Procedural Aspects on Impartial and Independent Judging

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1. *Introduction*

Independent and impartial judges (courts) are a cornerstone of a State governed by the rule of law[1]. In Europe, we uphold this principle as part of the right to a fair trial, as set out in Article 6 of the European Convention on Human Rights (ECHR)[2] and Article 47 of the Charter of Fundamental Rights of the European Union (CFR)[3]. The basic ideas are, first, that anyone is entitled to have a dispute heard by a court of law in a procedure that meets specific requirements, that is, in a fair trial. The State has a duty to make such judicial dispute-resolution procedures possible. Second, it is an essential characteristic of a democracy that individual judges and the judiciary as a whole are independent of all internal and external pressures, so that those who appear before them, and the wider public, can have confidence that their disputes will be decided fairly and in accordance with the rule of law.

The importance of judicial independence is more evident than ever. In recent years there has been a backsliding of the rule of law in the European Union (EU), with some Member States no longer respecting these fundamental values of the Union[4]. For the first time, the EU Commission has started infringement proceedings against a Member State (Poland) regarding legislation that breaches the principle of judicial independence. The ongoing rule-of-law crisis in Poland (and some other Member States) has given rise to extensive case-law emanating from both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) on the subject of the independence of national courts. Polish courts applying that new national legislation concerned have often been confronted with questions relating to judicial independence, and they have frequently requested preliminary rulings under Article 267 of the Treaty on the Functioning of the European Union (TFEU)[5]. In other Member States, courts

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have been critical of the situation in Poland and hesitant to surrender individuals to that country under the system of the European Arrest Warrant (EAW)[6], choosing to submit requests for a preliminary ruling to find out whether they may refuse to execute an European arrest warrant. In the *LM* case[7], the CJEU empowered national courts to carry out a "rule-of-law check" of other Member States by assessing the independence and impartiality of the issuing judicial authorities in the context of the EAW[8]. This means that national courts – often first-instance courts – have to investigate whether courts of other Member States are independent and impartial and, if they find them not to be, whether that circumstance could affect the individual concerned. How is this investigation to be performed, and on the basis of what criteria should a national court assess independence and impartiality in a specific situation?

What all of the case-law referred to directly or indirectly above has in common is that the judicial independence of Polish decision-making bodies has been questioned. In their respective case-law, the ECtHR and the CJEU have stressed different key criteria of importance for interpreting the safeguards of independence and impartiality when assessing whether a specific body satisfies the requirements of independence and impartiality that any court must meet under Article 6 § 1 ECHR and Article 47(2) CFR[9]. This paper aims to identify those criteria and explore how they should be interpreted when national courts assess whether courts in other Member States meet them. However, it should be pointed out even at the outset that those criteria are often inter-related and therefore can be difficult to keep apart. In addition, the two courts have sometimes dealt with several of the criteria as a single whole, and then it is not always easy to deduce from their reasoning which of those criteria they specifically refer to.

2. *The concept of a tribunal or court*

2.1. *General considerations*

It follows from Article 13 ECHR and Article 47(1) CFR that, as a general principle[10], everyone whose rights and freedoms are set forth in the ECHR or are guaranteed by the law of the EU is entitled to an effective remedy, which includes access to an independent tribunal[11]. According to Article 6 § 1 ECHR and Article 47(2) CFR, everyone is also entitled to access to justice, including a fair trial before an independent and impartial tribunal. In other words, for a party to a dispute to have its fundamental right of access to justice met, the body deciding that dispute must fulfil the requirements set out in the ECHR and the CFR. In this context, the concept of "tribunal" is central.

Whilst there is no explicit definition of the concept of a tribunal or court in any relevant legal instrument, it follows from the case-law of both the ECtHR and the CJEU that "tribunal" is not necessarily to be understood as referring only to a court of law of the classic kind, integrated within the standard judicial machinery of a country. The concept of "tribunal" does of course include such traditional courts, but it also includes other bodies deemed equivalent to traditional courts[12]. Both the ECtHR and the CJEU have established different (but equivalent) criteria that are relevant to determining whether a decision-making

body can be considered a "tribunal" for the purposes of Article 6 § 1 ECHR and Article 47 CFR. In the following, "tribunal" will be used to refer to a decision-making body which may, but does not have to be, a traditional court.

From the ECtHR's case-law it follows that a tribunal is characterised in the substantive sense by its judicial function, which is to determine matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner that meets the procedural requirements following from Article 6 § 1 ECHR. A tribunal must also act independently of the executive and be impartial in relation to the parties to the case[13]. In addition, it is inherent in the very notion of a tribunal that it must be composed of judges selected on the basis of merit, that is, composed of judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of a tribunal in a State governed by the rule of law[14].

According to the CJEU's case-law, the relevant criteria are those that the CJEU considers when determining whether a body is a "court or tribunal" for the purposes of Article 267 TFEU[15]. Relevant factors here are whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes* (adversarial), whether it applies rules of law and whether it is independent[16].

Although the ECtHR and the CJEU thus express the requirements that a tribunal must meet slightly differently, those requirements are in fact fundamentally the same: a tribunal must be established by law, it must perform judicial functions and settle disputes in a final and binding manner in accordance with rules of law, and the procedure used must comply with the requirements set out in Article 6 § 1 ECHR and Article 47(2) CFR.

Before the concept of independent and impartial tribunals is investigated in greater depth, something more should first be said about the other criteria that a tribunal must satisfy according to Article 6 § 1 ECHR and Article 47(2) CFR. Those criteria are discussed briefly below under the following headings: «A tribunal established by law», «A fair and public hearing», «Judicial functions and decision-making based on rules of law» and «Adjudication within a reasonable time».

2.2. *A tribunal established by law*

One key test of whether a body is a tribunal for the purposes of Article 6 § 1 ECHR is that it must be "established by law". This expression reflects the principle of the rule of law, which is inherent in the system of protection established by the ECHR. In a democratic society, it is essential for the judiciary to be independent of the executive. The "established by law" criterion ensures that the judicial organisation within a State is regulated by law emanating from the Parliament (the legislature), meaning that the judiciary is not dependent upon the executive[17]. The ECtHR has ruled that a tribunal which has not been established in conformity with the intentions of the legislator lacks the legitimacy required to resolve legal disputes in a democratic society[18]. It should be noted that this criterion covers not only the legal basis for the very existence of a tribunal. In addition, any tri-

bunal must also comply with the particular rules that govern it and the composition of the bench in each case[19].

The concept of "law" refers, in particular, to legislation concerning the establishment and jurisdiction of judicial bodies[20]. The ECtHR has found that the criterion of "established by law" is satisfied at least by those bodies whose very existence is based on law. This does not mean that every single detail of the judicial system must be governed by law, only that the establishment, organisation and competence of the bodies in question must follow from law[21]. In addition, the concept of "law" here includes not only rules that give a tribunal its legitimacy but also rules that regulate the tribunal's composition and the procedure for appointing its judges. In other words, what is required is not just a tribunal established "by law" but a tribunal established "in accordance with the law"[22]. For example, the criterion of "established by law" could be breached if the rules set out in national legislation for the appointment of judges are not complied with[23]. In recent years, this has been a problem in relation to courts in Poland, with the procedures for appointing judges both to ordinary courts and to the Supreme Court having been questioned. Regarding the latter, both the ECtHR and the CJEU have on several occasions found the appointment procedure to be unlawful[24]. The issue of the procedures for the appointment of judges in Poland will be further explored below at 3.2.2.

It should be noted that the right to have access to a tribunal established by law is very closely related to the right to be judged by an independent and impartial tribunal, even if these two rights are stand-alone rights according to Article 6 § 1 ECHR. In fact, under that article, a judicial body which does not satisfy the requirement of independence, in particular that of independence from the executive, may not even be characterised as a tribunal at all[25]. The concept of independent tribunals is further explored below in Chapter 3.

According to the CJEU's case-law, the concept of "established by law" includes an inherent permanence test. To qualify as a tribunal, a judicial body must be permanent. It must not exercise its judicial function only occasionally, and it must exercise it on the basis of an act adopted by national public authorities, not on the basis of an agreement between the parties to the proceedings before it[26]. This is connected with the concept of a tribunal being interpreted in the light of Article 267 TFEU, where the requirement for a permanent court is a prerequisite according to the CJEU's case-law[27].

The requirement for permanence is not explicitly stated in Article 6 § 1 ECHR, but one of the purposes of the requirement that a tribunal should be "established by law" is to prevent the establishment of extraordinary tribunals to hear particular cases or to operate in emergencies. Even so, the permanence test following from Article 6 § 1 ECHR is not the same as that following from Article 267 TFEU. For example, the ECtHR has found that arbital tribunals established on the basis of the parties' agreement are to be considered "tribunals" for the purposes of Article 6 § 1 ECHR[28]. The decisive issue in those cases has been whether the process before the arbitral tribunal meets other procedural requirements set out in Article 6 § 1 ECHR; if it does, there is no violation of that article.

In recent years, the issue of what constitutes an "independent tribunal established by law" has been extensively discussed in relation to a newly established Disciplinary Chamber of the Polish Supreme Court. In 2017, the organisation of that court was reformed. The new Law on the Supreme Court[29] (which entered into force in 2018) created two new chambers: a Chamber of Extraordinary Review and Public Affairs and a Disciplinary Chamber[30]. The latter chamber has been criticised on several levels, mainly for not being considered to protect Polish judges from control by the ruling political party but also because of the procedure for appointing judges to it. Concretely, the judges of the Disciplinary Chamber are appointed by the President of the Republic on a proposal of the National Council of the Judiciary (NCJ), which is the same procedure used to appoint judges for the other chambers of the Supreme Court[31]. However, according to the new Law on the Supreme Court, the Disciplinary Chamber must be constituted solely of newly elected judges, meaning that those already sitting on the Supreme Court are excluded from it[32].

The main role of the NCJ is to safeguard the independence of courts and judges[33]. In the context of the appointment of judges, a body such as the NCJ may well contribute to making the appointment process more objective[34]. However, the problem is that the NCJ's organisation was also reformed in 2017, in such a way that it can be questioned whether this is a body which is independent of political power.

The NCJ consists of twenty-five members. In the past, fifteen of them were judges selected by their peers, but now they are instead judges appointed by a branch of the Polish legislature. Another eight members are appointed in different ways by political authorities. Hence, of the twenty-five members of the NCJ in its new composition, twenty-three have been appointed by, or are members of, the executive or legislature[35]. For this reason, it is highly questionable whether the NCJ fulfils the requirement of independence vis-à-vis the legislative and executive powers. This is serious given the decisive role of the NCJ in the process of appointing judges to the newly established Disciplinary Chamber of the Supreme Court.

None of the above-mentioned circumstances necessarily entails that a decision-making body – such as a disciplinary chamber or a national council of the judiciary – does not meet the requirement of independence. That the judges concerned are appointed by the President of a Member State does not necessarily make those judges subordinate to the President or raise doubt as to those judges' impartiality[36]. However, to avoid such effects, it is necessary to ensure that the substantive conditions and procedural rules governing the adoption of the appointment decisions in question are such that they cannot give rise to reasonable doubts in the minds of individuals as to the imperviousness of the judges concerned to external factors and their neutrality with respect to the interests before them, once they have been appointed judges. Furthermore, it is important, *inter alia*, in that perspective, that those conditions and procedural rules should be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned[37].

When it comes to the NCJ, its crucial role in the appointment procedure makes it imperative that there should be no doubts as to its independence. However, following an overall assessment, both the ECtHR and the CJEU have concluded that there are legitimate doubts as to the independence of the NCJ and its role in the procedure underpinning the appointment of the members of the Disciplinary Chamber. The question, then, is how this affects the Disciplinary Chamber: can it still be classified as an "independent tribunal established by law"?

The CJEU's answer to that question was that the particular context and objective circumstances in which the Disciplinary Chamber was created, the characteristics of that chamber and the way in which its members were appointed were such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of that body to external factors, in particular the direct or indirect influence of the Polish legislature and executive, and its neutrality with respect to the interests before it. The likely outcome, according to the CJEU, was that the Disciplinary Chamber would not be seen to be independent or impartial, which was likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in those individuals[38].

In *Guðmundur Andri Ástráðsson*, the ECtHR had established a three-step test to determine whether irregularities in a judicial appointment process violate the essence of the right to a tribunal established by law. The three steps involved are whether there was (i) a manifest breach (ii) of a fundamental rule of the appointment procedure and (iii) whether allegations were effectively reviewed and redressed by domestic courts in a Convention-compliant manner[39]. After applying this three-step test to the circumstances of the Disciplinary Chamber of the Polish Supreme Court, the ECtHR found that there was a manifest breach of the domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Disciplinary Chamber, since the appointment was effected upon a recommendation of the NCJ, which no longer offered sufficient guarantees of independence from the legislative or executive powers. The irregularities of the appointment process compromised the legitimacy of the Disciplinary Chamber to the extent that, following an inherently deficient procedure for judicial appointments, it did lack and continues to lack the attributes of a "tribunal" which is "lawful" for the purposes of Article 6 § 1 ECHR. The very essence of the right at issue had therefore been affected[40]. In the light of the foregoing, the ECtHR concluded that the Disciplinary Chamber of the Supreme Court[41] was not a "tribunal established by law"[42].

2.3. *A fair and public hearing*

The concept of a "fair hearing" is a broad one. It includes a requirement that judicial proceedings should be organised and accomplished in a way that is "fair" to the parties to the dispute in question[43]. The right to a fair hearing set out in Article 47(2) CFR should provide a level of protection which is at least equivalent to that provided by the ECHR and the relevant case-law of the ECtHR[44]. Questions of fairness are determined by considering the whole pro-

ceedings to see whether any defects in the process have occurred[45].

Predictability is an essential prerequisite for a fair trial. A State must have pre-established rules for the procedure so that the parties can predict what will happen at the different stages of the process. Further, as a starting point, judicial proceedings must be adversarial[46]. The parties must have the opportunity to contest with each other, present their respective case before the tribunal, and comment on and respond to each other's action, including the legal facts invoked by the parties, the argumentation presented by them and the evidence adduced by them[47]. Any litigation materials filed by one party with a tribunal must be made available to the other party so that it can respond[48]. Further, a tribunal must base its decision only on such materials that both parties have had the opportunity to comment on[49].

The requirement for adversarial proceedings is closely connected to the principle of equality of arms. Indeed, the facts of a case may give rise to concerns from the perspective both of the right to an adversarial trial and of the right to equality of arms. However, equality of arms is deemed to obtain if the parties are treated equally, whereas adversarial process implies a right of access to all relevant litigation materials, whether or not the other party has such access[50]. The principle of equality of arms requires procedural equality between the parties, that is, a fair balance between the parties. This means that each party must be afforded a reasonable opportunity to present her case, including her evidence, under conditions that do not place her at a substantial disadvantage vis-à-vis her opponent[51]. It is not clear from Article 6 § 1 ECHR and Article 47(2) CFR what procedural safeguards are required to guarantee the principle of equality of arms – this depends on the nature of the case and on what is at issue between the parties. Both the ECtHR and the CJEU have interpreted this principle in various cases and established various procedural safeguards included in it. At an overall level, it concerns various aspects of the parties' right to appear before a tribunal and to actively present their case in the manner they wish[52].

The requirement of a fair hearing also presupposes that the tribunal will give reasons for its judgment in both criminal and non-criminal cases. Indeed, national courts must «indicate with sufficient clarity the grounds on which they based their decision»[53]. Exactly what is required will depend on the nature and circumstances of each case[54]. A tribunal does not have to deal with every point that a party has raised in its argumentation, but it must address the parties' main arguments[55].

Further, the hearing before a tribunal must be not only fair but also public. In fact, a public hearing «protects the litigants against the administration of justice in secret with no public scrutiny»[56] and maintains public confidence in the judicial system[57]. For this reason, the principal rule is that hearings should be public. However, there are exceptions. For example, Article 6 § 1 ECHR specifically lays down that, under certain circumstances, the press and public may be excluded from all or part of the trial. The parties may also waive the right to a public hearing. However, such a waiver must be made unequivocally and must not run counter to any important public interest[58].

2.4. *Judicial functions and decision-making based on rules of law*

As mentioned above, a tribunal is characterised in the substantive sense of the term by its judicial function, which is to determine matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner[59]. In this context, both the ECtHR and the CJEU have established that one essential criterion for a tribunal is that it should substantively settle disputes brought before it and must have jurisdiction to examine all questions of fact and law relevant to such disputes. Further, tribunals should adopt their decisions on the basis of exclusively legal criteria and following an adversarial procedure[60].

Specifically, in *Kövesi*, the ECtHR pointed out that «the "tribunal" in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it [and that t]he requirement that a court or tribunal should have "full jurisdiction" will be satisfied where it is found that the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient review" in the proceedings before it»[61].

Finally, a further requirement inherent in the judicial function of a tribunal is that its decisions must be binding[62]. In order for a given body to qualify as a tribunal, it is therefore essential that it should act in a judicial capacity, not only in an administrative one[63]. It is of course conceivable for a single body to perform both judicial and other functions, and such "plurality of powers" cannot in itself preclude a body from being a tribunal with respect to some of its functions. What is decisive here is that, in the specific case in question, the body performs judicial functions[64]. To constitute a tribunal, a body must give judgment in proceedings that are intended to lead to a decision of a judicial nature[65].

2.5. *Adjudication within a reasonable time*

Finally, justice must be delivered within a reasonable time. The purpose of this requirement is to protect all parties to judicial proceedings against excessive procedural delays that might jeopardise the effectiveness and credibility of justice[66]. The reasonable-time requirement applies to both criminal and other cases. However, it is particularly important in criminal cases, where a defendant is charged with a crime and may be detained pending the sentence. Both the ECtHR and the CJEU have refused to impose a fixed time limit when determining whether a certain time is reasonable. Instead, they have adopted a case-by-case approach. However, both of them have established specific criteria that are important when the question of reasonable time is to be decided: (i) the complexity of the case, (ii) the conduct of the applicant, (iii) the conduct of the domestic authorities and (iv) the importance of what is at stake[67].

3. *The concept of "independent and impartial tribunals"*

3.1. *General considerations*

The independence of national (courts and) tribunals and their judges is fundamental to the rule of law. This refers to independence

from the executive and the legislature as well as from the parties to the case at hand[68]. In a recent judgment, the CJEU concluded that the independence of the judges of the Member States is of fundamental importance for the EU legal order in various respects, emphasising that this independence is, first, informed by principles of the rule of law, second, a necessary condition if individuals are to be guaranteed, within the scope of EU law, the fundamental right to an independent and impartial tribunal laid down in Article 47 CFR and, third, essential to the proper working of the system of judicial co-operation embodied by the preliminary-ruling mechanism under Article 267 TFEU in that that mechanism may be activated only by a body responsible for applying EU law that satisfies, *inter alia*, the criterion of independence[69].

The concepts of independence and impartiality include different aspects of the requirement that tribunals should act objectively and not be affected by irrelevant circumstances. While these concepts are often mentioned together and dealt with as a whole, there are differences between them[70]. The concept of independence requires the tribunal to exercise its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever. This protects the tribunal against external interventions or pressure liable to impair its members' independent judgement and influence their decisions[71]. Further, individual judges must be free from undue influence both inside and outside the judiciary, meaning that they must be free from directives or pressure from their fellow judges or from those who have administrative responsibilities within the tribunal, such as the president of the tribunal or the president of a division within the tribunal[72].

By contrast, the concept of impartiality applies to individual judges and to their actions in specific cases. There must be no will or inclination within the tribunal to favour one party over another, and the parties must be treated equally in the decision-making process and the proceedings[73]. Impartiality is essential to ensure a level playing-field for the parties to the proceedings and for their respective interests with regard to the subject matter of those proceedings. The judges must be objective and must have no interest in the outcome of the proceedings apart from the strict application of the rule of law[74]. However, since it is difficult to prove that a judge has been deliberately biased, both a subjective and an objective test are required to determine whether a judge has been impartial in a specific case. The subjective test assesses the judge's personal conviction and behaviour in that case, for example to determine whether he or she held any personal prejudice or bias in the case. The objective test applies to the tribunal itself and assesses, *inter alia*, whether its composition offered sufficient guarantees to exclude any legitimate doubt regarding its impartiality. What needs to be determined is whether, apart from a specific judge's conduct, there are any ascertainable facts that may raise doubts about the impartiality of the tribunal or of that judge[75].

The concepts of independence and *objective* impartiality are particularly closely linked (which is presumably an important part of the reason why the concepts of independence and impartiality are often

mentioned as a whole[76]). In this respect, even appearances may be of a certain importance, as reflected in the dictum that «justice must not only be done, it must also be seen to be done»[77]. This is because the tribunals must inspire public confidence, which is essential in a democratic society[78].

The CJEU has ruled that the concept of independence is inherent in the task of adjudication. It makes a distinction between the external and internal aspects of independence, where the latter aspect relates to impartiality and the former to independence in the sense of protection from external factors[79]. It goes without saying that the internal aspect of independence (impartiality) is essential. As noted, this requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law[80], which is clearly a fundamental prerequisite for the proper application of the law. However, this paper focuses on independence at a more general level, specifically on the criteria that characterise a tribunal that is "independent" in the sense of the ECtHR's and the CJEU's first aspect, that is, one that is free from external and internal pressure.

The structure and organisation of a tribunal are essential to guarantee that it is free from external or internal pressure. Hence there must be structural and organisational rules and safeguards against outside pressure in a Member State to ensure that its judiciary has legal opportunities to act independently as well as to ensure that it presents an appearance of independence. In this context, rules concerning security of tenure are of particular importance. In the following, various criteria pertaining to this issue that the ECtHR and the CJEU have highlighted as important when deciding whether a tribunal has the potential to act independently will be addressed, both at a theoretical level and in relation to the specific case of Poland.

3.2. *Security of tenure*

3.2.1. *Introduction*

According to the case-law of the ECtHR and the CJEU, the judiciary must be so organised that the tribunals offer guarantees ensuring an "appearance of independence". As expressed by the CJEU in the *Wilson* case, «guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members»[81], in order to dismiss any reasonable doubt in the minds of individuals as to the independence and impartiality of a tribunal. The ECtHR has made similar statements about the criteria that are relevant when determining whether a tribunal meets the requirement of independence, stressing the following criteria as particularly essential in that context: (i) the appointment of judges and the appointment procedure, (ii) their term of office and (iii) the removal – or rather irremovability – of judges[82].

3.2.2. *Appointment of judges*

According to the requirements set out in Article 6 § 1 ECHR and Article 47(2) CFR,

as interpreted in the case-law of the ECtHR and the CJEU, respectively, a tribunal must be established not only "by law" but "in accordance with the law"[83]. This means that both the composition of a tribunal and the procedure for the appointment of its judges must be in accordance with domestic law[84] and that the domestic legislation on the procedure for the appointment of judges must be formulated in unequivocal terms, to the extent possible, so as to prevent arbitrary interference with the appointment process[85].

Further, it is essential for the judicial system of a State to have clear rules on the appointment of judges. It must be predictable what qualifications are required to become a judge and how the appointment procedure is organised. The judges sitting on a tribunal must be selected on the basis of merit – that is, from among individuals who fulfil the requirements of technical competence and moral integrity. The higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be[86]. In addition, it is essential to protect the procedure for the appointment of judges from political interference and arbitrary appointments, in order to guarantee judicial independence and impartiality. Judges must be protected from any external intervention or pressure liable to jeopardise their independence. In particular, rules about security of tenure must be such as to preclude not only direct influence in the form of instructions but also types of influence which are more indirect and liable to affect the decisions of the judges concerned. It is also essential to ensure that the substantive conditions and detailed procedural rules governing the appointment procedure and the decisions to appoint a specific judge are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once they have been appointed judges[87].

However, it must be pointed out that there is no single model for selecting and appointing judges that is common to all countries. Rather, there are several different ways of doing this[88]. One important principle is that of the "separation of powers" between the political organs of government and the judiciary. This does not mean that the executive and the legislature must not be involved in the appointment of judges, provided that the judges, once appointed, are free from influence or pressure when fulfilling their judicial function[89]. Instead, the decisive factor according to the ECtHR is always whether the requirements of the ECHR are met in a given case[90].

The procedure for appointing judges to Polish courts – both to the ordinary courts and to the Supreme Court – has been the subject of much criticism in recent years. It has been questioned whether appointments made are compatible with domestic law. Further, criticism has been based on the fact that the body that appointed the judges in question was not considered to be independent. In addition, proper reasons were not given for some appointment decisions. Finally, shortcomings have been pointed out with regard to opportunities for appealing against such decisions[91]. For example, in one case, the judges of the Disciplinary Chamber of the Polish Supreme Court had been appointed by the President of the Republic of Poland on the recommendation of the NCJ, the majority of whose mem-

bers are no longer elected by judges but rather by the Sejm (the lower house of the national parliament)[92]. The ECtHR found that the legislative and executive powers had improperly influenced the procedure for appointing judges. This had resulted in a fundamental irregularity which adversely affected the entire process and compromised the legitimacy of the Disciplinary Chamber, which could therefore not be considered an "independent and impartial tribunal established by law"[93].

The composition of a decision-making body is not a problem in the case of traditional courts composed entirely of judges. Such a court is usually composed of professional judges, but this is not an absolute requirement. Lay judges (or lay assessors) – non-professional judges – are not unusual in European legal systems. At a general level, there are no problems with them, but in specific cases there can be. In the *Langborger* case, the composition of the Swedish Housing and Tenancy Court was at issue. The ECtHR found that, although the lay assessors who sat on the Housing and Tenancy Court alongside professional judges generally appeared to be exceptionally well qualified to adjudicate disputes between landlords and tenants as well as to address the specific questions that might arise in such disputes, it could not be excluded that their independence and impartiality might be open to doubt in a particular case. In *Langborger*, the lay assessors had been nominated by, and had close links with, two associations that both had an interest in the outcome of the case. For this reason, the ECtHR concluded that the composition of the Housing and Tenancy Court did not present an appearance of independence in the specific case[94].

Further, even if lay judges are accepted as members of a tribunal, there must be an appropriate balance between them and the professional judges. In fact, the number of judges and their functions have a bearing on whether a tribunal can be considered independent and impartial. The ECtHR has held that, where at least half of the members of a tribunal are professional judges, including the president with a casting vote, this is a strong indicator of impartiality. On the other hand, if the vast majority of the members of a tribunal are non-professional judges, there could be a problem as regards its appearance of independence and impartiality[95].

3.2.3. *Term of office*

Judges do not need to be given lifetime appointments, but their term of office must not be too short. It goes without saying that life tenure or long terms of office promote judicial independence and that there is a risk that short terms will have the opposite effect, especially if reappointment is possible. The requirement of independence set out in Article 6 § 1 ECHR and Article 47(2) CFR is in fact not met if the judges' term of office is too short, although the exact meaning of that depends on the type of decision-making body. For example, a three-year term for members of a prison board has been accepted by the ECtHR, which admitted that this period was relatively short but found it to be justified by the fact that the board members were unpaid and that it might be hard to find candidates willing to serve for longer periods[96]. Such considerations would in most cases probably not be

acceptable for courts in the standard sense, however. Judges are usually appointed for life or for a fixed term which is considerably longer than three years.

Further, that judges should be in principle irremovable during their time of office is generally seen as a corollary of their independence and thus deemed to be included in the guarantees of Article 6 § 1 ECHR[97]. In fact, the CJEU has ruled that judges must perform their judicial functions until the expiry of their mandate or until they have reached the obligatory retirement age[98]. This issue created problems when Poland, in recent years, introduced new legislation lowering the retirement age for judges in both the ordinary courts and the Supreme Court. The new rules would apply even to judges who had been appointed and taken office before they came into force. The EU Commission considered that the new rules conflicted with EU law and therefore initiated two infringement actions against Poland. In its judgments, the CJEU stated that the new rules were incompatible with the principle of the irremovability of judges[99]. It should be noted that the national provisions challenged by the Commission in its actions had already been repealed or amended, and their effects had thus been eliminated, before the CJEU gave its judgments. However, according to the settled case-law of the CJEU, the question of whether there has been a failure to fulfil obligations under EU law must be examined on the basis of the position in which the Member State at issue had found itself at the end of the period laid down in the reasoned opinion, meaning that the CJEU was unable to take account of any subsequent changes and had to rule on the actions anyway[100]. Its judgments will be further analysed below.

3.2.4. *Removal of judges*

It is an essential prerequisite of a democratic society that judges should exercise their duties without fear of being dismissed if they do not make certain rulings or if they otherwise adjudicate in a way that is not desirable to State authorities. Government agencies must not have the right to dismiss a judge just because it considers him or her inconvenient. According to the CJEU's case-law, a tribunal must exercise its function

> wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, being thus protected against external interventions or pressure liable to impair the independent judg[e]ment of its members and to influence their decisions[101].

The principle is that judges may remain in post until they reach the obligatory retirement age or until the expiry of their mandate, where it is for a fixed term[102]. Hence a Member State must not retroactively lower the retirement age for judges during their term of office[103]. While it must be possible to hold judges accountable if they neglect their duties or abuse their position, meaning that there is a need for disciplinary mechanisms, including to remove judges, the disciplinary processes must be predictable. In other words, the procedure for disciplining and removing judges must be thorough, robust and politically impartial[104].

According to the CJEU, the dismissal of members of a tribunal should be «determined by specific rules, by means of express legislative provisions offering safeguards that go beyond those provided for by

the general rules of administrative law and employment law which apply in the event of an unlawful dismissal»[105]. Specifically, judges may be dismissed if they are deemed unfit to carry out their duties because of incapacity or a severe breach of their obligations, provided that the appropriate procedures are followed. By contrast, judges should not be subject to arbitrary removal, and they should not be dependent on the authorities having appointed them. Each dismissal of a judge or other comparable decision-makers must provide the necessary guarantees to prevent the risk that disciplinary injunctions will be used as a means to exercise political control over the content of judicial decisions[106].

The above-mentioned new Polish Law on the Supreme Court[107] lowered the retirement age for Supreme Court judges to 65 years, whereas the previous retirement age had been 70 years with a possible extension of two years provided the judge submitted a health declaration. This new retirement age began to apply on the day when the law entered into force, even with regard to those Supreme Court judges who had been appointed and taken office before that day. Under the new law, it was similarly possible for a Supreme Court judge to have his or her appointment extended and to continue serving as a judge beyond the age of 65[108]. A judge wishing to obtain such an extension would submit a declaration to that effect along with a health certificate. However, then the President of the Republic of Poland had the power to decide whether to grant the request for an extension. The President would not be bound by any criteria when making that decision, which would not be subject to judicial review.

The retirement age for judges in ordinary Polish courts was also lowered in 2017, to 60 years for women and 65 years for men, whereas the previous retirement age had been 67 years for both sexes[109]. The law introducing that rule also empowered the Minister of Justice to extend the active term of office for judges in ordinary courts beyond the new retirement ages.

As mentioned above at 3.2.3, the Commission initiated two infringement actions against Poland following the introduction of the rules lowering the retirement age for judges in the Supreme Court and in the ordinary courts. The CJEU ruled that those rules breached EU law in that they failed to meet the requirement for independent courts because of a violation of the principle of the irremovability of judges[110].

In this context, the CJEU noted that the fact that a State representative such as the President or Minister of Justice of Poland had been entrusted with the power to decide whether or not to extend the period of judicial activity beyond the normal retirement age did not in and of itself provide sufficient grounds for concluding that the principle of independence had been infringed. Rather, the problem was to be found in the unclarity of the substantive conditions and detailed procedural rules that governed the decision-making power of the President and Minister of Justice. The CJEU stressed that the decisions made in such matters must be such that they do not give rise to reasonable doubts, in the minds of individuals, as to the independence of the decision-making process and of the judges concerned. The conditions and procedural rules should be so designed that those judges are protected from potential temptations to give in to external intervention or pressure that is

liable to jeopardise their independence. In particular, the procedural rules must make it possible to preclude not only any direct influence in the form of instructions, but also types of more indirect influence which are liable to affect the decisions of the judges concerned. In the CJEU's opinion, the criteria based on which the President and Minister made their decisions did not satisfy those requirements[111]. In addition, the CJEU considered that the fact that the new rules applied even to judges already serving on the Supreme Court entailed that those judges might have to stop performing their judicial tasks prematurely, which raised reasonable concerns regarding compliance with the principle of the irremovability of judges[112].

As regards the lowering of the retirement age for Supreme Court judges, a further problem in the CJEU's opinion was that the President's decisions were not just discretionary in that they were not governed by any objective and verifiable criterion, but also not subject to a requirement to state reasons nor possible to challenge in court[113]. Concretely, the new Law on the Supreme Court provided for the NCJ to deliver an opinion to the President before he adopted his decision. While the CJEU noted that having a body such as the NCJ prepare a matter concerning the possible extension of a judge's tenure before the President makes his decision may help make the procedure more objective, this presupposes that the body in question (in the present case, the NCJ) is independent of the legislative and executive authorities and of the authority to which it is to give its opinion (in the present case, the President). Further, the CJEU pointed out that the NCJ did not need to give reasons for its opinion, and an opinion without explicit reasons cannot be considered to be capable of objectively guiding the President when he decides whether to extend the term of office of a Supreme Court judge[114].

As regards judges in ordinary courts, the CJEU found that the lowering of their retirement age combined with the conferment upon the Minister of Justice of discretion for the purpose of authorising them to continue carrying out their duties beyond the new retirement ages failed to comply with the principle of irremovability. In fact, that combination of measures was deemed to create reasonable doubts in the minds of individuals that the new system might actually have been intended to enable the Minister to remove certain groups of judges once they had reached the newly set normal retirement age while letting other judges retain their position[115].

A further requirement following from the principle of judicial independence is that national judges should not be subjected to disciplinary proceedings or actions for exercising their discretion to bring a question before the CJEU[116]. A related issue that has become increasingly relevant in Poland in recent years, since the reform of its judicial organisation, is to do with what actions by judges can lead to disciplinary liability.

One problem in this connection is that the rules on disciplinary liability of judges (which are to be applied by the new Disciplinary Chamber)[117] are such that they can be used as a means of exerting political control over judges' judicial activity[118]. The CJEU has emphasised that it is essential that judges should not be subject to disciplinary action because a court decision contains a possible error regarding the interpretation and application of national and EU law pro-

visions or in the assessment of the facts and the appraisal of the evidence[119]. To guarantee the independence inherent in the tasks of judges, and to avoid exposing them to the risk that their disciplinary liability may be triggered solely because of the decisions taken by them, it is essential that there should be rules that define in a sufficiently clear and precise manner what forms of conduct may give rise to disciplinary action against judges[120].

Under Polish law, disciplinary liability may arise if there exists an «obvious and gross violations of the law» or a «finding of error» entailing an «obvious violation of the law»[121]. The CJEU concluded that these expressions do not meet the requirements of clarity and precision in that they are not such as to prevent the liability of judges from being triggered solely on the basis of the supposedly "incorrect" content of their decisions[122]. Hence the provisions containing the above-mentioned expressions undermine the independence of judges and do so, what is more, at the cost of a reduction in the protection of the value of the rule of law in Poland[123].

As highlighted in this paper, Poland has introduced national rules that prevent, in various ways, Polish judges from acting independently. The purpose of those rules seems to be to subordinate the judiciary to the executive and the parliamentary majority. The newly established Disciplinary Chamber of the Polish Supreme Court has been given powers to bring proceedings against judges who "break ranks". These new rules are popularly referred to as the "Muzzle Law"[124].

As a result of that Muzzle Law, the Commission has brought a fourth infringement action before the CJEU against Poland for its alleged failure to fulfil obligations concerning the lack of independence of the Disciplinary Chamber of the Supreme Court[125]. The Commission has requested that the CJEU should declare that various national provisions which, in different ways, empower the Disciplinary Chamber to bring proceedings against judges for questioning the new rules infringe Poland's obligations under EU law. The Commission has stated five different reasons why the Muzzle Law violates various provisions of EU law that protect judicial independence. Of particular importance is that the Muzzle Law prevents Polish courts from requesting preliminary rulings from the CJEU in matters of judicial independence and that Polish judges may risk disciplinary action if they request such rulings. The Commission also requested certain interim measures, which have been granted by the Vice-President of the CJEU, who ordered Poland to immediately suspend the application of national rules on the functioning of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges until the final judgment is delivered[126]. On the same day, the Polish Constitutional Court ruled that the interim measures imposed upon Poland by the CJEU are contrary to the Polish constitution[127]. Poland failed to comply with the order by suspending the application of the national provisions in question, whereupon the Vice-President of the CJEU ordered Poland to pay the Commission a periodic penalty payment of € 1,000,000 per day[128].

The Commission has also withheld the support that Poland would be due under the recovery package with financial support to Member States that the EU has developed in the wake of the Covid-19 pandemic, pend-

ing compliance with the above-mentioned order to suspend the Supreme Court's Disciplinary Chamber. This has been economically significant for Poland, and in order to unlock billions of euros of funds frozen over rule-of-law concerns, the Sejm (the lower house of the Polish parliament) voted on 26 May 2022 to abolish the controversial Disciplinary Chamber and replace it with a new body[129]. However, critics of the Polish government say that the new bill on judicial reform does not go far enough to ensure that judges are not subjected to political pressure[130].

4. *Conclusions*

The problems in recent years with some EU Member States, not least Poland, no longer respecting the fundamental values of the ECHR and EU law have given both the ECtHR and the CJEU a great deal of work. This has yielded an extensive case-law from both of them assessing various issues pertaining, *inter alia*, to the fundamental right to an independent and impartial tribunal. In this context, it has been necessary to clarify the criteria that a Member State's decision-making bodies must meet in order to be classified as tribunals exercising their jurisdiction independently and impartially in a manner consistent with the requirements of Article 6 § 1 ECHR and Article 47(2) CFR. This paper aims to identify and clarify those criteria. Doing so is not an easy task, because the different criteria are closely interconnected, but one thing is abundantly clear: to qualify, a decision-making body must constitute an "independent and impartial tribunal established by law".

The criterion of "established by law" requires that a tribunal must have been established in conformity with the intentions of the legislator. This criterion covers not only the legal basis for the very existence of a tribunal; rather, the tribunal must also comply with the particular rules that regulate its composition and the procedure for appointing its judges. As expressed by both the ECtHR and the CJEU, what is required is not just a tribunal "established by law", but a tribunal established "in accordance with the law". If these requirements are not fulfilled, a decision-making body lacks the legitimacy required to resolve legal disputes in a democratic society.

Further, a tribunal must not only be established by law and in accordance with the law, but must also be able – and give the appearance of being able – to act independently of the legislature and the executive, and impartially in relation to the parties. A tribunal must not take orders or instructions from any source whatsoever. It must exercise its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body. There must be no will or inclination within the tribunal to favour one party over another, and the parties must be treated equally in the decision-making process and the proceedings. Against this background, particular importance in the assessment of whether a decision-making body fulfils the criteria of an "independent and impartial tribunal" should be ascribed to the issue of judges' security of tenure, especially to (i) the procedure for the appointment of judges, (ii) the judges' term of office and (iii) the (ir)removability of judges.

To begin with, it must be predictable what qualifications are required to become

a judge in a certain State and how the appointment procedure is organised there. The judges sitting on tribunals must be selected on the basis on merit, and the procedure for the appointment of judges must be protected from political interference and arbitrary appointments. In addition, the length of the judges' term of office is essential. Appointments do not need to be made for a lifetime, but they must have a certain duration that cannot be too short. Further, one essential requirement in a democratic society is that judges should be able to exercise their duties without fear of being dismissed if they do not make certain rulings or otherwise adjudicate in a way that is not desirable to State authorities. The principle must be that judges may remain in post until they reach the obligatory retirement age or until the expiry of their mandate, where it is for a fixed term. While judges need to be held accountable if they neglect their duties or abuse their position, meaning that there is a need for disciplinary mechanisms, including to remove judges, the disciplinary processes must be predictable. There must be specific rules governing the dismissal of members of a tribunal, in the form of express legislative provisions offering safeguards to prevent the unlawful and discretionary removal of judges.

On several occasions in recent years, the ECtHR and the CJEU have assessed whether various Polish legislative initiatives complied with the criteria mentioned above and found this not to be the case. For example, the new rules lowering the retirement age for judges serving on ordinary courts and the Supreme Court were deemed not to meet either the requirements imposed on the procedure for the appointment of judges or those applying with regard to the irremovability of judges. In addition, the newly established Disciplinary Chamber of the Supreme Court was considered unlawful, both regarding its establishment, which had not taken place in accordance with the law, and regarding the requirement of the irremovability of judges. The ECtHR and the CJEU in fact rejected the Disciplinary Chamber as a tribunal, ruling that there is a risk that judges will be removed from office because of the judgments they give and their application of rules of law. In addition, they found that the Polish rules on the disciplinary liability of judges could be used as a means of exerting political control over judges' judicial activity, emphasising that the wording of the relevant legislative provisions is not such as to prevent judges from being subject to disciplinary action solely on the basis of the supposedly "incorrect" content of their decisions.

Regarding both the retirement age for judges and the suspension of the Disciplinary Chamber, Poland has chosen to abide by the CJEU's judgments and orders to a certain extent, at least on paper. However, this has not convinced members of society, domestically or internationally, that judges in Poland are now protected by the principle of independent and impartial judging and that the situation is under control with regard to the rule-of-law problem in Poland. At the end of May 2022, when the Sejm considered a bill to abolish the Disciplinary Chamber in its present form, the opposition parties voted against the bill, arguing that it would create a new disciplinary chamber with a new name rather than resolving the rule-of-law concerns that had been raised by them and by the EU. Unfortunately, there is a significant risk that the opposition is right.

There is no doubt that the legal organisation in Poland is struggling with significant problems regarding the trust of the outside world. Another example of this is that several EU Member States have questioned whether individuals could be surrendered to Poland under the EAW. As mentioned in the introduction to this paper, the CJEU has empowered national courts to carry out a "rule-of-law check" of other Member States by assessing the independence and impartiality of the judicial authorities having issued an European arrest warrant. A national court may refuse to execute such an arrest warrant if it concludes that the issuing court does not meet the requirement of independence and impartiality and also finds that this can affect the individual concerned.

The criteria on the basis of which a national court should investigate whether another Member State's judicial authorities fulfil the requirements of independence and impartiality are often discussed in rather general terms, whereas the question of how this investigation is to be performed in an individual case remains to be answered. It is obvious that the assessing court must have access to reliable facts about the organisation of the court assessed. However, it is unclear how the assessing court is to go about finding information and facts about the rule-of-law situation in another Member State. Either the parties to the case could present the facts, or the assessing court could obtain the information itself. Another essential issue pertains to the importance to be ascribed to such information. In this regard, further research as well as clarifications from the CJEU are needed to make it easier for national courts to carry out this important task. It will take time and effort to resolve the situation. However, time is likely to be in abundant supply, considering that it seems probable that the ongoing backsliding of the rule of law in various EU Member States will accelerate rather than decelerate or be reversed in the years to come.

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[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

[3] Charter of Fundamental Rights of the European Union (2000/C 364/01), OJ C 364, 18.12.2000, p. 1.

[4] L. Pech, K.L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, in «Cambridge Yearbook of European Legal Studies», n. 19, 2017.

[5] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47.

[6] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.07.2002, p. 1.

[7] Case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586.

[8] The CJEU subsequently upheld the principle of *LM* in joined cases C-354/20 PPU and C-412/20 PPU, *L and P*, ECLI:EU:C:220:1033, and in joined cases C-562/21 PPU and C-563/21 PPU, *Openbaar Ministerie*, ECLI:EU:C:2022:100. See also A. Frackowiak-Adamska, *Trust until it is too late! Mutual recognition of judgments and limitations of judicial independence in a Member State: L and P*, in «Common Market Law Review», n. 59, pp. 113-150.

[9] See, e.g., case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117; case C-216/18 PPU, *LM*, EU:C:2018:586; ECtHR, 28 June 1984, *Campbell and Fell v. the United Kingdom*; ECtHR, 18 October 2018, *Thiam v. France*.

[10] *Explanations relating to the Charter of Fundamental Rights*, OJ C 303, 14.12.2007, p. 2, explanation relating to Article 47.

[11] See, e.g., ECtHR, 28 June 1984, *Campbell and Fell v. the United Kingdom*; case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117; case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586.

[12] See, e.g., ECtHR, 28 June 1984, *Campbell and Fell v. the United Kingdom*, p. 76; ECtHR, 1 July 1997, *Rolf Gustafson v. Sweden*, p. 45. Cf. case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, pp. 37-38.

[13] ECtHR, 29 April 1988, *Belilos v. Switzerland*, p. 64; ECtHR, 21 July 2005, *Mihailov v. Bulgaria*, p. 37; ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, p. 219.

[14] Ivi, p. 220; ECtHR, 7 May 2021, *Xero Flor v. Poland*, p. 244; ECtHR, 3 February 2022, *Advance Pharma sp. z o.o v. Poland*, p. 295.

[15] Article 267 TFEU mentions both "courts" and "tribunals", while Article 6 § 1 ECHR mentions only "tribunals" (and "courts" regarding public access to proceedings, whilst the French version is consistent in its use of "tribunal" only). In the present paper, the term "tribunal" will be used in the following and will then include courts.

[16] See, e.g., case C-17/00, *De Coster*, ECLI:EU:C:2001:651, p. 10; case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, p. 38.

[17] ECtHR, 22 June 2000, *Coëme and others v. Belgium*, p. 98; ECtHR, 22 July 2021, *Reczkowicz v. Poland*, p. 216; ECtHR, 3 February 2022, *Advance Pharma sp. z o.o v. Poland*, p. 294.

[18] ECtHR, 28 November 2002, *Lavents v. Latvia*, p. 114; ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, p. 211.

[19] ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, pp. 213, 223.

[20] ECtHR, 23 June 2020, *Maciszewski and others v. Poland*, p. 34.

[21] Ivi, p. 36 and the case-law cited.

[22] ECtHR, 7 May 2021, *Xero Flor v. Poland*, pp. 245-246; ECtHR, 3 February 2022, *Advance Pharma sp. z o.o v. Poland*, p. 297. Also cf. case C-487/19, *W.Ż.*, ECLI:EU:C:2021:798, p. 130; joined cases C-542/18, RX-II (Simpson) and C-543/18, RX-II (HG), *Réexamen Simpson v. Council*, ECLI:EU:C:2020:232, p. 75.

[23] Cf. ECtHR, 5 October 2010, *DMD Group v. Slovakia*, p. 61.

[24] See, e.g., ECtHR, 7 May 2021, *Xero Flor v. Poland*; ECtHR, 22 July 2021, *Reczkowicz v. Poland*; ECtHR, 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*; ECtHR, 3 February 2022, *Advance Pharma sp. z o.o v. Poland*; case C-487/19, *W.Ż.*, ECLI:EU:C:2021:798, pp. 147-152; case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596, pp. 103-110.

[25] ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, pp. 231-232.

[26] L. Pech, *Article 47(2) – An Independent and Impartial Tribunal Previously Established by Law*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, 2021, at 47.326.

[27] See, e.g., case C-17/00, *De Coster*, ECLI:EU:C:2001:651, p. 10; case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, p. 38. Cf. Article 47 (2), which states «tribunal previously established by law».

[28] See, e.g., ECommissionHR, 5 March 1962, *X v. Federal Republic of Germany*; ECtHR, 23 February 1999, *Suovaniemi and others v. Finland*; ECtHR, 16 December 2003, *Transado-Transportes Fluviais do Sado S.A. v. Portugal*; ECtHR, 1 March 2016, *Tabbane v. Switzerland*.

[29] Act of 8 December 2017 on the Supreme Court (the CJEU uses the term "Law" whilst the English translation found at <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)005-e>, 1 July 2022, uses "Act").

[30] Article 3 of the Act on the Su-

preme Court.

[31] Article 179 of the Polish Constitution [Constitution of the Republic of Poland of 2 April 1997] and Article 29 of the Act on the Supreme Court. See also joined cases C-585/18, C-624/18 and C-625/18, *A.K.*, ECLI:EU:C:2019:982, p. 136.

[32] Article 131 of the Act on the Supreme Court. See also joined cases C-585/18, C-624/18 and C-625/18, *A.K.*, ECLI:EU:C:2019:982, p. 150; ECtHR, 22 July 2021, *Reczkowicz v. Poland*, pp. 23-24.

[33] Article 186(1) of the Polish Constitution.

[34] Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596, p. 99; ECtHR, 22 July 2021, *Reczkowicz v. Poland*, p. 233.

[35] Joined cases C-585/18, C-624/18 and C-625/18, *A.K.*, ECLI:EU:C:2019:982, p. 143; case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596, pp. 103-104; ECtHR, 22 July 2021, *Reczkowicz v. Poland*, p. 233.

[36] Cf. joined cases C-585/18, C-624/18 and C-625/18, *A.K.*, ECLI:EU:C:2019:982, pp. 133, 137; case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596, pp. 97, 99.

[37] Ivi, p. 134; ivi, p. 98.

[38] Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596, p. 112.

[39] ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, pp. 243-252.

[40] ECtHR, 22 July 2021, *Reczkowicz v. Poland*, p. 280.

[41] The Disciplinary Chamber and problems related to it will be further discussed at 3.2.3 and 3.2.4.

[42] ECtHR, 22 July 2021, *Reczkowicz v. Poland*, p. 281.

[43] In this text, "fair hearing" is used synonymously with "fair trial".

[44] Case C-199/11, *Europese Gemeenschap v. Otis NV and others*, ECLI:EU:C:2012:684, p. 47; case C-279/09, *DEB*, ECLI:EU:C:2010:811, p. 32.

[45] ECtHR, 16 December 1992, *Edwards v. United Kingdom*, p. 34; ECtHR, 23 April 1998, *Bernard v. France*, p. 37; ECtHR, 4 June 2002, *Komanický v. Slovakia*, p. 47.

[46] Although bodies with inquisitorial powers have been found to constitute a "court or tribunal"; cf. case C-110/98, *Gambalfrisa*, ECLI:EU:C:2000:145, pp. 33, 37.

[47] See, e.g., case C- 450/06, *Varac*, ECLI:EU:C:2008:91, pp. 45-47; case C-89/08, *Commission v. Ireland and others*, ECLI:EU:C:2009:742, p. 52; case C-300/11, *ZZ v. Secretary of State for the Home Department*, ECLI:EU:C:2013:363, p. 55; ECtHR, 27 October 1993, *Dombo Beheer B.V. v. The Netherlands*, pp. 31-33; ECtHR, 20 February 1996, *Lobo Machado v. Portugal*, p. 31; ECtHR, 18 February 1997, *Niederöst-Huber v. Schweiz*, pp. 23-24; ECtHR, 31 May 2001, *K.S. v. Finland*, p. 21; ECtHR, 4 June 2002, *Komanický v. Slovakia*, pp. 45-47.

[48] ECtHR, 3 June 2003, *Walstone v. Norway*, pp. 58-60, where the ECtHR ruled that national tribunals have a duty to ensure that parties receive all litigation materials and that it is not for national tribunals to decide whether a document lacks importance.

[49] Cf. case C-89/08, *Commission v. Ireland and others*, ECLI:EU:C:2009:742, p. 55; case C-472/11, *Banif Plus Bank*, ECLI:EU:C:2013:88, p. 30; ECtHR, 6 February 2001, *Beer v. Austria*, p. 18.

[50] D.J. Harris, M. O'Boyle, E.P. Bates, C.M. Buckley, *Harris, O'Boyle and Warbrick – Law of the European Convention on Human Rights*, Oxford University Press, 2018, p. 418. See also ECtHR, 18 February 1997, *Niederöst-Huber v. Schweiz*, pp. 23-24.

[51] Case C-199/11, *Europese Gemeenschap v. Otis NV and others*, ECLI:EU:C:2012:684, p. 71; ECtHR, 27 October 1993, *Dombo Beheer B.V. v. The Netherlands*, p. 33; ECtHR, 7 June 2001, *Kress v. France*, p. 72.

[52] See, e.g., case C-276/01, *Steffensen*, ECLI:EU:C:2003:228, pp. 75-78; ECtHR, 7 June 2001, *Kress v. France*, pp. 72-75; ECtHR, 4 June 2002, *Komanický v. Slovakia*, pp. 45-47, 55.

[53] ECtHR, 16 December 1992, *Hadjianastassiou v. Greece*, p. 33. See also ECtHR, 27 September 2001, *Hairvisaari v. Finland*, pp. 30-33.

[54] ECtHR, 21 January 1999, *García Ruiz v. Spain*, p. 26. See also case C-166/13, *Mukarubega*, ECLI:EU:C:2014:2336, pp. 46-48; case C-230/18, *PI v. Landespolizeidirektion Tirol*, ECLI:EU:C:2019:838, p. 79.

[55] ECtHR, 19 April 1994, *Van de Hurk v. The Netherlands*, p. 61.

[56] ECtHR, 8 December 1983, *Pretto v. Italy*, p. 21.

[57] ECtHR, 26 September 1995, *Diennet v. France*, p. 33.

[58] ECtHR, 23 June 1981, *Le Compte, Van Leuven and De Meyere*, p. 59; ECtHR, 21 February 1990, *Håkansson and Sturesson v. Sweden*, p. 66.

[59] See, e.g., ECtHR, 29 April 1988, *Belilos v. Switzerland*, p. 64; ECtHR, 21 July 2005, *Mihailov v. Bulgaria*, p. 37.

[60] Cf. ECtHR, 22 October 1984, *Samrek v. Austria*, p. 36; ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, p. 176; case C-546/16, *Montte*, ECLI:EU:C:2018:752, pp. 22-23.

[61] ECtHR, 5 May 2020, *Kövesi v. Romania*, p. 147.

[62] Harris, *Harris, O'Boyle and Warbrick – Law of the European Convention on Human Rights* cit., p. 447.

[63] Case C-503/15, *Panicello*, ECLI:EU:C:2017:126, p. 28. See also case C-110/98, *Gambalfrisa*, ECLI:EU:C:2000:145, pp. 33, 36, 38.

[64] ECtHR, 30 November 1987, *H v. Belgium*, p. 50.

[65] Case C-363/11, *Epitropos tou Elegktikou Synedriou*, ECLI:EU:C:2012:825, pp. 19, 28.

[66] ECtHR, 24 October 1989, *H v. France*, p. 58

[67] See, e.g., case C-270/99, *Z v. Parliament*, ECLI:EU:C:2001:639, p. 24; ECtHR, 20 June 2019, *Chiarello v. Germany*, p. 45.

[68] ECommissionHR, 18 December 1980, *Crociani and others v. Italy*, p. 10 at 220-221; ECtHR, 7 January 2016, *Gerovska Popčevska v. The former Yugoslav Republic of Macedonia*, p. 55, where the Minister of Justice, a member of the executive, had impaired the independence of a decision-making body (a judicial disciplinary body).

[69] Case C-272/19, *VQ v. Land Hessen*, ECLI:EU:C:2020:535, p. 45.

[70] See, e.g., ECtHR, 25 February 1997, *Findlay v. United Kingdom*, p. 73; ECtHR, 22 December 2009, *Parlov-Tkalcic v. Croatia*, p. 86; ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, p. 150.

[71] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, p. 44.

[72] ECtHR, 22 December 2009, *Parlov-Tkalcic v. Croatia*, p. 86. Cf. also ECtHR, 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium*, p. 55.

[73] ECtHR, 22 December 2009, *Parlov-Tkalcic v. Croatia*, p. 86. Cf. also ECtHR, 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium*, p. 55; case C-192/18, *Commission v. Poland (Independence of ordinary courts)*, ECLI:EU:C:2019:924, p. 110.

[74] Case C-503/15, *Margarit Panicello*, ECLI:EU:C:2017:126, p. 38 and the case-law cited; case C-274/14, *Banco de Santander SA*, ECLI:EU:C:2020:17, p. 61.

[75] Regarding the subjective and objective tests, see also Harris, *Harris, O'Boyle and Warbrick – Law of the European Convention on Human Rights* cit., pp. 451-458.

[76] ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, pp. 144-150.

[77] ECtHR, 9 January 2013, *Oleksandr Volkov v. Ukraine*, p. 106.

[78] Ivi, pp. 106-107.

[79] Case C-506/04, *Wilson*, ECLI:EU:C:2006:587, p. 49.

[80] Ivi, p. 52.

[81] Ivi, p. 53. The same follows from later case-law from the CJEU; see, e.g., case C-222/13, *TDC*, ECLI:EU:C:2014:2265, p. 32; case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596, p. 47, 59.

[82] ECtHR, 18 July 2013, *Maktouf and Damjanović v. Bosnia and Herzegovina*, p. 49.

[83] Cf. above at 2.2.

[84] Cf. ECtHR, 7 May 2021, *Xero Flor v. Poland* , pp. 245-246; ECtHR, 3 February 2022, *Advance Pharma sp. z o.o v. Poland*, p. 297. Cf. also joined cases C-542/18, RX-II (Simpson) and C-543/18, RX-II (HG), *Réexamen Simpson v. Council*, ECLI:EU:C:2020:232 p. 57; case C-487/19, *W.Ż.*, ECLI:EU:C:2021:798, p. 130.

[85] ECtHR, 7 May 2021, *Xero Flor v. Poland*, p. 246.

[86] ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, pp. 220, 222; ECtHR, 7 May 2021, *Xero Flor v. Poland*, p. 244; ECtHR, 22 July 2021, *Reczkowicz v. Poland*, p. 217.

[87] Cf., e.g., joined cases C-585/18, C-624/18 and C-625/18, *A.K.*, ECLI:EU:C:2019:982, pp. 120, 123, 125, 134; case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, pp. 74, 77, 108, 111-112. Cf. also ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, p. 144.

[88] ECtHR, 7 May 2021, *Xero Flor v. Poland*, p. 252.

[89] ECtHR, 18 July 2013, *Maktouf and Damjanović v. Bosnia and Herzegovina*, p. 49; ECtHR 7 May 2021, *Xero Flor v. Poland*, p. 252.

[90] ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, p. 207; ECtHR, 7 May 2021, *Xero Flor v. Poland*, p. 244.

[91] E.g., ECtHR, 7 May 2021, *Xero Flor v. Poland*; ECtHR, 22 July 2021, *Reczkowicz v. Poland*; ECtHR, 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*; case C-625/18, *A.K.*, ECLI:EU:C:2019:982; case C-824/18, *A.B. and others*, ECLI:EU:C:2021:153; case C-487/19, *W.Ż.*, ECLI:EU:C:2021:798.

[92] Cf. above at 2.2.

[93] ECtHR, 22 July 2021, *Reczkowicz v. Poland*, p. 276.

[94] ECtHR, 22 June 1989, *Langborger v. Sweden*, pp. 30-36.

[95] ECtHR, 9 January 2013, *Oleksandr Volkov v. Ukraine*, pp. 109-117, where the High Council of Justice, a body responsible for disciplining judges, consisted of twenty members, of whom only three were professional judges while the vast majority were non-judicial staff appointed directly by the executive and legislature. See also ECtHR, 23 June 1981, *Le Compte, Van Leuven and De Meyere*, p. 58.

[96] ECtHR, 28 June 1984, *Campbell and Fell v. United Kingdom*, pp. 78, 80.

[97] ECtHR, 18 July 2013, *Maktouf and Damjanović v. Bosnia and Herzegovina*, p. 49. See also Report of the ECommissionHR, 12 October 1978, *Leo Zand v. Austria*, p. 80.

[98] Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, p. 76; case C-192/18, *Commission v. Poland (Independence of ordinary courts)*, ECLI:EU:C:2019:924, p 113; case C-274/14, *Banco de Santander SA*, ECLI:EU:C:2020:17 p. 59.

[99] Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, p. 96; case C-192/18, *Commission v. Poland (Independence of ordinary courts)*, ECLI:EU:C:2019:924, p. 130.

[100] Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, pp. 27-31; case C-192/18, *Commission v. Poland (Independence of ordinary courts)*, ECLI:EU:C:2019:924, pp. 41-46.

[101] Case C-274/14, *Banco de Santander SA*, ECLI:EU:C:2020:17, p. 57. See also case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, p. 44 and the case-law cited.

[102] Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, p. 76; case C-274/14, *Banco de Santander SA*, ECLI:EU:C:2020:17, p. 59.

[103] Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, pp. 78, 84-85.

[104] Ivi, pp. 76-77; case C-274/14, *Banco de Santander SA*, ECLI:EU:C:2020:17, pp. 59-60.

[105] Case C-274/14, *Banco de Santander SA*, ECLI:EU:C:2020:17, p. 60.

[106] Case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586, p. 67.

[107] See above at 2.2.

[108] The rules on lowering the retirement age for judges on the Supreme Court were introduced under Article 37 of the new Act on the Supreme Court. For more detailed information about these rules as well as various amendments and supplementary regulations, see case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, pp. 9-14.

[109] The new rules were introduced as amendments to Article 69 of the Act of 27 July 2001 Act on the Ordinary Courts. For more detailed information on these amendments and the various supplementary regulations, see case C-192/18, *Commission v. Poland (Independence of ordinary courts)*, ECLI:EU:C:2019:924, pp. 15-22.

[110] Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, p. 130, and case C-192/18, *Commission v. Poland (Independence of ordinary courts)*, ECLI:EU:C:2019:924, p. 130.

[111] Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, pp. 111-113, and case C-192/18, *Commission v. Poland (Independence of ordinary courts)*, ECLI:EU:C:2019:924, pp. 119-121.

[112] Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, p. 78.

[113] Ivi, p. 114, 118.

[114] Ivi, pp. 115-117.

[115] Case C-192/18, *Commission v. Poland (Independence of ordinary courts)*, ECLI:EU:C:2019:924, pp. 124, 130.

[116] Joined cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny*, ECLI:EU:C:2020:234, p. 59 and the case-law cited.

[117] See above at 2.2.

[118] Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596, p. 115.

[119] Ivi, p. 138.

[120] Ivi, p. 140.

[121] Article 107(1) of the Act on the Ordinary Courts and Article 97(1) and (3) of the new Act on the Supreme Court.

[122] Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596, p. 141.

[123] Ivi, p. 157.

[124] For more information about the "Muzzle Law", see <http://themis-sedziowie.eu/wp-content/uploads/2020/02/Newsletter.pdf>, 1 July 2022.

[125] Action brought on 1 April 2021, *Commission v. Poland*, case C-204/21 R,.

[126] Order of 14 July 2021 in case C-204/21 R, *Commission v. Poland*, ECLI:EU:C:2021:593.

[127] Judgment of the Constitutional Tribunal, P 7/20, at <https://trybunal.gov.pl/en/hearings/judgments/art/11589-obowiazek-panstwa-czlonkowskiego-ue-polegajacy-na-wykonywaniu-srodkow-tymczasowych-odnoszacych-sie-do-ksztaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa>, 1 July 2022.

[128] Order of 27 October 2021 in case C-204/21 R, *Commission v. Poland*, ECLI:EU:C:2021:878.

[129] It should be noted that the Commission decided on 1 June 2022 to approve Poland's recovery and resilience plan; see the Commission's press release of 1 June 2022 at <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3375>, 1 July 2022.

[130] See, e.g., P. Pohjankoski, *The rule of law takes the back seat: EU Commission greenlights "Next Generation EU" funds to Poland*, in «EU Law Live», 9 June 2022; A. Alemanno, *Censuring von der Leyen's Capitulation on the Rule of Law*, in «Verfassungsblogg», 8 June 2022; *Open Letter to the European Commission regarding the Polish National Council of the Judiciary* – Polish and international civil society organisations write to the President of the Commission and the commissioners responsible for the Rule of Law, requesting an infringement action as regards the National Council of the Judiciary, 7 June 2022, in «Rule of Law in Poland» [an English-language online resource on recent developments concerning all principles which fall within the scope of the rule of law]; W. Sadurski, *The European Commission Cedes its Crucial Leverage vis-à-vis the Rule of Law in Poland*, in «Verfassungsblog», 6 June 2022; J. Jaraczewski, *Just a Feint? President Duda's bill on the Polish Supreme Court and the Brussels-Warsaw deal on the rule of law*, in «Vervassungs blog», 1 June 2022.