paragraph of] Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that an effective and adequate mechanism for satisfying the criteria relating to a court established by law within the meaning of EU law is to confer on the parties the right under national law to request verification of the effect of all the circumstances surrounding the appointment procedure and the conduct of the judge after his or her appointment on his or her impartiality and independence in the case in question, in the context of a 'test of impartiality' or an application for recusal of the judge?

Provisions of European Union law relied on

Treaty on European Union, second paragraph of Article 19(1);

Charter of Fundamental Rights of the European Union ('Charter of Fundamental Rights'), first paragraph of Article 47;

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (TEU).

Provisions of national law relied on

Constitution of the Republic of Poland, Articles 179 and 180;

Ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym (Law of 8 December 2017 on the Supreme Court), Article 29;

Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (Law of 17 November 1964 establishing the Code of Criminal Procedure), Articles 49(1) and 379(4);

Ustawa z dnia 15 grudnia 2000 r. o ochronie konkurencji i konsumentów (Law of 15 December 2000 on competition and consumer protection), Articles 5(1)(1) and (3), 9, and 101(1)(1), and (2).

Succinct presentation of the facts and procedure

1 The appellants lodged appeals against the decision of the Head of the Office of Competition and Consumer Protection of 8 December 2009, which declared an agreement concluded between L.S.A. in M., G.S.A. in C., G.1 in S.A. in K., C.2 sp. z o.o. in W., D. sp. z o.o. in S., C.W.S.A. in T. and C.O.S.A. in O, setting prices and other conditions for the sale of grey cement, sharing the market for the production and sale of grey cement, and exchanging confidential commercial information, to be a practice restricting competition in the national market for the production and sale of grey cement, and issued an injunction against it. Fines were imposed on the above entities by that decision.

2 By judgment of 13 December 2013, the Sąd Okręgowy w Warszawie – Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw – Competition and Consumer Protection Court, Poland; 'the regional court')) varied the decision under appeal and reduced the fines imposed.

3 By judgment of 21 May 2021, the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland; 'the court of appeal') partially set aside the judgment of the regional court under appeal and in that respect referred the case back to the regional court, leaving it to that court to decide on the costs of the appeal and cassation proceedings.

4 An appeal in cassation against the above decision was lodged by, inter alia, C. sp. z o.o. The company raised an objection concerning the invalidity of the proceedings (Article 379(4) of the Code of Civil Procedure), on account of the unlawful – in its view – composition of the Supreme Court adjudicating in the case ref. No I NSK 8/19, which gave rise the judgment of 29 July 2020, according

to which the court of appeal reheard the case and gave the judgment under appeal. The panel of judges included persons appointed to the position of judge of the Supreme Court on the proposal of the Krajowa Rada Sądownictwa (National Council of the Judiciary; 'the KRS') established by the Ustawa z dnia 8 grudnia 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law of 8 December amending the Law on the National Council of the Judiciary and certain other laws) (Dz.U. of 2018, item 3; 'the 2017 Law'). Similarly, the panel of the court of appeal adjudicating in case ref. No VII AGa 847/20, which gave rise to the judgment under appeal, included a person appointed to the position of judge of the court of appeal on the proposal of the KRS established by the 2017 Law. At the same time, the appellant raised an objection alleging infringement of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 in that the judgment under appeal was given in conditions in which the appellant was not granted the right to have its case heard by an independent and impartial tribunal established by law owing to the unlawful composition of the Supreme Court, adjudicating in case ref. no. I NSK 8/19, and the unlawful composition of the court of appeal w Warszawie adjudicating in case ref. No VII AGa 847/20.

5 With reference to those objections, the appellant company requested that the judgment under appeal be set aside, that the proceedings be abolished in so far as they are affected by the invalidity, and that the case be referred back to a duly composed panel of Supreme Court, or, failing that, that the judgment under appeal be set aside and the case be referred back to a duly composed panel of the court of appeal.

6 By letter of 23 January 2023, C. sp. z o.o. applied for a declaration that judge of the Supreme Court O.N. ('judge O.N.'), appointed to the panel hearing Case I NZ 22/22, does not meet the requirements relating to independence and impartiality, having regard to the circumstances surrounding his appointment and his conduct following his appointment. The following were cited as circumstances justifying the application:

(a) judge O.N.'s participation in the competition for judicial positions declared vacant in the Supreme Court before the KRS established by the 2017 Law;

(b) judge O.N.'s adjudication and administration of justice despite the Naczelny Sąd Administracyjny (Supreme Administrative Court) giving an order suspending the effectiveness of the KRS resolution pursuant to which he was appointed to judicial office and despite the resolution of 23 January 2020 of the three combined Chambers of the Supreme Court – the Civil Chamber, the Criminal Chamber and the Labour and Social Insurance Chamber – ('the 2020 resolution'), which prejudged any irregularity in the composition where it included a person appointed to the office of judge of the Supreme Court on the proposal of the KRS established by the 2017 Law;

(c) judge O.N.'s involvement in the giving of a judgment, raising serious doubts as to his independence, on electoral protests following the 2020 presidential elections.

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

7 The issue which has arisen in the present case combines two matters relating to two procedural institutions provided for in national law (Polish civil procedure), namely the recusal of a judge (under the Code of Civil Procedure) and the 'test of impartiality', that is to say an examination of the requirements relating to the independence and impartiality of a judge – in this case a judge of the Supreme Court (under the Ustawa o Sądzie Najwyższym (Law on the Supreme Court)), while a similar solution is provided for (in a different legal act) in relation to judges of ordinary courts.

8 The questions referred seek to establish the framework within which – in the view of the Supreme Court – there are grounds for reconciling the systemic sphere, arising from the Polish constitutional order, and the procedural and guarantee sphere, arising from the values underlying the fundamental right of access to a court under EU law, to the standard established by the case-law of the Court of Justice. In light of the previous case-law of both the Court of Justice and the Trybunał Konstytucyjny (Constitutional Court, Poland), the Supreme Court sees scope for a case-law dialogue to avoid an approach which leads to irreconcilable conflict between EU law and national (constitutional) law.

9 The first matter relates to a procedural act (application) party seeking to challenge the appointment of a judge, which is not subject to judicial review under national and EU law, by calling into question the capacity of that judge to adjudicate – a challenge which is not admissible under EU law and the constitution of a Member State owing to the lack of a connection between the circumstances of the process for appointing that judge and the circumstances of the case at issue and the lack of any actual grounds for calling into question his or her impartiality and independence on the basis of circumstances other than the lawfulness of the procedure for appointing that judge, called into question by the party concerned, including the conduct of that judge after his or her appointment and his or her susceptibility to influence from the legislature or executive. Under national law, such an act of a party is equivalent to an inadmissible *actio popularis* and constitutes a flagrant and manifest abuse of national procedural law. The question therefore arises whether, in the light of the second subparagraph of Article 19(1) TEU, in conjunction with the first paragraph of Article 47 of the Charter of Fundamental Rights, the court hearing the case is required to disregard such an act.

10 Polish law provides for two measures which allow the parties to the proceedings to argue that, in a particular case, the judge appointed to the panel does not provide a guarantee of objective determination of the case. The first is the

institution of the recusal of a judge under Article 49 of the Code of Civil Procedure. That provision provides for the recusal of a judge in a given case if there is a circumstance of the kind which could give rise to any doubt as to the judge's impartiality in that case (*iudex suspectus*). That is not an exclusion by operation of law (*ipso iure*) as proceedings to that effect must be initiated – either on the application of the party concerned or on the basis of a declaration by the judge himself.

11 When assessing the existence of circumstances which may cast doubt on a judge's impartiality, two aspects must be taken into account, namely 'the objective and subjective aspects of judicial impartiality'. The subjective aspect means that none of the judges must show bias or personal prejudice, there being a presumption of personal impartiality in the absence of evidence to the contrary. On the other hand, the court must be objectively impartial and must therefore offer guarantees to exclude any legitimate doubt in this respect (see judgment of the Court of Justice of 19 February 2009 in Case C-308/07, *Koldo Gorostiaga Atxalandabaso* v *Parliament*, EU:C:2009:103).

12 In line with this, the case-law of the Constitutional adopted the concept of maintaining external signs of independence. What is important is not only that the judge adjudicating in the case always behaves in accordance with the principles of independence and impartiality, but also that, viewed externally, the judge's conduct corresponds to such standards. In the case-law of the Supreme Court it is also noted that the question is not whether a judge can be reasonably accused of a lack of objectivity, but whether there are sufficient circumstances from the point of view of the party concerned to raise doubts about the judge's impartiality. This is also emphasised in the case-law of the European Court of Human Rights (ECtHR).

13 The recusal of a judge under Article 49(1) of the Code of Civil Procedure is not determined by the mere fact of him or her knowing, even 'personally', a party, but by a particular set of personal relations which would make it difficult for the judge to maintain impartiality in resolving a dispute concerning that party. Such relationships may be characterised by emotional bias towards the person concerned or by connections affecting the judge's interests or position in life.

14 The second measure (concerning a judge of the Supreme Court) was provided for in Law on the Supreme Court – in Article 29(5) (introduced in 2022 to give effect to the standard arising from the case-law of the Court of Justice). It concerns an examination of the fulfilment of the requirements of independence and impartiality by a judge of the Supreme Court, inter alia, having regard to the circumstances surrounding his or her appointment and the judge's conduct after his or her appointment, if, in the circumstances of a particular case, this may lead to a breach of the standard of independence or impartiality affecting the outcome of the case, taking into account the circumstances of the entitled person and the nature of the case. Having granted the application, the Supreme Court is to recuse the judge from hearing the case; however, the recusal of a judge from involvement

in a particular case cannot constitute grounds for recusing that judge in other cases heard with his or her involvement (Article 29(18) of the Law on the Supreme Court).

15 Neither the application for recusal of a judge nor the application for an examination of the requirements of independence and impartiality are measures of a general nature and therefore do not seek to recuse a judge in general. Both of those measures are intended to be used by a party to recuse a judge who, in the actual context of a particular case, does not offer a guarantee that the case will be decided objectively and independently, with no influence from third parties.

16 Under Article 179 of the Constitution of the Republic of Poland, the President of the Republic appoints judges, on the proposal of the KRS, for an indefinite period. On the other hand, under Article 29 of the Law on the Supreme Court, a judge of the Supreme Court is a person appointed to that post by the President of the Republic who has taken an oath before the President of the Republic (Paragraph 1). What is important in that respect is that in the context of the activities of the Supreme Court or its organs, it is not permissible to call into question the legitimacy of the tribunals and courts, the constitutional organs of the State or the organs responsible for reviewing and protecting the law (Paragraph 2) and the Supreme Court or other authority cannot establish or assess the legality of the appointment of a judge or of the power to exercise judicial functions that derives from that appointment (Paragraph 3).

17 The circumstances surrounding the appointment of a judge of the Supreme Court cannot form the sole basis for challenging a ruling given with the involvement of that judge or questioning his or her independence and impartiality (Article 29(4) of the Law on the Supreme Court).

18 A similar view is taken in the case-law of the Constitutional Court. In several judgments, the Constitutional Court has held that Article 49(1) of the Code of Civil Procedure, in so far as it allows an application for recusal of a judge to be considered by reason of an irregularity in his or her appointment by the President of the Republic on the proposal of the KRS, and in so far as it declares any circumstance relating to the procedure for the appointment of that judge by the President of the Republic on the proposal of the KRS as likely to give rise to a legitimate doubt as to the impartiality of the judge in a particular case, has been found to be incompatible with the Constitution of the Republic of Poland. In addition, the Constitutional Court has declared certain provisions of the Law on the Supreme Court to be incompatible with the Constitution of the Republic in so far as they provide a normative basis for the Supreme Court to rule on the status of a person appointed to the office of judge, including a judge of the Supreme Court, and the resulting powers of such a judge and the effectiveness of a judicial act performed with the involvement of that person related to that status.

19 This approach is also recognised in the case-law of the Court of Justice, which accepts that the mere fact that judges are appointed with the involvement of the

executive cannot give rise to a relationship of subordination of the former to the latter or to doubts as to the former's impartiality, if, once appointed, they are free from influence or pressure when carrying out their role (see judgment of 19 November 2019, C-585/18, C-624/18 and C-625/18, *A.K. and Others*, EU:C:2019:982, paragraphs 133; see also judgments of the Court of Justice of: 2 March 2021, C-824/18, *A.B. and Others*, EU:C:2021:153, paragraph 122; 20 April 2021, C-896/19, *Repubblika*, EU:C:2021:311, paragraph 56; and 15 July 2021, C-791/21, *Commission* v *Poland*, EU:C:2021:596, paragraph 97). At the same time, the fact that a body, such as a national council of the judiciary, which is involved in the process for appointing judges is, for the most part, made up of members chosen by the legislature cannot, in itself, give rise to any doubt as to the independence of the judges appointed at the end of that process (see, to that effect, the judgment of the Court of Justice of 9 July 2020, C-272/19, *Land Hessen*, EU:C:2020:535, paragraphs 55 and 56).

20 It is also apparent from the case-law of the Court of Justice that the situation may be different where that fact, combined with other relevant factors and the conditions under which those choices were made, leads to such doubts being raised (judgment of the Court of Justice in Case C-791/[19], paragraph 103). It should be noted that the concept 'niezawisły i bezstronny sąd' (Eng. *independent and impartial tribunal*, Ger. *unabhangiges und unparteiisches Gericht*) is, in essence, a category for assessing the independence and impartiality of a court (not the independence of a judge), although the two concepts are closely connected.

21 Under the assessment criteria introduced by the Court of Justice in its judgment of 29 March 2022 (C-132/20, *Getin Noble Bank*, EU:C:2022:235), the Supreme Court enjoys a 'presumption of independence', which may be rebutted either by a final judicial decision declaring that the judge constituting the referring court is not an independent and impartial tribunal previously established by law, or by the demonstration of other factors which could undermine the independence and impartiality of that court.

22 According to the settled case-law of the Court of Justice, national legislative provisions which are the subject of infringement proceedings must, as a general rule, be assessed in the light of the interpretation given to them by national courts (see judgment of 15 July 2021, C-791/19, *Commission* v *Poland*, EU:C:2021:596, and the case-law cited therein). At the same time, in cases concerning the administration of justice, national courts may not disregard provisions of national law, including constitutional provisions, when assessing the criteria set out in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights.

23 The provisions of national (and international) law do not specify the standard of independence or impartiality. They do not even define what independence and impartiality are within the meaning of a law, or what can or should constitute infringement thereof. Nor do they indicate whether the sole criterion for assessing a lack of independence and impartiality is the conduct of the judge him or herself

or other circumstances beyond the judge's control. In the decision of the Supreme Court of 23 February 2023, it was held that the circumstances surrounding the appointment of a judge against the background of Article 29(5) of the Law of the Supreme Court should be understood not as circumstances of a general nature, relating to systemic measures in the process of appointing judges, but as individual circumstances of the appointment relating to a particular judge.

24 In the light of the case-law of the Constitutional Court, the independence of a judge in the constitutional sense consists of several essential elements, which include: (1) impartiality vis-à-vis the participants in the procedure; (2) independence towards non-judicial bodies (institutions); (3) independence of the judge vis-à-vis the authorities and other judicial bodies; (4) independence from the influence of political factors, especially political parties; and (5) internal independence of the judge.

25 Other than the first of the abovementioned elements concerning impartiality, they cannot in principle be limited to an assessment within the framework of a single case under consideration since dependence on non-judicial bodies (institutions), judicial authorities and bodies, or political factors, especially political parties, means in principle that a judge lacks the attribute of independence in general. Thus, a finding of a lack of independence in that sense, which is what the application in the present case de facto aims to establish, does not relate to one specific case since the existence of dependence must always result in appropriate measures being taken to recluse a judge from adjudication in any case. This is *a fortiori* so since at issue here is the normative, constitutional model of judicial appointments. A finding that there is 'dependence' on factors or persons involved in the judicial nomination procedure in general – as prejudging a judge's lack of independence – would mean that such a judge loses his or her capacity to carry out his or her office in general, whereas any circumstances of his or her appointment may lead either to an assessment of the conduct of a candidate for judge him or herself or members of the bodies involved in the appointment procedure (on which decisions the candidate has no influence but which are made in a specific procedure laid down by law), which cannot be assessed in terms of a lack of independence in that general sense. If, on the other hand, specific circumstances specified in the appointment process justify the recusal of a judge, this should be effected under the general rules provided for in the ordinary recusal procedure, for example, when a judge is to hear a case involving a member of the KRS who expresses his or her assessments about the judge in the appointment procedure, or even the person holding the office of the President of the Republic at the time, and on each occasion the assessment of impartiality should be made on an individual basis.

26 However, significant doubts are raised primarily by the mere finding that the circumstances of a judge's appointment (understood narrowly as relating to the procedure and legal basis of the appointment procedure, and also in this case to the conduct of the appointment procedure itself), with no specification of their nature, may affect the assessment of a judge's independence or impartiality in

general. The application in the present case focuses on that aspect, and general consequences are drawn from it – in the form of the inability of judge of the Supreme Court O.N. to perform his office, also as the judge of the court of appeal involved in giving judgment under appeal. The merits of that application are supported – in the view of the appellant – by judge O.N.'s disregard of the 'manifest irregularity of his appointment, and also the irregularity of the appointment of the other judges appointed on the proposal of the KRS'. Such an interpretation of the status of a judge goes beyond the stated criteria arising from the previous case-law of the Court of Justice and the Constitutional Court.

27 The prevailing position in case-law is that it is not sufficient to cite the circumstances surrounding the appointment of a judge of the Supreme Court in question (including any irregularities in the appointment procedure) and his or her conduct after the appointment (in particular, jurisdictional and pre-jurisdictional activities, declarations and statements in the public sphere or other public activities) which may give rise to legitimate doubts as to whether he or she meets the requirements of independence and impartiality, but it is also necessary to set out the circumstances showing that that deficiency may affect the outcome of the specific case, having regard to the circumstances of the entitled person and the nature of the case.

28 However, an opposite view is put forward, namely, that to find that, for the assessment of a judge's lack of independence and impartiality in the light of Article 29(5) et seq. of the Law on the Supreme Court, an allegedly irregular appointment of a judge is sufficient (this relates to appointments made on the basis of the KRS' proposals under the provisions in force since 2018, that is to say on the basis of the 2017 Law), and, moreover, the performance by a judge, whose impartiality and independence are questioned, of judicial duties contrary to the ECHR case-law and the conclusions arising from the 2020 resolution of the Supreme Court, may be considered to be 'conduct after appointment'. According to that resolution, the court is not duly constituted or the composition of the court is contrary to the law also where the court includes a person appointed to the office of a judge of the Supreme Court on the proposal of the KRS under provisions of the 2017 Law. That view ignores the case-law of the Constitutional Court and, in the view of the referring court, is related to the declaration of an unconstitutional normative act, such as the above resolution, as applicable and binding allegedly on all compositions of the Supreme Court.

29 The application at issue raises the 'irregularity' of judicial appointments by reference to a standard arising from EU law and Article 6 ECHR (right of access to a court), but completely fails to assess whether, in the particular circumstances, there is dependence of the judge or the court on the legislature or executive by reason of the manner (circumstances) in which the judge or court was appointed, and what that dependence is to consist of, or whether there are doubts as to impartiality because, following his or her appointment, the judge or court is subject to influence or pressure when carrying out their role (judgment of the Court of Justice in Joined Cases C-585/18, C-624/18 and C-625/18). In the case of

the judges of the Supreme Court, this also means that the lack of individual verification of the above criteria must be regarded as an infringement of the abovementioned standard of EU law, which was to be implemented when it was adopted. It was merely pointed out, somewhat additionally, that judge O.N. was involved in the ruling on the electoral protests concerning the conduct of the 2020 election for the office of President of the Republic, which was favourable from the point of view of the political party from which the winning candidate originated, and therefore his jurisprudential activity gave the impression of favouring the political force which made possible his appointment to the Supreme Court. Irrespective of the merits of such a claim, it must be noted that what is really at issue is the performance of judicial activities in spite of an irregular – in the view of the appellant – appointment process for the office of judge.

30 Some panels of the Supreme Court (judges appointed to that court prior to 2018) also consider that the conduct of a judge after appointment also includes the performance of judicial acts by that judge. The order of 27 February 2023 refused to attribute binding force to the judgment of the Constitutional Court of 20 April 2020 in so far as it declared unconstitutional the 2020 resolution in which the judges issuing the aforementioned order were involved, deeming that their own unconstitutional resolution was correct and allegedly produced legal effects, and thus in manifest breach of the standard arising from the principle of *nemo iudex in causa sua*.

31 Furthermore, by an order of 4 April 2023, the Supreme Court asked an extended panel of Supreme Court whether it follows from Article 29(5) of the Law on the Supreme Court that, in order for a judge of the Supreme Court to be recused from hearing a case, it is necessary for all the conditions set out therein to be fulfilled cumulatively, in the light of which a judge of the Supreme Court does not satisfy the requirements of independence and impartiality, or is satisfaction of just one of those conditions sufficient in the specific circumstances of the case.

32 Such a conclusion, and thus one based solely on such a condition, would in essence be false, in a manner unknown to national and EU law, and would result in the judge's right to hold that office being called into question. Moreover, it would in essence serve to assess, on a case-by-case basis, not that judge, but the presidential prerogative to appoint him or her, which cannot be reviewed on the basis of provisions that do not arise from the Polish Constitution. In its judgment of 5 June 2012, the Constitutional Court held that Article 179 of the Constitution of the Republic is 'a complete rule in terms of defining the power of the President of the Republic in relation to the appointment of judges since all the necessary elements of the appointment procedure are set out therein'.

33 In its case-law, the Constitutional Court has held that in the Polish legal system, a judge is a person who has received an act of appointment from the President of the Republic, and the grounds for removing a judge from a case must arise from the Constitution of the Republic and the legislation based thereon. The prerogative of the President of the Republic is not subject to judicial review.

34 A general recusal of a judge from a case would amount to a de facto 'suspension' of such a judge from office – contrary to the law and, more importantly, contrary to the Constitution of the Republic of Poland and EU law. A similar position is put forward by the Constitutional Court with regard to complete 'recusal' from a case by means of a sub-statutory act (resolution of the Supreme Court), which leads to the creation of a peculiar institution of a retired judge *ab initio*. The exercise of prerogatives, and therefore also those relating appointment of judges, does not require justification of the decisions on appointments taken by the President of the Republic.

35 The requirement under Article 179 of the Constitution of the Republic relating to a proposal from the KRS constitutes, according to the case-law of the Constitutional Court, a significant restriction of the freedom of action of the President, who may not appoint any person fulfilling the requirements for candidates for judicial posts, but only a person whose candidature has been considered and stated by the KRS. The Constitution of the Republic makes the exercise of the prerogative by the President of the Republic dependent on the submission of a relevant proposal by the KRS, with only the act of appointment creating the status of a judge. However, the Constitution of the Republic of Poland does not directly determine the stages preceding the submission of the proposal, nor does it determine the qualifications to be met by a candidate for a judicial post. The President's powers are independent in nature, and he or she exercises them in his or her own name, on his or her own account, and under his or her own responsibility.

36 An order of the President of the Republic appointing a person to the office of judge is not an administrative act and is not subject to the jurisdiction of an administrative court, and the appointment itself is not an administrative matter. There is no procedure for assessing the validity or lawfulness or effects of the exercise of that power by the President of the Republic. Nor is it not possible to create such a review procedure, having regard to the international standard or at the statutory level. The appointment of a judge is an act of constitutional law, having its origin directly in a rule of constitutional law. As such, it is not an act of administrative law. No authority therefore has the power to review its lawfulness or effects. Nor is the ECtHR a body authorised to assess the exercise of a constitutional prerogative by the President of the Republic. The model for appointing a judge adopted in the Polish Constitution entails a need to ensure that the judge's status is unquestionable, so that he or she is not exposed to possible attempts to challenge him or her by seeking circumstances which could affect the assessment of the lawfulness of the appointment procedure at the stage prior to appointment by the President of the Republic. Understood thus, the unquestionability of status is an obvious component of the guarantee of irremovability, which is not envisaged as a 'privilege' for the judge, but is anchored in the guarantees of the right of access to a court, including the stability of final judicial decisions.

37 Under Article 179 of the Constitution of the Republic, in conjunction with Article 144(3)(17) thereof, and also EU law, it is not possible to appoint a judge merely in the form of a symbolic act, devoid of real practical effects. The appointment of a judge is at the same time the conferral of competence on the person concerned to exercise judicial power. An application relating to circumstances of a judge's appointment which would serve to review unfavourably his or her independence and impartiality would in every case result in his or her exercise of judicial power being restricted or even rendered impossible.

38 In the absence of an express constitutional basis in a democratic State governed by the rule of law, and in EU law, the appointment of a judge cannot be challenged in any manner. Fulfilment of constitutional requirements results in a judge being granted a mandate to the full extent provided for in the law, while the resulting principle of stability of office and non-removability serve in essence to provide a guarantee of the right to access a court within the meaning of Article 45(1) of the Constitution of the Republic and the second subparagraph of Article 19(1) TEU, in conjunction with the first paragraph of Article 47 of the Charter of Fundamental Rights. The assessment of the act of conferring the mandate and its effectiveness under Polish law, on the other hand, is not subject to assessment from the perspective of EU law. Independence and impartiality are in no way linked to the procedure under which a judge was appointed in so far as it is followed in a democratic State. Both the constitutional rules and the provisions of EU law not only do not provide grounds for questioning a judge's independence by virtue of the procedure of his or her appointment, but are actually intended to ensure that independence, thereby protecting him or her against any external influence – whether from the legislature and executive or the judiciary.

39 As has been pointed out, there is likewise no basis in EU law for challenging the appointment of a judge in a Member State and thus preventing him or her from exercising his or her office and therefore, above all, from adjudicating. This is also evidenced by the circumstance, raised by the appellant, that judge O.N. was appointed to the office of judge of the Supreme Court having 'full knowledge' of the order of the Supreme Administrative Court suspending implementation of the resolution of the KRS in so far as it concerns the presentation of the proposal for his appointment, inter alia, to the office of judge of the Supreme Court. In the view of the appellant, that demonstrates disregard for the law on the part of judge O.N. It is just not very clear on what basis the appellant draws such conclusions. First of all, it must be pointed out that O.N. (who was not yet a judge at the time) was not a participant in any proceedings before the Supreme Administrative Court concerning an interim measure in connection with the resolution of the Supreme Administrative Court and therefore was not served with the order cited by the appellant, and there is nothing to show that he had knowledge of any interim measure. For that reason alone, therefore, the suggestion that he disregarded the law is erroneous. The suggested disregard could only have occurred in full knowledge that such an order had been made and exactly what the subject matter of such an order was. Therefore, the basis of the circumstances from the

appellant's agent infers judge O.N.'s knowledge of the interim measure and the disregard thereof is unknown. If he does so on the basis of the grounds for the resolution of 23 January 2020, which refer to 'knowledge derived from media reports', then, irrespective of the fact that it was issued in breach of procedure and constitutes de facto a provision of law, the arguments contained therein concerning that matter do not correspond to the truth at all, constitute unproven insinuations by the signatories to that statement of grounds, and cannot create a factual situation. Moreover, even if the candidate had obtained general knowledge from the media as to the very fact of the existence of an order for an interim measure, he could have expected that the order, according to the rules applicable to civil proceedings, would comply with those rules, that is to say would concern that part of the KRS resolution which was not final. As far as O.N. was concerned, the resolution of the KRS was final and enforceable, and thus it was not even permissible and procedurally possible to adopt an interim measure in that respect. Accordingly, on the date of appointment the assumption could not be made that the Supreme Administrative Court would grossly infringe the law in its rulings, including the orders for interim measures. Such an assumption could only be made after the content of the entire order had been seen, which, for the quite objective reasons set out, could not have been the case. Any interference with the content of the KRS resolution at a later date is irrelevant here since for obvious reasons it cannot produce any retroactive effects. Irrespective of the foregoing, such an 'interim measure' produces no effects in public law and vis-à-vis the President of the Republic.

40 By referring to the irregularities – which it deems to exist – in the appointment process, the appellant is in fact questioning the status of the judge and seeking his recusal on the basis of circumstances capable of demonstrating the judge's lack of impartiality in a particular case. Such an application is, de facto, a false application which seeks to question the appointment of a judge, which is impermissible under EU law and the constitution of a Member State, and which is also not possible under national law or EU law, and should therefore – in the view of the Supreme Court – be disregarded.

41 The second matter concerns procedural measures already referred to – in the context of the second subparagraph of Article 19(1) TEU, in conjunction with the first paragraph of Article 47 of the Charter of Fundamental Rights – and amounts to whether an effective and sufficient mechanism for satisfying the criteria relating to a court established by law within the meaning of EU law is to confer on the parties, under national law, the right to request verification of the effect of all the circumstances surrounding the appointment procedure and a judge's conduct after appointment on his or her impartiality and independence in the case at issue, in the context of a 'test of impartiality' or an application for recusal of the judge.

42 Despite the principle of coherence and uniformity of EU law, the Supreme Court is not aware of any cases where, apart from Poland, the legal systems of other Member States have also introduced new measures of a procedural or systemic nature which have adapted provisions of national law to the requirements arising

from the abovementioned case-law of the Court of Justice. In the view of the Supreme Court, the provisions referred to in the question referred for a preliminary ruling are intended to reconcile the standard of Polish law on the permissibility of verifying a judge's independence and impartiality with the conclusions arising from the above judgments of the Court of Justice. They are also intended to introduce a judicial route for verifying the criterion relating to a 'court established by law' within the meaning of Article 6 ECHR.

43 The above measures appear to be sufficient to determine whether the composition of the court is correct especially since, despite the publicity surrounding them and even sometimes media exhortation to use them, they are very few in number, which means that the impartiality and independence of judges of Supreme Court, including those appointed since 2018, are in fact very rarely questioned by the parties to the proceedings. In civil cases (in the Civil Chamber of the Supreme Court), there have been a total of around 40 applications for the recusal of a judge and for a test since that time. Having regard to the number of cases received by the Civil Chamber of the Supreme Court at 5 000 to 7 000 per year, that essentially constitutes a tiny fraction.

44 The measures laid down are sufficient to implement the party's right to proper formation of a court, provided – of course – that they are duly applied by both the parties and the Supreme Court. This concerns both the permissibility of the parties to the proceedings raising relevant pleas in law and adjudication by the Supreme Court, or another court, of a judge of the Supreme Court and questioning of rulings made by the Supreme Court with the involvement of a judge on account of various circumstances. The assumption of a rational legislature and the principle of lawfulness (Article 7 of the Constitution of the Republic of Poland), and also EU principles, require that the assessment should not consist in 'questioning' a ruling or 'challenging' the status of a judge and that it should be effected in accordance with the procedure and rules laid down in separate provisions (Article 49 of the Code of Civil Procedure and Article 29(5) et seq. of the Law on the Supreme Court should now be regarded as such). However, the practice in case-law in recent years indicates a different trend, namely that the provisions of the Constitution of the Republic, national laws and EU law often merely constitute a pretext for adjudicating panels (especially those composed of judges appointed to the Supreme Court before 2018) to draw up assessments and take judicial measures which have no basis in law. Some compositions of the Supreme Court rule that relying solely on the circumstances of the appointment justifies treating the application as an application for recusal of the judge, even though such an interpretation directly contradicts both the provisions of law relied on and the judgments of the Constitutional Court and, in addition, is not supported by any provisions of EU law.

45 The foregoing arises from the impossibility of applying Article 29(5) of the Law on the Supreme Court in practice. For example, in its decision of 15 November 2022 the Supreme Court found that the irregularities in the test of independence and impartiality of a judge are systemic in nature and are so serious that they

make it practically impossible to use it as an effective remedy. They mean that the measure is essentially illusory in nature, and waiving application thereof – or not complying with formal requirements which weaken its effectiveness in practice – should not be seen as an expression of a party's lack of diligence.

46 In another decision of 27 February 2023, the Supreme Court held that the structure of the test set out in the Law on the Supreme Court is aptly described as a procedure seeking to prevent the application of Article 6(1) ECHR, as interpreted by the ECtHR in its judgments in cases against Poland (*Reczkowicz, Dolińska-Ficek and Ozimek* and *Dolińska-Ficek and Ozimek*), while relying on the judgment of the Grand Chamber of the Court of Human Rights in the case of *Guðmundur Andri Ástráðsson v. Iceland* (Application 26374; judgment of the Grand Chamber of the Court of Human Rights of 1 December 2020). In that judgment of 1 December 2020, it was held that the notion of 'established by law' also includes the process of appointing judges (paragraph 228), and that a judicial body that does not meet the requirements of independence – especially vis-à-vis the executive – and impartiality cannot be described as a 'tribunal' for the purposes of Article 6(1) ECHR. For that reason, in assessing whether a court meets the necessary requirement of independence and impartiality, the Strasbourg Court found that the manner in which its members are appointed must also be taken into account – given the same objective. The judgment of 1 December 2020 adopts and sets out a three-step test to be applied in any case where there is doubt as to the proper appointment of the judge adjudicating in it. All of its elements apply when a breach of national law is found to have occurred in the process of appointing a judge (it then examines the nature of the breach – step two, and whether a breach of national law of a certain nature has been established and remedied by the national courts – step three). The elements of that test relate, of course, to independence and impartiality understood from an objective rather than a subjective perspective.

47 On the other hand, the fact that that measure works, and is essentially a different matter, is evidenced, for example, by decisions of the Supreme Court in other cases. It is significant that in those cases the panels of Supreme Court were formed of judges appointed to that court before 2018 (with no judges appointed since 2018). In other words, as long as those judges are adjudicating 'amongst themselves', they do not see any obstacle to applying the provisions of the law by recusing another judge of the Supreme Court (appointed under the 2017 Law), relying – as mentioned above – on the irregularities in the appointment procedure and the fact that that judge did not decline to adjudicate on account of those alleged irregularities. On the other hand, the wording used in Article 29(5) of the Law on the Supreme Court indicates that it is not only that circumstance (the appointment) that should be verified, but also whether, in the circumstances of the case at issue, the circumstances of the judge's appointment and conduct after the appointment may lead to infringement of the standard of independence or impartiality affecting the outcome of the case, having regard to the circumstances of the person entitled and the nature of the case.

48 To sum up, national law provides for measures to verify the impartiality and independence of judges of the Supreme Court. The proper application thereof allows the correct effect to be achieved. If a party makes proper use of an application for the recusal of a judge or the 'test of impartiality' and the court considering it applies the law (also duly), the court will be duly formed.

49 In addition, it should be pointed out that parties to proceedings (especially civil proceedings) do not make use of either an application for recusal of a judge or the test of impartiality test often, and indeed – from the perspective of the total number of cases received by the Supreme Court – do so very rarely. The question therefore arises whether, if a party does not make use of the procedural rights conferred on it, not challenging the composition of the court in a particular case (which, of course, is not the case here), it can be said that the court has been formed in breach of national and EU law. Since, from the perspective of the party itself, the assessment must relate to the sphere of external independence, that is to say, the perception of third parties, in particular the parties to the proceedings, in a situation where the parties do not challenge the independence and impartiality of the judge in the case, it cannot be found that the court concerned is not fulfilling at all the requirements of national and EU law. It is only that element of external independence which can determine that a judge, having regard to both the manner in which his or her appointment procedure is carried out and his or her conduct after his or her appointment, could be subject to verification to establish whether he or she meets the criterion relating an independent court in a particular case questioning his or her constitutional status as such.

50 In the light of the foregoing, the Supreme Court has referred the above questions to the Court of Justice for a preliminary ruling.