EU Law and Judicial Decisions of National Judges Appointed in Breach of European Standards

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I. Introduction

Since the seminal *Associação Sindical dos Juízes Portugueses (ASJP)*[1] ruling it is clear that, if a national 'court or tribunal' decides on questions concerning the application or interpretation of EU law, the Member State concerned must ensure that such a court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19 (1) TEU and Article 47 of the EU Charter of Fundamental Rights ("CFR").[2] The requirement that courts be independent forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU,

1 ECJ, *Associação Sindical dos Juízes Portugueses*, judgment of 1 February 2018, case no. C-64/16, ECLI:EU:C:2018:117. See Laurent Pech and Sebastien Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case', CML Rev. 55 (2018), 1827–1854; Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges came to the rescue of the Polish judiciary', European Constitutional Law Review 14 (2018), 622–643; Luke Dimitrios Spieker, 'Breathing Life into the Union's Common Values', GLJ 20 (2019), 1182–1213.

2 ECJ, *Associação Sindical dos Juízes Portugueses* (n. 1), para. 40.

in particular the value of the rule of law, will be safeguarded.[3] In several judgments after *ASJP*, the Court specified the criteria which national courts must meet to be considered independent in the meaning of Article 19 (1) TEU and Article 47 CFR.[4] The Court also pointed out that these requirements, as part of the value of the rule of law of Article 2 TEU, are to be regarded as part of the identity of the EU legal order.[5] In effect, a national judge who is liable to be called upon to interpret and apply EU law, must constitute an independent and impartial tribunal previously established by law.[6] Therefore also, the primary obligation of the Member State is not to allow that cases are being adjudicated by a court that does not meet the standards of Article 19 (1) TEU and Article 47 CFR. All national bodies should refuse to apply a provision that grants jurisdiction to hear a case to a body which does not meet the requirements of independence.[7]

The independence criterion also plays a crucial role in the context of the preliminary reference procedure. In this regard, the independence of a national court is assessed in the light of Article 267 TFEU alone,[8] although the Court takes here into account also its case law issued on the basis of Article 19 (1) TEU and Article 47 CFR.[9] In *Banco de Santander*, the Court stated that the criterion of independence used in Article 267 TFEU

3 ECJ, *Repubblika v Il-Prim Ministru*, judgment of 20 April 2021, case no. C-896/19, ECLI:EU:C:2021:311, para. 51; *Commission v. Poland (Disciplinary regime for judges)*, judgment of 15 July 2021, case no. C-791/19, ECLI:EU:C:2021:596, para. 58.

4 For an overview see Laurent Pech and Dimitry Kochenov (eds), *Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case* (Stockholm: SIEPS 2021).

5 ECJ, *Hungary v. Parliament and Council*, judgment of 16 February 2022, case no. C-156/21, ECLI:EU:C:2021:974, para. 127 and ECJ, *Poland v. Parliament and Council*, judgment of 16 February 2022, case no. C-157/21, ECLI:EU:C:2022:98, para. 145. See Luke Dimitrios Spieker, *EU Values Before the Court of Justice. Foundations, Potential, Risks* (Oxford: OUP, 2023).

6 See ECJ, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, judgment of October 2021, case no. C-487/19, ECLI:EU:C:2021:798, para. 154.

7 ECJ, *A.K. and Others*, judgment of 2 March 2021, joined cases C-585, 624 and 625/18, ECLI:EU:C:2019:982, paras 165–166. See Michał Krajewski and Michał Ziółkowski, 'EU Judicial Independence Decentralized: AK', CML Rev. 57 (2020), 1107–1138.

8 See ECJ, *VQ v. Land Hessen*, judgment of 9 July 2020, case no. C-272/19, ECLI:EU:C:2020:535, para. 46.

9 The Court has, at least since the *Wilson* judgment (ECJ, judgment of 19 September 2006, *Wilson*, case no. C-506/04, ECLI:EU:C:2006:587), taken into account for the concept of a court or tribunal under Article 267 TFEU, also elements established under Article 6 ECHR or Article 47 CFR. See respectively: ECJ, *TDC A/S*, judgment of 9

proceedings 'must be *re-examined* in the light of the most recent case-law of the Court' such as i.a. *ASJP*.[10] But later on, in *Getin Noble Bank*,[11] the Court established a specific presumption, according to which, a referring court in principle satisfies the requirement of independence ("GNB presumption") irrespective of its actual composition. This presumption may nevertheless be rebutted 'where a final judicial decision handed down by a national or international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19 (1) TEU, read in the light of the second paragraph of Article 47 of the Charter'.[12] Then the composition national court will be regarded as defective for the sake of the preliminary ruling procedure and the national court's decision would not be able to effectively initiate that procedure.

The purpose of this contribution is to consider under EU law the status and legal effects of rulings issued by national courts staffed by judges who cannot be regarded as independent, impartial or established by law in the light of Article 19 (1) TEU, Article 47 CFR and Article 6 (1) ECHR. This primarily refers to judges who were nominated in violation of EU and ECHR standards according to the tests established in *A.K. and Others*,[13] *Simpson,*[14] *Ástráðsson*[15]and *W.Ż.*[16] rulings.[17] Those tests of judicial independence, embedded in EU and ECHR law, have been described in this book

October 2014, case no. C-222/13, EU:C:2014:2265, para. 31 and ECJ, *Berlioz Investment Fund,* judgment of 16 May 2017, case no. C-682/15, ECLI:EU:C:2017:373, para. 60.

10 ECJ, *Banco de Santander*, judgment of 21 January 2020, case no. C-274/14, ECLI:EU:C:2020:17, para. 55.

11 ECJ, *Getin Noble Bank*, judgment of 29 March 2022, case no. C-132/20, ECLI:EU:C:2022:235.

12 ECJ, *Getin Noble Bank* (n. 11), para. 72.

13 ECJ, *A.K. and Others* (n. 7).

14 ECJ, *Review Simpson and HG v. Council and Commission*, judgment of 26 March 2020, C-542/18 RX-II and C-543/18 RX-II, ECLI:EU:C:2020:232.

15 ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, judgment of 1 December 2020, case no. 26374/18.

16 *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6).

17 On those tests see also Ben Smulders, 'Increasing convergence between the European Court of Human Rights and the Court of Justice of the European Union in their recent case law on judicial independence: The case of irregular judicial appointments', CML Rev 59 (2022), 105–128. The status of the defective appointees and possible ways to remedy the defectiveness of their status is the subject of analysis of the contribution by Paweł Filipek in Chapter 14 of this volume.

in detail by P. Filipek in Chapter 14 of this volume, who elaborates also on their practical application and potential consequences for the Polish legal order. Therefore, they will not be discussed here separately but taken as a starting point. The basic assumption for this contribution will thus be that a judicial decision has been issued by a national court with the participation of persons appointed in a procedure that, after performing the respective tests of independence, cannot be reconciled with the requirements of Article 6 (1) ECHR, Article 19 (1) TEU and Article 47 CFR ("defective appointments/appointees").[18] Such a judicial decision handled by defective appointees may be regarded as legally defective under EU law because it was issued in breach of the principle of effective judicial protection ("defective/flawed judicial decisions") under Article 19 (1) and Article 47 CFR. What needs to be defined more closely is how the EU legal order approaches the problem of flawed judicial decisions. It seems particularly important to establish whether EU law imposes certain obligations on the Member States regarding such decisions, whether EU law refers rather to the Member States' regulatory autonomy and whether that autonomy is somehow limited by EU law. Those reflections may be of use in a situation when a Member State will consider the status of such flawed rulings and their potential healing process after the rule of law crisis in that Member State is over. All measures introduced during such a process must be in accordance with EU law, which may also serve as a reference point or toolbox for the proposed national solutions.

In some recent judgments the Court signalled that decisions issued by courts with a composition that does not meet European standards can be considered "null and void".[19] In doing so, the Court did not pursue any considerations regarding the principle of legal certainty or the alleged finality of a judicial decision. However, in previous rulings relating to final judgments of national courts issued in violation of EU law, the Court has, as a rule, referred explicitly to the principle of legal certainty, which also protects court rulings which are in breach of EU law. The Court usually weighed the principle of legal certainty against the established violation of

18 In light of ECtHR rulings, it is sufficient for a violation of Article 6 ECHR that one of the judges sitting in a national court does not meet the requirements of Article 6 ECHR – see ECtHR, *Morice v. France*, judgment of 23 April 2015, Appl. No. 29369/10, para. 89.

19 See especially *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6), paras 159 – 160 and further judgments presented in point III.1. *infra*.

EU law in a particular case. From this perspective, the finding that the principle of legal certainty cannot protect a flawed ruling issued by a defectively nominated national judge can be seen as rather exceptional. Therefore, in order to better understand the CJEU's first statements regarding judicial decisions of defective appointees, this contribution will be built on how the CJEU's jurisprudence concerning judicial rulings issued in violation of EU law fits to flawed judicial decisions of defective appointees.

The article starts with three points of reference for further issues (point II). First, the Polish problem with judicial appointments (with a focus on the Polish Supreme Court) will be illuminated, to get an idea of the normative background of the Court's case law regarding the status of judicial decisions issued by defective appointees (point II.1). We will also indicate what rank in the EU legal order the CJEU has given to the issue of independence of national courts to show that the problem of defective appointees and their judicial decisions might strike at the very heart of the EU legal order (point II.2). Then, as a point of departure for further considerations, the CJEU's existing jurisprudential framework for final judicial decisions that were made in violation of EU law will be presented in a concise manner (point II.3). This will then make it possible to correctly assess and classify the CJEU's statement to date on judicial decisions of defective appointees being null and void (point III.1). It will also be indicated, albeit only in outline, what other consequences may arise under EU law for decisions of defective appointees and what obligations are incumbent on Member States in this regard, inter alia in connection with the reopening of judicial proceedings (point III.2), damages liability (point III.3) and infringement proceedings (point III.4).

II. Preliminary Considerations

1. The Polish problem with the judicial appointments – an outline

The judicial "reform", which has been carried out by the Polish Government for several years, is mainly aimed at changing the staffing of the judiciary.[20] The process of appointing judges has been changed so that the political

20 The Court of Justice even used the statement that the reform of the retirement age of serving judges of the Polish Supreme Court was made [...] with the aim of side-lining a certain group of judges of that court – see ECJ, *Commission v. Republic of Poland*,

authorities can nominate "their" judges without scrutiny, especially to the Polish Supreme Court ("SC"), in a way comparable to the opening of a "transfer window".[21] To this end, the Constitutional Tribunal ("CT") was first attacked and "packed".[22] Then the composition of the National Council of the Judiciary ("NCJ"), which proposes judges for nomination to the President was changed. From a body that was supposed to safeguard the independence of judges, it was transformed into a body nominated by politicians.[23] Therefore, the NCJ has been excluded from the European Network of Councils for the Judiciary in October 2021.[24] The hitherto existing judicial control over the process of appointing SC judges was also practically removed.[25] Additionally, presidents of courts throughout

judgment of 24 June 2019, case no. C-619/18, ECLI:EU:C:2019:531, para. 82. See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: OUP, 2019).

21 As the Polish Supreme Court stated in its preliminary referral to the Court in case C-508/19 (Polish Supreme Court order of 15 July 2020, case no. II PO 16/20, para 50), "It must therefore be clearly emphasised that in 2018–2019 there was a special 'transfer window' in the Polish legal system in which with a flagrant and evident violation of the constitutional standard and with full awareness of this by all concerned, appointments to serve in the Supreme Court were handed out [..] What is more, the circumstances under which these appointments took place give rise to justified doubts on the part of the individuals hoping to ensure the right to a court implementation of this right, since first the President of the Republic of Poland prepared draft laws allowing for the creation of courts that do not meet the requirements of independence and impartiality, and then on the basis of such provisions – in violation of then, on the basis of such legislation – in breach of constitutional procedural guarantees providing for prior judicial review of NCJ resolutions – appointed persons close to him to judicial positions."

22 See the Commission's Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM/2017/0835 final), paras 26–39, 92–113, as well as the launching by the European Commission of an infringement procedure against Poland because of serious concerns with respect to the Polish Constitutional Tribunal – see in that respect press release, 15 February 2023,The European Commission decides to refer Poland to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal**,** https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842**.** See also ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of 7 May 2021, no. 4907/18.

23 See ECJ, *Commission v. Poland (Disciplinary regime for judges)* (n. 3), para. 108. See also ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, judgment of 11 November 2021, nos. 49868/19 and 57511/19, paras 290 and 320.

24 See https://www.encj.eu/node/605.

25 ECJ, *A.B. and Others*, judgment of 2 March 2021, case no. C-824/18, ECLI:EU:C:2021:153.

Poland have been changed and completely subordinated to the Minister of Justice.[26]

The Polish CT is now composed exclusively of judges nominated by the governing political party. Therefore, representatives of the government willingly file motions asking the CT to invoke Polish constitutional identity in order to restrict the effects of the principle of primacy of EU law, or to eliminate from application in Poland particular ECtHR and CJEU judgments indicating violations of European standards concerning the independence of the judiciary and the rule of law, especially those concerning the appointment procedures for judges.[27] And the CT gives the authorities exactly what they want.[28] That is also one of the reasons why the European Commission initiated an infringement procedure, claiming that the Polish CT is partially not a court established by law,[29] that it does not guarantee an effective and independent control of constitutionality of law and that its judicial decisions undermine the primacy and effectiveness of the EU legal order.[30]

Currently, more than half of the judges of the SC, including the person holding the position of its First President, and the entirety of judges sitting in two chambers: the Disciplinary Chamber[31] (now abolished and transferred into the Chamber of Professional Liability)[32], and the Extraor-

26 ECtHR, *Broda and Bojara v. Poland*, judgment of 29 June 2021, nos. 26691/18 and 27367/18.

27 See e.g. Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', HJRL 11 (2019), 63–84. There is even a proposal by the Minister of Justice to declare that the asking of questions by Polish Courts regarding the principle of effective judicial protection and independence of national courts under Article 267 TFEU is incompatible with the Polish Constitution (see case pending before the Polish CT, case no. K 7/18).

28 Regarding ECJ judgments, see judgment of the Constitutional Tribunal of 14 July 2021 in case P 7/21 and judgment of the Constitutional Tribunal of 7 October 2021 in case K 3/21; regarding the exclusion of ECtHR judgments from the Polish legal order, see judgment of the Constitutional Tribunal of 10 March 2022 in case K 7/21 and judgment of the Constitutional Tribunal of 24 November 2021 in case K 6/21.

29 See in this respect ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland* (n. 22).

30 See in that respect the press release of 15 February 2023, 'The European Commission decides to refer Poland to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal', https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842.

31 ECJ, *Commission v. Poland (Disciplinary regime for judges)* (n. 3).

32 The Supreme Court's Professional Responsibility Chamber (pol. Izba Odpowiedzialności Zawodowej) also includes the "new" Supreme Court judges. Thus, there is a concern that they will not meet the requirement of a court established by law

dinary Control and Public Affairs Chamber,[33] were appointed to the SC in a procedure that does not meet the requirements of a court established by law under Article 6 (1) ECHR. This was confirmed by the European Court on Human Rights in Strasburg ("ECtHR") in cases such as *Reczkowicz*,[34]*DolińskaFicek*,[35] or *Advance Pharma*.[36] Those judgments, described in detail by P. Filipek in this volume, directly state a breach of Article 6 (1) ECHR because of the way the judges were appointed to the SC. No other circumstances played a role in establishing such a breach. In those rulings, the ECtHR applied its three-stage test for assessing whether the irregularities in the judicial appointment process were serious enough to entail a violation of the right to a court established by law.[37] The test comprises a set of cumulative criteria: (1) there is a breach of domestic law which, in principle, must be manifest – that is, must be objectively and genuinely identified as such; (2) the breach must be serious enough, affect the essence of the right to a court 'established by law' – that is, pertain to a fundamental rule of the procedure for appointing judges, thereby creating a real risk that other state organs could exercise undue discretion in the appointment process; and (3) the breach was not effectively reviewed and remedied by the domestic court. Therefore, although the judgments in *Reczkowicz*, *DolińskaFicek*, or *Advance Pharma* concerned directly only a limited number of concrete appointees to the SC, the statements made in these judgments can be equally extended to all judges who were nominated to the Supreme Court under similar circumstances. The problem of defective appointments to the SC would then concern all judges nominated to the Polish SC after 2018 ("new judges" of the SC). As defective appointees, they should not rule on matters that are covered by the scope of application

under Article 6 (1) ECHR. This may be evidenced in particular by the first interim injunctions of the ECtHR in the cases of Polish judges who were to be tried before the Supreme Court's Chamber of Professional Responsibility – see the press release concerning applications nos. 18632/22, 6904/22, 15928/22, 46453/21, 8687/22, 8076/22, file:///C:/Users/macie/Downloads/Interim%20measures%20amended%20in%20three%20more%20cases%20concerning%20disciplinary%20proceedings%20against%20judges.pdf.

33 See ECJ, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6), paras 158 – 160.

34 ECtHR, *Reczkowicz v. Poland*, judgment of 22 July 2021, no. 43447/19.

35 ECtHR, *Dolińska-Ficek and Ozimek v. Poland* (n. 23).

36 ECtHR, *Advance Pharma sp. z o.o v. Poland*, judgment of 3 February 2022, no. 1469/20.

37 ECtHR, *Ástráðsson* (n. 15), para. 243 et seq.

of the ECHR. Otherwise, they will deliver a flawed judgment which will again be in breach of Article 6 (1) ECHR.

Because of Article 52 (3) CFR and in the light of the judgment in *W.Ż.*,[38] the above mentioned conclusion should in principle also apply to the scope of application of EU law.[39] Here the Court adopted in the *Simpson* ruling an equivalent formula to verify whether the irregularity in the appointment procedure concerns fundamental rules forming an integral part of the establishment and functioning of the judicial system and is of such a kind and such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge concerned.[40] The Court relies also on a cumulative method for assessing the independence of courts which was developed in *A.K. and Others*.[41] Here, the Court appraises together all relevant factors and circumstances to check their cumulative effect on the independence of the court or a judge and whether they cast doubt on the

38 ECJ, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6).

39 In particular, the pending ECJ case no. C-718/21 may ultimately bring about a final appraisal of the status of the "new" judges of the Extraordinary Control and Public Affairs Chamber of the SC and the question of how the GNB presumption can be rebutted. See for a more detailed analysis of the GNB presumption Piotr Bogdanowicz and Maciej Taborowski, 'The Independence Criterion for National Courts in the Preliminary Reference Procedure after *Banco de Santander*: Still the Joker in the Deck?', CML Rev. 60 (2023), 763–796.

40 Cf, ECJ, *Simpson* (n. 14), para. 75; ECJ, *W.Ż.* (n. 6), para. 130. It must be underlined, that at the end in *Simpson* the Court found that the flaws in the appointment procedure were not blatant and therefore they did not constitute an infringement of the fundamental rules of EU law applicable to the appointment of judges to the Civil Service Tribunal that entailed an infringement of the applicants' right to a tribunal established by law, as guaranteed by the first sentence of the second paragraph of Article 47 of the Charter.

41 ECJ, *A.K. and Others* (n. 7). In respect to the Polish SC see also the resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of the Polish Supreme Court, 23 January 2020 r. (BSA I-4110–1/20); for the English language version see https://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf; That resolution finds unequivocally, that the new judges of the Polish SC do not fulfil the demands of European standards as far as their independence is concerned. All of them are thus defectively appointed and their judgments are flawed in a way that they might be declared invalid.

judge's independence.[42] In addition, according to the GNB presumption, judges directly covered by Strasbourg judgments stating that they do not meet the requirements of Article 6 (1) ECHR will probably with time lose the possibility to refer preliminary questions to the CJEU based on Article 267 TFEU.[43]

How far-reaching the problem is with the defective judicial appointments in Poland and therefore also with the flawed judgments, we will only find out in the coming months and years. Proceedings concerning the assessment of the status of the ordinary and administrative courts are still pending, both in Strasbourg,[44] and in Luxembourg.[45] For the moment, it seems though that the biggest problem will be with the defective appointments of the new judges to the Polish SC and their judicial decisions.[46]

2. The axiological context: The identity of the EU legal order

The Court of Justice of the EU places the independence requirement for national courts as the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.[47] The value of the rule of law, in turn, defines 'the very identity of the European Union as a common legal order',[48] which the EU must be able to defend within the limits of its powers as laid down by the Treaties.[49] It is also an obligation as to the result to be achieved on the part of the Member States[50] and is expressed in principles comprising legally binding obligations for the Member States.[51] The EU legal system, including its

42 Cf. ECJ, *A.K. and others* (n. 7), paras 143 and 153.
43 See ECJ, *Getin Noble Bank* (n. 11), paras 72–73.
44 See e.g. ECtHR, pending cases *Brodowiak v. Poland*, no 27122/2020 and *Dżus v. Poland*, no. 48599/20.
45 See pending cases *G and B.C. D.C.*, joined cases nos. C-181/21 and C-269/21.
46 See the resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of the Polish Supreme Court, 23 January 2020 (n. 41).
47 ECJ, *VQ v. Land Hessen* (n. 8), para. 45.
48 ECJ, *Poland v. Parliament and Council* (n. 5), para. 145.
49 ECJ, *Poland v. Parliament and Council* (n. 5), para. 145.
50 ECJ, *Poland v. Parliament and Council* (n. 5), para. 201.
51 ECJ, *Poland v. Parliament and Council* (n. 5), para. 264.

specific characteristics arising from the very nature of EU law[52] and its decentralized enforcement, is built on the assumption that Member States observe all the values contained in Article 2 TEU.[53] That assumption serves as basis for trust in the legal systems of Member States[54] that those values and the law of the EU will be respected.[55] In the *RS* case, the Court found even that the undermining of the independence of national judges would also be incompatible with the principle of equality of the Member States, where the disciplinary liability of a national judge is incurred on the ground that he or she has refused to apply a decision of the Constitutional Court of the Member State by which that court refused to give effect to a preliminary ruling from the Court.[56] Therefore, it seems that infringing upon judicial independence may also in certain situations be regarded as infringement of the principle of equality of Member States.

Thus, judicial independence is placed by the Court axiologically at the highest place in the hierarchy of the EU legal order. The infringement of a European standard of such a rank should therefore be adequately reflected in the legal consequences resulting from such a violation. As we will see in point II.3. and point III.1. and 2. *infra*, the importance of the violated EU rules may also have an impact on the obligations of Member States towards national judicial decisions violating EU law, including flawed judicial decisions issued by courts with the participation of defective nominees in breach of Article 6 (1) ECHR, Article 19 (1) TEU or Article 47 CFR.

3. National judicial decisions in breach of EU Law

The legal and judicial framework of EU Member States should make it possible to consider all obligations (substantive as well as procedural) under EU law, in order to achieve in any national judicial proceedings an outcome that is compatible with EU law. Nevertheless, it cannot be ruled out that the outcome of the proceedings reflected in the national court's decision will violate Union law. National remedies may provide under the principle of

52 ECJ, *Adhésion de l'Union à la CEDH*, *Opinion* of the Court (Full Court) of 18 December 2014, case no. 2/13, ECLI:EU:C:2014:2454, paras 157–177.
53 ECJ, *Adhésion de l'Union à la CEDH* (n. 52), para. 168.
54 ECJ, *Associação Sindical dos Juízes Portugueses* (n. 1), para. 30.
55 ECJ, *Adhésion de l'Union à la CEDH* (n. 52), para. 168 and para. 191.
56 *RS (Effet des arrêts d'une cour constitutionnelle)*, judgment of 22 February 2022, case no. C-430/21, ECLI:EU:C:2022:99, para. 88.

procedural autonomy for the possibility of reviewing a non-final decision due to a misinterpretation or a misapplication of EU law. The same pathway would be available also in case of non-final judgments issued by a national court with a defective composition under Article 6 (1) ECHR, Article 19 (1) TEU or Article 47 CFR. The problem might be solved within the national judicial procedures by an inferior court which fulfills the relevant European criteria and is staffed by properly appointed judges. For that reason also, courts of last instance in the meaning of Article 267 paragraph 3 TFEU, such as the Polish SC, play an important role in the EU legal order and the protection of the rights of individuals.[57] Therefore also, for the sake of this contribution, a distinction should be drawn on the one hand between rulings that infringe upon EU law but may still be subject to appeal and correction in national courts and, on the other hand, final rulings that may no longer be subject to appeal based on national legal remedies (i.e., rulings issued by a court of last instance within the meaning of the third paragraph of Article 267 TFEU).

An important feature of definitive national rulings is that they should unfold full legal effects, arising from the national legal system, associated with their content, including being subject, if possible, to enforcement. This also applies if these rulings turn out to be contrary to EU law. The legal status of such rulings, unlike in the case of non-final rulings, is specifically protected in the legal systems of Member States, primarily due to the principle of legal certainty.[58] Unlike in the case of non-final rulings, national law, except in very extraordinary circumstances, does not provide further legal remedies for reviewing or challenging a definitive national ruling, even if it turns out to be contrary to national or EU law.

57 After all, it is before these courts that individuals have the last chance to obtain protection of their rights derived from EU law, and judges have the last possibility to refer a question to the Court for a preliminary ruling. At the same time, the obligation in Article 267 (3) TFEU safeguards the effectiveness of the preliminary ruling procedure mechanism and, as a result, the uniform interpretation of EU law in all EU Member States. As it is the courts of last instance which usually set the direction for the interpretation of the law for other national courts, the obligation in Article 267 (3) TFEU is primarily intended to prevent the development of national case law in a Member State which is not in conformity with the provisions of EU law. The imposition of such an obligation on the courts of last instance increases the likelihood that final rulings will comply with EU law.

58 See in this regard, the extensive comparative legal research by Claas Friedrich Germelmann, *Die Rechtskraft von Gerichtsentscheidungen in der EU* (Tübingen: Mohr Siebeck 2009).

The starting point for further considerations concerning final judicial decisions violating EU law must be therefore the principle of legal certainty, which is a general principle of EU law.[59] As an integral part of this principle, the Court considers the principle of *res judicata* of national judicial decisions.[60] In this regard, in accordance with established case law the legal order of the EU attaches importance to the principle of the authority of *res judicata*. To ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after the expiry of the time limits provided for in that connection can no longer be called into question.[61] Therefore, EU law does not require a national court to disapply domestic rules of procedure conferring the authority of *res judicata* on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law.[62] EU law does not, therefore, require a national judicial body, in order to take account of the interpretation of a relevant provision of EU law adopted by the Court, automatically to revisit a decision that has acquired the authority of *res judicata*.[63]

Comparative legal research shows that the legal orders of the EU Member States shape the protection of the principle of *res judicata* in different ways and through different concepts of national law but in general there are two main aspects of judicial rulings which are protected.[64] The first aspect protects the sustainability of the definitive ruling (*formal aspect*). Thus, this refers to the situation in which the decision can no longer be annulled and amended due to its incompatibility with EU law. The second aspect protects the (legal) effects of the content that a final national ruling usually

59 See ECJ, *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas*, judgment of 3 September 2009, case no. C-2/08, ECLI:EU:C:2009:506, para. 37.

60 The Court recognizes that the principle of *res judicata* derives from the principle of legal certainty – see ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, case no. C-126/97, ECLI:EU:C:1999:269, para. 46.

61 See ECJ, *Târşia*, judgments of 6 October 2015, case no. C-69/14, EU:C:2015:662, para. 28; ECJ, *XC and Others*, judgment of 24 October 2018, case no. C-234/17, EU:C:2018:853, para. 52; ECJ, *Călin*, judgment of 11 September 2019, case no. C-676/17, EU:C:2019:700, para. 26.

62 ECJ, *Târşia* (n. 61), para. 29; ECJ, *XC and Others* (n. 61), para. 53; ECJ, Călin (n. 61), para. 27.

63 ECJ, *Târşia* (n. 61), para. 38; *XC and Others* (n. 61), para. 54; ECJ, *Călin* (n. 61), para. 28.

64 See Germelmann (n. 58).

has (*substantive aspect*). This aspect may concern, first, the binding of the content of the ruling (the legal assessment expressed in the ruling) and the recognition of this ruling as binding on the parties to the proceedings, the court issuing the final judicial decision, as well as on other national courts and State authorities, such as administrative authorities or those responsible for the enforcement or execution of the decision (*positive material aspect*). This aspect most often involves the inability of a national court or other national judicial or administrative authorities to make a different legal assessment of what was the subject of the final decision. Thus, in principle, the possibility of re-evaluating the issue of EU law contained in the final ruling is also excluded. Secondly, within the framework of the substantive aspect, it would also be necessary to consider to what extent it is possible to conduct new proceedings between the same parties regarding what, in connection with the legal basis, was the subject of the ruling, i.e. to what extent the violation of EU law contained in the final national judgment justifies the possibility of conducting the same proceedings again without the possibility of invoking the effects of the earlier final judicial decision (*negative substantive aspect*).

As a general rule, in the absence of EU legislation in this area, the rules implementing and protecting the principle of *res judicata* are a matter to decide for the national legal order, in accordance with the principle of procedural autonomy of the Member States, but must be consistent with the principles of equivalence and effectiveness.[65] Nevertheless, despite the respect for the principle of legal certainty and *res judicata*, the Court has confirmed that EU law provides for or influences legal mechanisms that, even after the closing of legal proceedings at the national level by a final judgment of a national court that infringes upon EU law, allow or even oblige Member States for the elimination of violations or the effects of violations of EU law contained in such a final judgment.

First, there is the principle of State liability for damages for violations of EU law by a final national court judgment. In *Köbler*,[66] the Court stated that the full effectiveness of EU law would be called into question and the protection of EU derived rights of individuals would be weakened if there would be no possibility to obtain reparation when the rights of individuals are affected by an infringement of EU law attributable to a decision of a

65 ECJ, *Impresa Pizzarotti*, judgment of 10 July 2014, case no. C-213/13, EU:C:2014:2067, para. 54.

66 ECJ, *Köbler*, judgment of 30 September 2003, case no. C-224/01, EU:C:2003:513.

court of a Member State adjudicating at last instance.[67] The Court also underlined that the principle of *res judicata* does not stand in the way of such a liability. That is because that liability does not in itself have the consequence of calling in question the status of the judicial decision as *res judicata* is concerned or invalidating it.[68]

Second, in certain procedural constellations, EU law may influence the interpretation and application of national provisions concerning the finality and *res judicata* of rulings of national courts in the context of reopening judicial proceedings.[69] This tool is based mainly on the principles of equivalence and effectiveness, restricting national procedural autonomy. It must be nevertheless underlined that, in principle, EU law does not demand from Member States the introduction of a possibility to reopen a proceeding after a final judicial decision has been taken. Therefore, that tool should be taken into account only, if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to reverse a judicial decision having the authority of *res judicata* in order to render the situation arising from that decision compatible with national law. That possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation is brought back into line with EU legislation.[70] How this can work, is shown inter alia by the *Asturcom* judgment,[71] where the Court stated, that a national court seized of an action for enforcement of a final arbitration award is required, in accordance with domestic rules of procedure, to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it is also obliged to assess of its own motion whether that clause is unfair in the light of Article 6 of Directive 93/13.[72]

Third, the Court introduced the possibility for national courts to limit the binding force or the legal effects of a final judicial ruling in whole or in part to the extent that that ruling is contrary to EU law. That mechanism

67 ECJ, *Köbler* (n. 66), para. 33.
68 ECJ, *Köbler* (n. 66), paras 38–40. In fact, the state liability principle influences only the positive material aspect of *res judicata*.
69 That tool affects the formal aspect as well as the substantial negative aspect of *res judicata*.
70 ECJ, *Impresa Pizzarotti* (n. 65), para. 62.
71 ECJ, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, judgment of 6 October 2009, case no. C-40/08, ECLI:EU:C:2009:615, paras 52–53.
72 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, 29–34.

allows courts to use a kind of non-applicability tool for a final judicial decision (or national provisions protecting such a judicial decision) in a way similar to the working of the principle of primacy of EU law regarding general legislative acts. The Court allowed such an approach in different procedural constellations: e.g. in the context of not being bound by a final judgment of a criminal court in civil proceedings,[73] within the lower court/higher court relationship,[74] within a relationship between an administrative body and a national court[75] or in the relationship between a Constitutional Court and other national courts.[76] In all those cases, the CJEU invokes various principles of EU law, such as the principle of loyalty (Article 4 (2) TEU), the principle of effectiveness or the principle of *effet utile*. M. Dougan rightly points out in that respect, that the Court accepted the limitation of *res judicata* in extraordinary situations when the protection granted by *res judicata* seems to create too great and durable an obstacle to the effective application of EU law. Those rulings show that restrictions to *res judicata* (mainly concerning its substantive positive aspect) can be justified by the clash between a particularly high value being placed on the

73 See ECJ, *Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) v. Vueling Airlines SA v. Vueling Airlines SA and Jean-Luc Poignant*, judgment of 2 April 2020, case nos. C-370/17 and C-37/18, ECLI:EU:C:2020:260.

74 See e.g. ECJ, *Cartesio Oktató és Szolgáltató bt.*, judgment of 16 December 2008, case no. C-210/06, ECLI:EU:C:2008:723; ECJ, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, judgment of 16 January 1974, case no. 166/73, ECLI:EU:C:1974:3; ECJ, *Interedil Srl, in liquidation v. Fallimento Interedil Srl and Intesa Gestione Crediti SpA*, judgment of 20 October 2011, case no. C-396/09, ECLI:EU:C:2011:671; ECJ, *Georgi Ivanov Elchinov v. Natsionalna zdravnoosiguritelna kasa*, judgment of 5 October 2010, case no. C-173/09, ECLI:EU:C:2010:581. See also Michal Bobek, 'The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts' in: Catherine van de Heyning and Maartje De Visser (eds), *Constitutional Conversations in Europe* (Mortsel: Intersentia 2012), 287–308.

75 ECJ, *Gervais Larsy v. Institut national d'assurances sociales pour travailleurs indépendants (INASTI)*, judgment of 28 June 2001, case no. C-118/00, ECLI:EU:C:2001:368.

76 ECJ, *Jozef Križan and Others v. Slovenská inšpekcia životného prostredia*, judgment of 15 January 2015, case no. C-416/10, ECLI:EU:C:2013:8; ECJ, *Mecanarte – Metalúrgica da Lagoa Ld[a] v. Chefe do Serviço da Conferência Final da Alfândega do Porto,* judgment of 27 June 1991, case no. C-348/89, ECLI:EU:C:1991:278; ECJ, *Aziz Melki and Sélim Abdeli*, judgment of 22 June 2010, case nos. C-188–189/10, ECLI:EU:C:2010:363; ECJ, *Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*, judgment of 19 November 2009, case no. C-314/08, ECLI:EU:C:2009:719; ECJ, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, judgment of 8 September 2010, case no. C-409/06, ECLI:EU:C:2010:503.

proper application of EU law and a particularly serious obstacle related to specific procedural rules at the national level.[77]

Fourth, it has also been confirmed by the Court, that, in principle, it is possible to use the infringement proceedings in case of definitive national rulings that violate EU law, although it is a very rarely used tool.[78] The possibility of initiating proceedings under Article 258 TFEU in view of an infringement committed by a national court was confirmed already as a side issue of the *Killinger* case.[79] In that judgment the Court stated that an infringement of EU law by the national authorities, including an infringement of Article 267 (3) TFEU, may be brought before the Court.[80] Examples concerning Italy,[81] Spain,[82] Slovak Republic,[83] or France[84] followed. Recently, the Commission initiated the pre-judicial stage of the infringement proceedings (letter of formal notice) against Germany[85] in connection with

77 See Michael Dougan, 'Primacy and the remedy of disapplication', CML Rev. 56 (2019), 1459–1508.

78 See i.a. Marten Breuer, 'Urteile mitgliedstaatlicher Gerichte als möglicher Gegenstand eines Vertragsverletzungsverfahrens gem. Art. 258 EG', EuZW (2004), 199; Christiaan Timmermans, 'Use of the infringement procedure in cases of judicial errors', in: Jaap W. de Zwaan, Frans A. Nelissen, Jan H. Jans, and Steven Blockmans (eds), *The European Union: An Ongoing Process of Integration--Liber Amoricum Alfred E Kellerman* (The Hague: T.M.C. Asser Press 2004), 155–163.

79 ECJ, *Magnus Killinger v. Federal Republic of Germany, Council of the European Union and Commission of the European Communities*, order of 3 June 2005, case no. C-396/03 P, ECLI:EU:C:2005:355.

80 See ECJ, *Magnus Killinger* (n. 79), para. 28. For more details see Maciej Taborowski, 'Infringement proceedings and non-compliant national courts', CML Rev. 49 (2012),1881–1914.

81 ECJ, *Commission of the European Communities v. Italian Republic*, judgment of 9 December 2003, case no. C-129/00, ECLI:EU:C:2003:656. Here Court held that judicial decisions which are contrary to EU law may be a factor which determines a declaration of an infringement on the part of the legislating bodies of a Member State.

82 ECJ, *Commission v. Kingdom of Spain*, judgment of 12 November 2008, case no. C-154/08, ECLI:EU:C:2009:695. See Escudero, 'Case C-154/08, Commission v. Spain, Judgment of the Court (Third Chamber) of 12 November 2009, not yet reported', CML Rev. 48 (2011), 227-242.

83 ECJ, *Commission v. Slovak Republic*, judgment of 22 December 2010, case no. C-507/08, ECLI:EU:C:2010:802.

84 See ECJ, *European Commission v. French Republic*, judgment of 4 October 2018, case no. C-416/17, ECLI:EU:C:2018:811. Here the national court adjudicating at last instance failed to follow his obligation to make a reference for a preliminary ruling to the Court.

85 See https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743.

the *Weiss* judgment of 5 May 2020,[86] and went to Court against Poland in connection with the judgments of the Polish CT concerning the primacy of EU law.[87]

III. Potential Consequences of Judicial Decisions of Defective Appointees

1. Legal ineffectiveness

In several rulings, the Court has made statements regarding the status of judgments that were issued by a court that does not meet the requirements of being established by law, independent and impartial. The Court indicated that it is possible that judicial decisions issued by courts that do not meet these requirements may not unfold full legal effects in the national legal orders. Such a consequence may thus also concern judicial decisions of the national court's ruling with the participation of defective appointees.

According to the Court's judgment in *Euro Box Promotion*, if a national court has been tasked with applying EU law, even if it is a Constitutional Court, and it cannot be regarded as a body which is independent, impartial, and previously established by law, EU law precludes other national courts from having to recognize its rulings as binding. That is because a national court that does not meet the requirements of Article 19 (1) TEU or Article 47 CFR is unable to provide effective judicial protection.[88]

The Court also had the opportunity to assess the impact of the rulings of the Disciplinary Chamber of the Polish SC, stuffed exclusively with defective appointees. This is the Chamber that the Court found in *Commission v. Poland (Régimedisciplinaire des juges*) not to meet the requirements of independence and impartiality in the light of Article 19 (1) TEU, i.a. also because of the way judges were appointed to that chamber.[89] The Court stated that the designation by the President of the Disciplinary Chamber of the SC of the relevant lower disciplinary court (for national judges) is legally ineffective in the sense that the principle of primacy of EU law requires

86 See https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html.

87 See point III.4. *infra*.

88 ECJ, *Euro Box Promotion*, judgment of 21 December 2021, joined cases C-357, 379, 547, 811 and 840/19, ECLI:EU:C:2021:1034, para. 230.

89 See ECJ, *Commission v. Poland (Disciplinary regime for judges)* (n. 3), para. 113; see also ECtHR, *Reczkowicz v. Poland* (n. 34).

a disciplinary court so designated to disapply the national provisions, pursuant to which the designation took place and, consequently, to declare that it had no jurisdiction to hear the dispute before it.[90] With regard to the rulings of the Disciplinary Chamber of the SC, the Court stated, that a decision adopted by the Disciplinary Chamber is legally ineffective, on the ground that it is contrary to the second subparagraph of Article 19 (1) TEU, and that the applicant in the pending case must be allowed to invoke that ineffectiveness both in the judicial disciplinary proceedings still pending against him as well as before any other national authorities that might be called upon to give effect to that decision of the Disciplinary Chamber of the SC.[91]

Even more far-reaching statements as to the legal effects of judicial decisions of defective appointees were made in the *W.Ż.*[92] judgment of the Court, regarding a ruling issued by the Extraordinary Control and Public Affairs Chamber of the SC. This chamber is composed exclusively of new judges of the SC whose appointment process did not meet the standards of Article 6 (1) ECHR in the light of *Dolińska-Ficek*.[93] In this case, the claimant, a Polish Judge (Waldemar Żurek), a well-known opponent of the governmental judicial "reform", was transferred without his consent from one division to another division of a national court. Such an involuntary transfer may be regarded as having effects similar to a disciplinary penalty.[94] His appeal against this decision eventually went to the Chamber of Extraordinary Control and Public Affairs of the SC. The claimant then requested the recusal of all the judges from this chamber from hearing his appeal, on the grounds that it was staffed with defective appointees. The request for recusal was filed with an old chamber of the SC and dealt with by properly appointed judges of the SC. But then, in a surprising move, a new single judge from the Chamber of Extraordinary Control and Public Affairs, who had been at that time just (defectively) appointed to

90 ECJ, *M.F. v. J.M.*, judgment of 22 March 2022, case no. C-508/19, ECLI:EU:C:2022:201, paras 72–74; see also ECJ, *W.Ż., AS, Sąd Najwyższy and Others*, order of 22 December, cases nos. C-491/20-C-496/20, C-506/20, C-509/20 and C-511/20, ECLI:EU:C:2022:1046, para. 80.

91 ECJ, *W.Ż., AS, Sąd Najwyższy and Others* (n. 90), paras 80–85.

92 *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6).

93 ECtHR, *Dolińska-Ficek and Ozimek v. Poland* (n. 23).

94 See *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6), para. 115.

the SC found the appeal of Judge Żurek to be inadmissible, without awaiting the outcome of the recusal request. The preliminary referral in *W.Ż.* concerned thus the question of whether this new judge of the SC, because of his flawed nomination process, fulfilled the demands of Article 19 (1) TEU in the light of Article 47 CFR and whether he was allowed to make judicial decisions within the scope of EU law, like the one regarding Judge Żurek. It is well-known, that the Court has no possibility to appraise the national situation at hand or to apply EU law to the concrete case pending before a national court. But from the *W.Ż.* judgment, some clear indications emerged, that the new judge from the Chamber of Extraordinary Control and Public Affairs could not be regarded as a proper established court in the meaning of Article 19 (1) TEU and Article 47 CFR.[95] Then the Court pointed out, how the judicial decision of the defective appointee should be treated. According to the Court, it might be declared 'null and void', without any considerations relating to the principle of legal certainty or the *res judicata* of such a decision.[96]

This statement of the Court has opened a debate on the exact meaning of the declaration, that a judicial decision is 'null and void'. Some authors suggest that we are dealing here with a new autonomous remedy of EU law,[97] whilst others claim that the Court's statement in *W.Ż.* is rather part of the existing case law on the principle of the primacy of EU law.[98] It appears that the latter opinion should be regarded as correct. Firstly, if one traces the reasoning of the national court's preliminary referral in *W.Ż.*, one will see that the Court essentially used the terminology indicated by the Polish SC. That court analysed the potential effects of a judicial decision of a defective appointee in the Polish law context and suggested in the referral, that there was a possibility under national law to declare that the decision is null and void. It seems that the Court expressly indicated in the judgment itself that it followed the reasoning of the national court in this respect.[99] Secondly, in *W.Ż.* the Court makes an explicit reference to

95 See *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6), paras 152–153.

96 See *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6), paras 158–160.

97 Rafał Mańko and Przemysław Tacik, '*Sententia non existens*: A new remedy under EU law?: *Waldemar Żurek* (W.Ż.)', CML Rev. 59 (2022), 1169–1194.

98 See Dougan (n. 77).

99 See *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6), para. 159 pointing at para. 39 of the judgment.

the principle of primacy of EU law, which might suggest that the aim of the Court is to ensure full effectiveness of Article 19 (1) TEU in accordance with the principle of primacy, which, in line with *Simmenthal*, also includes the inapplicability of any "judicial practice".[100] Thirdly, the CJEU expressly stipulates that the assessment of whether the flawed ruling of the defective appointee should be considered null and void is a matter for the national court to decide and that this must be declared. The Court limits thus the effects of its statement only to the pending proceedings, which affects the positive aspect of *res judicata* and not its formal aspect (the legal existence of the judicial decision). In this respect, the solution adopted in *W.Ż.* seems to be similar to the CJEU's previous line of jurisprudence concerning the refusal to apply or to grant legal effects to final judicial decisions in breach of EU law.[101] Such a legal ineffectiveness might be invoked before national courts and other State authorities in pending proceedings. It is thus a measure of individual redress, strongly dependent on the concrete context.

According to *W.Ż.* the principles of legal certainty or *res judicata* should not be an obstacle for declaring a ruling of a defective appointee to be null and void. That statement sounds similar to the line of jurisprudence on the inapplicability of final national rulings based on the *effet utile* principle,[102] where the Court leaves no room for the application of those principles too. In these cases, the effectiveness of EU law is enforced fully at the expense of national law protecting the status of the final national court's rulings. Here, the *W.Ż.* case shows similarity with, *inter alia*, the Court's judgment in *Lucchini*. In that case, the Court stated, that EU law precludes the application of a provision of national law introducing the principle of *res judicata*, where that principle prevents the recovery of State aid granted in violation of EU law, the incompatibility of which has been established in a final decision of the European Commission. That is a consequence of the application of the principle of primacy of EU law and the *effet utile*

100 ECJ, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, judgment of 9 March 1978, case no 106/77, ECLI:EU:C:1978:49, para. 22. The CJEU, in principle, does not exercise direct jurisdiction over the validity of national acts of any kind. For an exception see ECJ, *Ilmārs Rimšēvičs and European Central Bank v. Republic of Latvia*, order of 10 April 2019, cases nos. C-202/18 and C-238/18, ECLI:EU:C:2019:299.

101 See point II.3. *supra*.

102 See e.g., ECJ, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, judgment of 18 July 2007, case no. C-119/05, ECLI:EU:C:2007:434.

principle, without any room left for the principle of legal certainty.[103] The rationale for limiting the binding force of a final judicial decision in *Lucchini* was to shield the obligations that Member State authorities have towards the EU, which are of a fundamental nature. At issue was the division of competences between the EU and the Member States in examining the compatibility of State aid with the EU internal market rules, as well as the effectiveness of final European Commission decisions that had not been challenged in time, which only the EU General Court and the Court, and not the national courts, were competent to assess. Similarly, the lack of any consideration on the principle of legal certainty is visible in those situations in which the Member State's action leads to a restriction on national courts' ability to apply the principle of primacy of EU law,[104] or to make use of the preliminary ruling mechanism.[105]

The lack of the possibility to invoke legal certainty or *res judicata* in *W.Ż.* would fit into this line of reasoning. Where EU law derived rights and obligations of individuals are decided by a judicial authority which is not an independent, impartial tribunal established by law under Article 19 (1) TEU and Article 47 CFR, the infringement of the rule of law and the identity of the EU legal order is at stake. From the perspective of the interference with the functioning of the supranational legal order of the EU, this might be an axiologically comparable situation, to limiting the principle of primacy, disturbing the preliminary reference mechanism, or interfering with the Commission's exclusive competencies in State aid cases.

In the context of legal certainty, in *W.Ż.* the Court does not mention potential consequences for third parties of a final court judgment being null and void or inapplicable. That is probably due to the fact, that in *W.Ż.*, as well as in the other judgments, in which the Court mentioned the ineffectiveness of flawed judicial decisions, no third parties were engaged. In those proceedings, only national judges were trying to protect their rights derived from the principle of effective judicial protection under Article 19 (1) TEU. In those cases, no rights and interests of third parties were at stake. The question then arises whether the decision of the Court could be equally ruthless if limiting the binding force of a final judgment would be

103 ECJ, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA* (n. 102), para. 61.

104 See e.g., ECJ, *Aziz Melki and Sélim Abdeli* (n. 70) and ECJ, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim* (n. 76).

105 ECJ, *Cartesio Oktató és Szolgáltató bt.* (n. 74).

detrimental to the rights of other parties to the proceedings. Probably the principle of legal certainty would then play a more prominent role in the Court's reasoning and would be a counterbalance for the *effet utile* principle. The examination of whether the binding effect of a flawed judgment of a defective appointee should be waived could then be approached in a similar way as in *Fallimento Olimpi club*,[106] *CRPNPAC*,[107] or *FMS and Others*.[108] Here the Court took the principle of legal certainty as the starting point.

In each of those cases, the Court assessed the *res judicata* protection for the final national rulings in the context of the principle of effectiveness and checked whether national procedural provisions made the protection of EU derived rights impossible or excessively difficult. That problem has then been analysed by reference to the role of the national provisions in the procedure, their operation, and their particular features, viewed as a whole, before the various national bodies. Account has been taken of the basic principles of the domestic judicial system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure.[109] In all these judgments, the starting point for the assessment of a final judicial decision, protected by *res judicata*, was the principle of legal certainty. The reasoning behind the analysis was not to allow obstacles to the effective application of EU law which cannot be reasonably justified. Such obstacles must be considered to be contrary to the principle of effectiveness.[110]

106 ECJ, *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v. Fallimento OlimpiclubSrl*, judgment of 3 September 2009, case no. C-2/08, ECLI:EU:C:2009:506.

107 ECJ, *Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) v. Vueling Airlines SA v Vueling Airlines SA and Jean-Luc Poignant* (n. 67).

108 ECJ, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, judgment of 14 May 2020, cases nos. C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, paras 192–202.

109 ECJ, *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v. Fallimento OlimpiclubSrl* (n. 106), para. 27; ECJ, *Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) v. Vueling Airlines SA v Vueling Airlines SA and Jean-Luc Poignant* (n. 73), para. 93.

110 ECJ, *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v. Fallimento OlimpiclubSrl* (n. 106), para. 31; ECJ, *Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) v. Vueling Airlines SA v. Vueling Airlines SA and Jean-Luc Poignant* (n. 73), paras 95 and 96; *FMS and Others*

That technique of weighing values in the search for a reasonable balance may also sometimes be necessary when assessing flawed judicial decisions of courts adjudicating with participation of defective appointees, in particular in respect to proceedings involving parties who are in a horizontal relationship. When a recognition of the binding force of a judicial decision of a defective appointee would then adversely affect the rights or the legal situation of a party to the proceedings, this could be compensated by damages liability of the Member State, but the flawed judicial decision would be protected, remain valid and unfold its legal effects.[111]

Finally, attention should be drawn to the pending case in *AW "T"*,[112] which lies at the borderline of the discussed issues. The case raises questions about the formal aspect (reopening) and the substantive positive aspect (ineffectiveness) of the principle of *res judicata* in the context of a flawed judicial decision. Here, the Extraordinary Control and Public Affairs Chamber of the SC, stuffed exclusively with defective appointees, has set aside a final judgment of the Court of Appeal in Cracow and referred the case back to that court for re-examination. The reversed judgment of the Court of Appeal was already protected by the principle of *res judicata*. In the meantime, however, while the case was pending at the SC, one of the parties to the proceedings, that ended with that (in the meantime repealed) final judgment, has applied for an enforcement clause for the judgment at the Cracow Court of Appeal. Now, the Court of Appeal needs to know, whether it should disapply the flawed judicial decision of the Chamber of Extraordinary Control and Public Affairs of the SC, issued by defective appointees, and declare the repealed judgment to be fully enforceable, or should it regard the annulment made by the defective appointees from the SC as binding and therefore refuse the request to execute the judgment of the Court of Appeal.

2. Reopening of judicial proceedings

Since the poss ibility to consider a ruling of a defective appointee to be "null and void" according to *W.Ż.* concerns most probably only the inapplicability

v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság (n. 108), para. 197.

111 See point III.3. *infra*.

112 ECJ, *AW „T"*, pending case no. C-225/22.

of such a judgment in certain procedural constellations,[113] this would not touch upon the permanence (existence) of the flawed judicial decision itself.[114] A flawed judgment of defective appointees might be inapplicable in various contexts, but it will exist in a legal sense. Thus, in order to remove it from the legal order, it would be necessary to initiate an available national judicial procedure leading to its review or annulment.

In this respect, according to the established case law of the Court, EU law, in principle, does not require a Member State to refuse to apply the provisions protecting the *res judicata* of a judgment,[115] or to create procedures to overturn the final judicial decisions which are in breach of EU law. At the same time, however, national law may provide for such a solution. If the applicable domestic rules of procedure foresee the possibility, under certain conditions, for a national court to reverse a decision having the authority of *res judicata* in order to render the situation arising from that decision compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that that situation is brought back into line with EU law.[116]

The regulation of these matters lies within the regulatory discretion and autonomy of the Member States. Within that autonomy, national law may, for example, provide that judgments of defective appointees are still null and void, notwithstanding the different possible interpretations of *W.Ż.*[117] It needs to be emphasized that for the Polish legal system, in the resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of the Polish Supreme Court from January 2023, which is significant for the legal status of rulings of defective appointees,[118] it was envisaged that all rulings of the new judges of the SC, nominated after 2018, are to be regarded invalid in the Polish legal order. At the same time, that invalidity must be declared in the relevant court procedures. A reopening of judicial proceedings is, therefore, in prin-

113 It would, therefore, have an impact on the material positive aspect of *res judicata*.
114 So, it would not affect the formal aspect of the principle of *res judicata*.
115 See CJ, *Târşia* (n. 61), para. 29; *XC and Others* (n. 61), para. 53; ECJ, *Călin* (n. 61), para. 27.
116 ECJ, *Impresa Pizzarotti* (n. 65), para. 62.
117 Indeed, the Polish SC has ruled so in several cases. See e.g., Polish Supreme Court, order of 26 November 2022, case no. II CSKP 556/22.
118 See the resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of the Polish Supreme Court, 23 January 2020 (n. 41).

ciple, already possible currently under the rules applicable to all judicial procedures in Poland on the grounds that a national court deliberated in a composition comprising a defective appointee. Such a national solution, stemming from the national regulatory autonomy of a Member State, is also allowed, and supported by EU law.[119]

The problem in this respect in the Polish legal order is that over time it will be difficult to find an appropriate forum to apply for such a reopening, especially at the Polish Supreme Court. This is because with time more and more judges in the SC will belong to the group of defective appointees. Hence there may be a problem with finding at the SC an appropriate composition that meets the standards of Article 19 (1) TEU, Article 47 CFR or Article 6 (1) ECHR. In addition, the current management of SC, stemming from the group of defective appointees, does not allow for cases to be decided in a way that is detrimental to the status of those appointees. A good example of this is provided by the aftermath of the *W.Ż.* case,[120] or the attempt to reopen national proceedings following the ECtHR ruling in *Advance Pharma*. The ECtHR found in favor of this Polish company, that Article 6 (1) ECHR has been infringed because the cassation appeal of the company filed with the SC had been rejected by a panel composed of defective appointees of the Civil Chamber of the SC. After the ECtHR's judgment, the company requested the SC to reopen the proceedings. The case has been referred for evaluation by a panel composed of one defective appointee. That appointee, surprisingly, initiated a preliminary referral based on Article 267 TFEU, currently pending before the ECJ, with some

119 Interestingly, the ECtHR in *Ástráðsson* expressly indicated that its judgment did not impose on Iceland an obligation to reopen all similar cases that have since become *res judicata* (see ECtHR, *Ástráðsson* (n. 15), para. 314), but no similar reservation was not made by the ECtHR in the judgments concerning appointments to the Polish Supreme Court (see ECtHR, *Dolińska Ficek and Ozimek* (n. 23), para. 368; ECtHR, *Advance Pharma* (n. 36), para. 364)

120 After the preliminary ruling in *W.Ż.* was decided in Luxembourg in October 2021, the files of this case returned to the Polish Supreme Court. But as of today (July 2023) no final ruling has been issued in this case. The reason for this is extra-judicial: the person currently acting as the First President of the Supreme Court, who, as a 'new' judge, is herself affected by the problem referred to in the *W.Ż.* ruling, decided not to release the case file to the panel of judges from the SC's Civil Chamber, who raised the preliminary questions with the Court. Then the composition of panel of judges which should decide the case and implement the CJEU judgment has been changed so that in the end, the 'new' judges, defectively appointed, have a majority on the bench.

questions concerning EU law and the obligation to reopen judicial proceedings.[121]

It is still necessary to consider whether EU law in any way requires Member States to introduce or to obligatory use a tool for reopening final judicial decisions.[122] The judgment of the Court in *XC*[123] seems to suggest that there is no such requirement provided that the effectiveness of EU law is guaranteed by the legal framework and appropriate remedies available to the parties in the respective Member State. If that is not the case, national law would make it impossible in practice or excessively difficult to exercise the rights conferred to individuals by the EU legal order. Then, the absence of the possibility to reopen proceedings might violate the principle of effectiveness.

In *XC* the Court concluded that legal remedies were in place which effectively guaranteed the protection of the EU derived rights of individuals. That is because the applicants in the main proceedings were fully able to plead an infringement of EU law before proper established national courts stuffed with correctly appointed national judges. Since the effectiveness of EU law was ensured by that framework, it was not necessary to add to it an exceptional remedy enabling national judicial decisions which have the force of *res judicata* to be challenged. The question arises, however, whether the legal framework can be considered to meet the requirements of the principle of effectiveness if, for example, a case has been decided at the last instance by a court which does not meet the requirements of Article 19 (1) TEU and Article 47 CFR and whether, in such a situation, the principle of effectiveness would not require the creation of an additional mechanism to guarantee the effective protection of EU law through a retrial. But for the moment, relevant examples from the Court's case law are missing.[124]

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121 See the preliminary referral stemming from a defective appointee of the Polish SC in case no. C-711/22 (pending) concerning the reopening of civil proceedings after the ECtHR judgment in *Advance Pharma sp. z o.o v. Poland* (n. 36).

122 The ECtHR ordered for the first time a reopening of national court proceedings after it has found an infringement of Article 6 (1) ECHR because of a failure to examine, without giving reasons, applicant's request to seek a preliminary ruling from the Court of Justice of the European Union under Article 267 (3) TFEU – see ECtHR, *Georgiou v. Greece*, judgment of 14 March 2023, no. 57378/18.

123 See ECJ, *XC and Others* (n. 61), paras 50–57.

124 But see for final administrative decisions violating EU law: ECJ, *Hristo Byankov v. Glaven sekretar na Ministerstvo na vatreshnite raboti*, judgment of 4 October 2012, case no. C-249/11, ECLI:EU:C:2012:608.

An isolated example emerged, in a slightly different context, not connected with the principle of effectiveness, from the judgment in *Skoma-Lux*.[125] Its main considerations concerned the consequences of the failure to publish an EU regulation in the EU's Official Journal in the official language of the Member State. In this regard, the Court stated that EU law precludes obligations contained in such a regulation which has not been published in the Official Journal of the EU in the language of the Member State concerned from being imposed on individuals, even if these individuals have had the opportunity to acquaint themselves with those regulations by other means. In regard to the temporal effects of the *Skoma-Lux* ruling, the Court stated that, while in principle the Member State concerned is not, under EU law, obliged to call in question final judicial decisions taken on the basis of untranslated legislation where those decisions have become final under the applicable national rules. But it would be otherwise in exceptional circumstances, where there have been administrative measures or judicial decisions, in particular of a coercive nature, which would compromise fundamental rights.[126]Thus, in case of sanctions which harm the fundamental rights of individuals, the obligation to reopen a final judicial decision nevertheless would arise under EU law. However, the Court has not indicated what exactly the legal basis was for such an obligation. Meanwhile, in other judgments, the Court declares that it is in principle not necessary to extend, in the event of an alleged infringement of a fundamental right guaranteed by EU law, in particular by the Charter, a remedy under national law which, in the event of an infringement of the ECHR or one of the protocols thereto, permits the rehearing of criminal proceedings closed by a national decision which has the force of *res judicata*.[127] Therefore the scope and the practical effects of the *Skoma-Lux* ruling are still unclear.

The above observations of the Court's case law may justify the conclusion, that, with regard to final judicial decisions, also those stemming from defective appointees, EU law in principle will not require their reopening. That is the general rule and starting point. But, firstly, EU law allows for Member States to introduce the possibility to reopen flawed judicial decisions within their regulatory autonomy. It seems thus, that when a Member State would like to introduce the possibility to reopen judicial proceedings

125 ECJ, *Skoma-Lux sro v. Celní ředitelství Olomouc*, judgment of 11 December 2007, case no. C-161/06, ECLI:EU:C:2007:773.

126 ECJ, *Skoma-Lux sro v. Celní ředitelství Olomouc* (n. 125), paras 71–72.

127 ECJ, *XC and Others* (n. 61).

which ended with a judicial decision of a defective appointee that would be allowed under EU law. Here EU law introduces some restraints resulting from the principles of equivalence and effectiveness. It is also important to keep in mind that due account must be taken of the rights of parties to a proceeding which will be reopened after a final judicial decision, especially in horizontal cases. A party, which would suffer harm from such a reopening should have the possibility to receive damages.

Secondly, from the case law of the Court also certain situations emerge, which for the moment are not entirely foreseeable or clear, that might require, already because of EU law, national authorities to introduce or to apply an obligation to review flawed judicial decisions of defective appointees. It seems that it would be especially so, where it would be apparent from the complex analysis of the national legal framework that it has not given due effectiveness to EU law, in particular where on the basis of a judicial decision sanctions were imposed that harm fundamental rights of individuals guaranteed by EU law. Actually, the example of the *W.Ż.* case would fit into this scheme, although the case itself did not concern the reopening of a flawed judicial decision of defective appointees but only its legal ineffectiveness in a certain procedural context. In that case, a sanction has been imposed on a national judge (involuntary transfer to a different court division) and the judicial proceeding leading to the verification of the legality of that sanction has been ended by a judicial decision of a defective appointee.

In must be underlined though that such situations are rare and certainly extraordinary, but they are striking at the very heart of the EU legal order. But as it is apparent from point II.2, an infringement of Article 19 (1) TEU or Article 47 CFR by a final judicial decision of a defective appointee, may constitute such a rough interference with the EU legal order. It can therefore not be excluded that, in certain extraordinary situations, especially when sanctions have been imposed on individuals, there may be a requirement under Union law for a Member State, not only to declare a judicial decision of a defective appointee to be null and void but also to implement some kind of procedures to overturn judicial decisions which have been released by defective appointees.[128]

128 For example, the European Commission imposed on Poland a requirement on the basis of milestone F.I.2. relating to the 'Justice System' from point F. of the Annex to Council Implementing Decision (EU) No 9728/22 of 14 June 2022 on the approval of the Polish National Recovery and Resilience Plan, that cases already decided by

3. Damages actions

The principle of *res judicata* does not preclude State liability for the judgments of a court adjudicating at last instance.[129] Given, inter alia, that an infringement, by a flawed judicial decision of a defective appointee, of rights derived from EU law cannot normally be corrected, individuals cannot be deprived of the possibility of holding the State liable in order to obtain adequate protection of their rights.[130]

With regard to the conditions under which a Member State may be rendered liable for the damage caused to individuals as a result of breaches of EU law for which it is responsible, the Court has repeatedly held that individuals who have been harmed have a right to reparation if three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between that breach and the loss or damage sustained by those individuals.[131] The liability of a Member State for damage caused by a decision of a court adjudicating at a final instance which breaches a rule of EU law is governed by the same conditions,[132] which are necessary and sufficient to create a right for individuals to obtain redress. This does not mean that a Member State cannot incur liability under less strict conditions based on national law.[133]While there is no doubt that, in principle, the emergence of liability for damages in respect of a final judgment of a defective appointee is possible, several specific questions arise in that respect.

First and foremost, a breach of a provision that confers rights on individuals is necessary for the State's liability for damages to arise. With regard to this premise, there is rather little doubt that the principle of effective judicial protection, as enshrined in Article 19 (1) TEU and Article 47 CFR, according to which a court should be independent, impartial and

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the (in the meantime) abolished Supreme Court Disciplinary Chamber should be re-examined by a court meeting the European requirements of Article 19 (1) TEU.

129 See ECJ, *Köbler* (n. 66), para. 40. On that topic especially see Bernhard Hofstötter, *Non-Compliance of National Courts. Remedies in European Community Law and Beyond* (The Hague: Springer, 2005).

130 See ECJ, *Köbler* (n. 66), para. 34; ECJ, *Târşia* (n. 55), para. 40.

131 See ECJ, *Köbler* (n. 66), para. 51; ECJ, *Tomášová*, judgment of 28 July 2016, case no. C-168/15, EU:C:2016:602, para. 22.

132 ECJ, *Köbler* (n. 66), para. 52; ECJ, *Tomášová* (n. 131), para. 23.

133 ECJ, *Köbler* (n. 66), para. 57.

established by law, explicitly grants rights to the individual for the sake of the damages action.[134]

Further, the liability for damage can be incurred only in the exceptional case where the national court adjudicating at the final instance has manifestly infringed the applicable law.[135] In any event, an infringement of EU law is sufficiently serious if it was made in manifest breach of the relevant case-law of the Court.[136] In this context, it would seem that already well-developed existing jurisprudence of the ECtHR and the CJEU on the independence of national courts and the value of the rule of law could indicate that the judgments currently rendered by defective appointees constitute such a manifest violation. In particular, in a situation where it has already been unequivocally established, in judgments such as *Reczkowicz*, *DolińskaFicek*, *Advance Pharma* or *W.Ż.* that it should be already clear, that the process of appointing the new judges of the Polish SC was so grossly flawed that every judicial decision of the defective appointees, released after those ECtHR judgments, violate at least Article 6 (1) of the ECHR.

It seems though, that the biggest problem will be with the requirement that there must be a direct causal link between the breach of EU law and the loss or damage sustained by individuals. In this regard, there may be a question as to whether the mere fact that a ruling is given by a court, involving a defective appointee, which is then not a court established by law, impartial and independent, causes in itself harm to an individual in a situation where the substantive effect of the flawed judicial decision itself

134 See ECJ, *A.B. and Others* (n. 25), para. 146 and ECJ, *A.K. and Others* (n. 7), para. 166.

135 See ECJ, *Köbler* (n. 66), para. 53 and ECJ, *Traghetti del Mediterraneo*, judgment of 13 June 2006, case no. C-173/03, EU:C:2006:391, paras 32 and 42.In order to determine whether a sufficiently serious infringement of EU law has occurred, the national court before which a claim for compensation has been brought must take account of all the factors which characterise the situation brought before it. The factors which may be taken into consideration in that regard include, in particular, the degree of clarity and precision of the rule breached, the scope of the room for assessment that the infringed rule confers on national authorities, whether the infringement and the damage caused were intentional or involuntary, whether any error of law was excusable or inexcusable, and the issue, where applicable, of whether the position taken by an EU institution may have contributed to the adoption or maintenance of national measures or practices contrary to EU law, and non-compliance by the national court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 267 TFEU – see i.a. ECJ, *Köbler* (n. 66), paras 54 and 55.

136 See ECJ, *Köbler* (n. 66), para. 56; ECJ, *Tomášová* (n. 131), para. 26.

would be correct in terms of EU law. Indeed, the requirements as to the nature of the national court under either Article 19 (1) TEU or Article 47 CFR will always be to some extent subsidiary to the specific rights derived from the EU legal order or the obligations imposed based on EU law on the parties to the proceedings.

In such a situation, a breach of the principle of effective judicial protection by delivering a judicial decision by a defective appointee will most commonly at the same time interfere with the EU derived right that is protected by that principle. At first sight, it will be probably difficult to consider a procedural failure of this kind as a separate breach leading to liability for damages. The object of assessment under the first condition for liability for damages will probably most often be, in this type of case, not whether rights are conferred by rules designed to protect the EU derived rights of individuals (Article 19 (1) TEU, Article 47 CFR), but whether they are conferred by the EU norms protected by those rules (e.g., free movement of persons or services).[137] The same will be true, moreover, of the national court's breach of its obligations under the principle of primacy or the principle of loyalty (Article 4(3) TEU). In these cases, what will be relevant first and foremost will be whether the provision of EU law, which, in breach of these principles, has not been applied correctly, confers rights on individuals. An infringement of rules of a procedural nature, as the rules concerning the proper composition of a court, will not always entail a substantively erroneous decision by that court. If the national court without a defective appointee would have given the same substantive ruling, even if it had taken into account the obligations flowing from the principle of effective judicial protection regarding its composition, the infringement remains, in principle, at least at a first glance, without negative consequences for the parties. The same will be the case in the event of an infringement of the obligation to initiate a preliminary reference under Article 267 (3) TFEU, which, after all, does not preclude the national court of last instance from giving a substantively correct decision. Then, in the institutional aspect (Member State – EU), although the national court will infringe EU law (Article 267(3) TFEU), it will, however, behave correctly with regard to the dimension granting the individual rights arising from the EU legal

137 With the exceptional situation e.g., where a national judge will derive rights directly from Article 19 (1) TEU.

order.[138] In such a situation, the individual, it seems, will not be able to claim damages.

However, damage to a party may undoubtedly arise from the fact that a judgment rendered by a defective appointee, because of the infringement of Article 19 (1) TEU or Article 47 CFR, may ultimately not unfold its full legal effects (e.g., it might be inapplicable according to the principle of primacy or challenged by a party as described in point III.2). This raises the risk that a party who, on the basis of such a judgment, has acquired a certain right, has relied on a certain legal relationship, or, for example, relied on the other party to perform certain obligations, may ultimately be unable to enforce them. In general, the question also arises as to whether and to what extent, for example, a specific right can be effectively acquired at all on the basis of a judgment of a defective appointee. Much will ultimately depend in this respect on the regulation of the effects of flawed judgments within the framework of the procedural autonomy of the respective Member State. Damage will undoubtedly arise at the point at which it becomes apparent that a party cannot rely on the content of a judicial decision or in a situation where that judicial decision may be subject to review because of a breach of Article 19 (1) TEU or Article 47 CFR and as a result to it, one of the parties suffers harm.

4. Infringement proceedings

The recent announcement that the European Commission ("Commission") is going to the Court on the basis of Article 258 TFEU against Poland in connection with the judgments of the Polish CT concerning the primacy of EU law,[139] reminded us of the fact, that infringement proceedings conceal also the possibility of a finding of an infringement against judgments of national courts. The subject matter of the infringement alleged against Poland are violations of EU law by the Polish CT and its case law. More specifically, it is about the rulings of the CT of 14 July 2021[140] and 7

138 See Hofstötter (n. 129), 133.

139 See in that respect the press release of 15 February 2023, 'The European Commission decides to refer Poland to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal', https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842

140 See judgment of the Polish Constitutional Tribunal of 14 July 2021, case no. P 7/21.

October 2021,[141] in which the CT had considered provisions of the EU Treaties incompatible with the Polish Constitution, expressly challenging the primacy of EU law. According to the Commission, the CT breached the general principles of autonomy, primacy, effectiveness, uniform application of Union law and the binding effect of rulings of the ECJ. These CT rulings also are in breach of Article 19 (1) TEU, which guarantees the right to effective judicial protection. The Commission also considers that the CT itself no longer meets the requirements of an independent and impartial tribunal previously established by law under Article 19 (1) TEU. This is due to the irregularities in the appointment procedures of three judges and in the selection of its President. Let us add that, in this context, a judgment has already been delivered by the ECtHR in *Xero Flor*,[142] where panels with the participation of the problematic three judges were found to be not a tribunal established by law under Article 6 (1) of the ECHR.

Thus, the Commission has made the rulings of the Polish CT directly subject of the infringement proceedings under Article 258 TFEU. The question then arises as to what obligations are envisaged by EU law in the event that the Court were to find an infringement with regard to specific judicial decisions, originating, inter alia, from defective appointees according to *Xero Flor*.[143] A judgment handed down under Article 258 TFEU with regard to an individual judicial decision of a national court (as the CT), would in all likelihood obligate a Member State to eliminate the infringement in a specific case covered by the proceedings. In order to avoid penalties under Article 260 (2) TFEU, a Member State would, in spite of the final nature of the ruling, have to find a solution which would effectively neutralize its legal consequences which are contrary to EU law. However, taking into account the Member States' autonomy regarding the manner of implementing a judgment delivered in infringement proceedings,[144] it seems that challenging a definitive national court ruling would be neither

141 See judgment of the Constitutional Tribunal of 7 October 2021, case no. K 3/21.

142 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland* (n. 22).

143 Further considerations in this point are taken from Taborowski (n. 80).

144 The Court has no competence to point to specific measures which should be applied in order to carry out the judgment pursuant to Art. 260 (1) TFEU with the reservation that Member States are obliged to obtain a result in the form of an effective removal of the infringement.

an automatic mandatory obligation following from Article 260 (1) TFEU, nor the sole remedy measure which could be applied in that situation.[145]

In its decision, a national court states in specific factual circumstances – constitutively or declaratorily – a certain legal state from which, depending on the type of case, specific effects sanctioned by the Member State follow. This is why it seems that removal of an infringement of this type could in certain circumstances be performed by limiting precisely these effects whilst leaving the ruling formally in force.[146] Thus, it would be possible, *inter alia*, to not carry out execution proceedings or refuse to grant such a ruling specific legal effects,[147] and hence, not to execute a judicial decision with the application of measures of compulsion and sanctions provided for by national law. Another way to carry out the Court's judgment would be to return or not to demand benefits which contrary to EU law should be paid by virtue of an erroneous judgment. If only the character of the breach were to furnish such possibility it would also be possible to grant compensation to aggrieved individuals, or even to take an *ad hoc* legislative intervention removing the effects of the infringement.[148]

However, leaving an erroneous – but in practice powerless – court decision in force may give rise to serious doubts from the point of view of the certainty of law. For this reason, if on the basis of national or EU law removal of a flawed ruling was to be possible[149] or even required,[150] this

145 The inability to challenge this type of decisions is one of the main arguments cited to justify the uselessness of the procedure under Art 258 TFEU in cases where the infringement relates to national courts – see i.a. N. Solar, *Vorlagepflichtsverletzung mitgliedstaatlicher Gerichte und ihre Sanierung* (Wien: Berliner Wissenschafts-Verlag, 2004), 108–109; See also the arguments presented by the Spanish Government in ECJ, *Commission v. Kingdom of Spain* (n. 82).

146 The Commission itself encourages Member States to above all take all appropriate steps aimed at eliminating the practical effects of erroneous court decisions – see 6th Annual Report of the Commission on national implementation of Community law for the year 1988 – Appendix on the attitude of national Supreme Courts to Community law, O.J. 1989, C 330/146 (160).

147 As in ECJ, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA* (n. 102).

148 The Commission encourages Member States to ensure proper application of EU law by courts also by applying legislative or administrative measures – see 3rd Annual Report of the Commission on national implementation of Community law for the year 1985, O.J. 1986, C 220/27.

149 As in ECJ, *Commission v. Slovak Republic* (n. 83).

150 E.g., according to the principle of equivalence or e.g., in the case of a breach of fundamental rights as in ECJ, *Skoma-Lux sro v. Celní ředitelství Olomouc* (n. 125), para. 72.

would be a desired measure. Following the need for correct implementation of an infringement judgment, a Member State could also introduce – voluntarily or under EU compulsion – into the national law system provisions which would make it possible to challenge definitive court decisions.[151] In this way one could remove the uncertainty as to what effects are created by an erroneous decision in the national law and secure in a reasonable way the interests of those individuals for which a renewal of closed proceedings would be unfavorable in a legal or financial dimension (especially in horizontal judicial proceedings). The introduction of appropriate solutions would thus allow States to create and control a balance between the obligation to remove an infringement, the protection of principles which are sensitive from the point of view of the national system of law, as well as the necessary interests of individuals.

Sometimes, in view of the character of a breach or the requirements of national law, reversing a final judicial decision of a national court which breaches EU law may prove to be actually the only way to implement a judgment of the Court, which may, in turn, provoke a direct conflict between the obligations of the State arising out of Article 260 (1) TFUE and the principle of certainty of law. That conflict occurred already in cases concerning acts of application of law by administrative bodies like i.a. in *Commission v. Germany*, where in the light of Article 260 (1) TFEU, the ECJ deemed that what will be necessary to reverse the effects of an infringement in the carrying out of a public tender is not financial compensation but the termination (annulment) of an agreement concluded with the business partner selected by virtue of a decision in the defectively conducted tender.[152] Also in *Commission v. Great Britain* the Court did not allow the Member State to rely on the protection of the stability of final administrative decisions (planning permissions) in order to prevent an infringement action regarding the failure of administrative authorities to assess the effects of certain projects on the environment.[153] In order to

151 See e.g., Opinion of A.G. Cruz Villalón in ECJ, *Commission v. Slovak Republic* (n. 83), para. 54.

152 ECJ, *Commission of the European Communities v. Federal Republic of Germany*, judgment of 18 July 2007, case no. C-503/04, ECLI:EU:C:2007:432, paras 31–34. See in particular Jan Komárek, 'Infringements in application of community law: some problems and (im)possible solutions', REAL 1 (2007), 87–98.

153 See ECJ, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, judgment of 4 May 2006, case no.C-508/03, ECLI:EU:C:2006:287, paras 66–73, in which the Court regarded the fact that the planning

avoid liability under Article 260 (2) TFEU, having regard to the judgment in *Commission v. Germany*,[154] the Member State, might have been forced to carry out the environment test required by EU law, which would involve the need to challenge the definitive administrative decisions in question.[155]

The above cases seem also to indicate that a Member State could not invoke the principle of certainty of law as a defense neither in proceedings under Article 258 TFUE nor under Article 260 (2) TFEU since a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify the failure to observe obligations arising under EU law[156] or the non-implementation of a judgment establishing a failure to fulfil obligations, including pleas based on the certainty of law, protection of justified expectations or *pacta sunt servanda* also in situations in which these principles could be invoked in proceedings before a national court.[157] In relations between the EU and a Member State, the Court thus essentially does not take account of the effects of the infringement judgment for the basic principles of the national legal system. Such an approach is understandable, since otherwise the effectiveness of judgments under Article 258 TFEU might be seriously put into question.

A judgment declaring an infringement concerning a judicial decision of a defective appointee may also have a significant impact on the legal position of individuals. However, measures which a Member State is obligated to take in order to correctly implement a judgment declaring an infringement should be distinguished from possible benefits which may be derived from such judgment by individuals being parties to proceedings definitively completed by incorrect decisions of national courts. Individuals can avail only of the 'content' of an infringement judgment, which specifies what kind of

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permission at issue was in force on expiry of the period laid down in the reasoned opinion as sufficient to admit the action for failure to fulfil obligations but ultimately did not declare an infringement concerning acts of application of law as the Commission did not present sufficient evidence in this respect.

154 See ECJ, *Commission of the European Communities v. Federal Republic of Germany* (n. 152), paras 36 and 38.

155 See Komárek (n. 152), 91.

156 See ECJ, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* (n. 153), para. 69; ECJ, *Commission of the European Communities v. Portuguese Republic*, judgment of 10 January 2008, case no. C-70/06, ECLI:EU:C:2008:3, para. 22 and ECJ, *Commission of the European Communities v. Federal Republic of Germany* (n. 152), para. 38;

157 See ECJ, *Commission of the European Communities v. Federal Republic of Germany* (n. 152), para. 36.

legal situation is, in the light of EU law, inadmissible, in particular as far as the *ex tunc* interpretation of EU law is concerned.[158] All national bodies will thus be obligated to take into account the effects of an infringement judgment as an element of the legal state of examined cases.[159] That might also be the real added value of the Commission's infringement action against Poland regarding the Polish CT. However, all potential rights of individuals follow in the above cases directly from the provisions of EU law which a Member State violated and not from Article 260 (1) TFEU. In order for individuals to be able to avail of legal protection before national courts all the remaining pre-conditions must be met which allow one to commence the pertinent proceedings before national courts[160] and to use the tools described in point III.

IV. Conclusions

After having analysed the potential influence of EU law on the status and legal effects of rulings issued by national courts staffed by judges who cannot be regarded as independent, impartial or established by law in the light of Article 19 (1) TEU, Article 47 CFR and Article 6 (1) ECHR makes it clear that, just like with the Court's case law on final judicial decisions violating EU law, the starting point for any actions should be the principle of legal certainty, the protection of *res judicata* and the rights of parties to the judicial proceedings. In accordance with established case law, EU law attaches importance to the principle of the authority of *res judicata* in order to ensure stability of the law and legal relations and the sound administration of justice. Therefore, EU law will most probably not require automatically revisiting flawed judicial decisions of defective appointees that have acquired the authority of *res judicata*. These statements have sev-

158 See A.G. Toth, 'The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects', YEL 4 (1984), 1–77 (53).

159 See i.a. ECJ, *Federal Republic of Germany v. Commission*, judgment of 12 June 1990, case no. 8/88, ECLI:EU:C:1990:241 para. 13 and with regard to courts see ECJ, *Procureur de la République and Comité national de défense contre l'alcoolisme v. Alex Waterkeyn and others*; *Procureur de la République v. Jean Cayard and others*, judgment of 14 December 1982, case nos. 314/81, 315/81, 316/81 and 83/82, ECLI:EU:C:1982:430, para. 14.

160 See in particular ECJ, *Vincent Blaizot*, judgment of 2 February 1988, case no. 24/86, ECLI:EU:C:1988:43, para. 27 and ECJ, *Bosman*, judgment of 15 December 1995, case no. C-415/93, ECLI:EU:C:1995:463, para. 141.

eral implications for a Member State that would like to undertake a healing process in connection with judicial decisions of defective appointees.

Firstly, in respect of such flawed judicial decisions, EU law refers to the Member States's regulatory autonomy, without imposing in principle any concrete obligations on that Member State as far as the legal status and the legal existence of such judicial decisions is concerned. That is also the space, which can be filled by a Member State general regulatory measure aiming at healing the status and the legal effects of flawed judicial decisions of defective appointees. To eliminate such rulings from the legal system, it will probably be necessary for the Member State to adopt appropriate legislative solutions or, if that is possible, to adopt solutions which are already in place (such as e.g., introducing procedures aiming at reopening of judicial proceedings, declaring the judicial decision void etc.). Here, the principles of equivalence and effectiveness restricting procedural autonomy will play a primary role in limiting the possibilities of the Member State's actions. Limits should also be imposed for the sake of legal certainty by the need to protect the rights of parties to proceedings and third parties affected by the measures, especially in horizontal relationships. For this reason, it also seems that it would be more advisable to put in place procedures that allow for individual evaluation of specific legal situations created by flawed rulings of defective appointees than statutory measures that would not provide for such individual evaluation. At least it is indispensable, that adequate compensation will be provided for those individuals, who suffered damages because of the measures introduced in order to heal flawed rulings of defective appointees. For the sake of legal certainty, it would also be certainly desirable that the possibility to question a flawed judicial decision of a defective appointee will be limited by a reasonable time-limit and decided by a court that fulfills all requirements of effective judicial protection under Article 19 (1) TEU and Article 47 CFR.

Secondly, EU law might nevertheless impose some obligations on the Member State as far as the legal status and the legal existence of judicial decisions of defective appointees are concerned, albeit only in some extraordinary situations, which now are not entirely clear or foreseeable according to the current case law of the Court. That might be the case, e.g., when the overall legal framework of judicial protection in a Member State would not guarantee a proper level of effectiveness for EU law, especially when on the basis of judicial decisions of defective appointees sanctions are imposed on individuals and their fundamental rights have been violated. Especially, when a damages action would not be able to cure the legal harm suffered by

the individual and the reversing of a judicial decision (e.g., by reopening of the judicial proceedings) would be indispensable in a concrete procedural constellation. Such an obligation to deal with the legal status or the legal existence of the flawed judicial decision may also potentially arise if the national judicial rulings of defective appointees become the direct subject of an infringement action under Article 258 TFEU.

Thirdly, EU law demands that a damages action is always accessible for individuals who suffered harm resulting from judicial decisions of defective appointees. Here, the Member State has no discretion. The EU damages liability principle is directly effective. When the respective minimal conditions established by the Court are met, the individual has a right to compensation which should be realized via national courts. In that respect, besides typical situations concerning the manifest infringement of EU law, damage will undoubtedly arise at the point at which it becomes apparent that a party of the judicial proceeding cannot rely on the content of a judicial decision or in a situation where that judicial decision may be subject to review because of the court ruling with the participation of defective appointees and as a result to it, one of the parties suffers harm.

And, fourthly, it is possible for individuals to use all available means of individual judicial protection already available in the procedures of the legal system of the Member State, or introduced specifically by the Member State to provide such protection (e.g., reopening of judicial proceedings). Here, besides the damages action demanded by the EU legal order, EU law offers to individuals potentially also a very special tool against judicial decisions of defective appointees: the inapplicability of a flawed judgment issued by a defective appointee as an implication of the principle of primacy of EU law. That possibility, indicated in *W.Ż.*, will, however, be in principle available in court procedures other than the one in which the defective ruling was made. The condition for using this tool, therefore, is that a party can initiate and conduct some other court proceeding in which the defective court decision plays a certain legal role. It is therefore a tool available only in the context of the individual circumstances of legal proceedings pending in the concrete jurisdiction. Besides, that solution requires further clarification in future case law. The need for clarification concerns mainly the role played by the principle of legal certainty and *res judicata* in allowing the non-application of a flawed judicial decision. The case of *W.Ż.* and the other cases concerning rulings of the Disciplinary Chamber of the Polish Supreme Court, where the Court did not consider legal certainty and *res judicata* as important factors, were all vertical cases (between an

individual and the State bodies) with sanctions or measures having a similar effect to sanctions imposed on individuals (national judges). In other proceedings, especially involving parties who are in a horizontal relationship, a technique of weighing values in the search for a reasonable balance between the infringement of EU law and legal certainty, may be necessary when assessing the possibility of disapplication of flawed judicial decisions of courts adjudicating with the participation of defective appointees.

The analysis has also shown, that flawed rulings issued by defective appointees, whose nomination process was in breach of Article 6 (1) of the ECHR, Article 19 (1) TEU or Article 47 CFR, can be a source of different problems for the legal system of a Member State in the context of i.a. the preliminary ruling procedure (GNB presumption), damages liability, the legal ineffectiveness of flawed judicial decisions (*W.Ż.*), the possible need of their revocation, the possibility of declaring an infringement of the ECHR by the ECtHR or from the perspective of infringement proceedings under Article 258 TFEU. In effect, judgments of defective appointees may create a problem concerning legal certainty. Potentially, judicial decisions of defective appointees may also cause difficulties within the framework of cross-border cooperation in criminal or civil matters since problems may occur with their recognition and enforcement.[161]

The arguments indicated above are also a good reason for the need to cure defective judicial appointments. Therefore, a judicial reform, after the rule of law crisis is over, cannot be limited to excluding from the judiciary only those defective appointees who most blatantly violated EU values as Von Bogdandy and Spieker propose in this volume (see Chapter 5). The problem of defective appointees is much broader: they will generate flawed judicial decisions all time long. The key problem with the status of defective appointees concerns their nomination process. Here, the mistakes once made, will not be cured with time by themselves. No change regarding defective judicial appointments means more and more flawed judgments. That may expose taxpayers to the need e.g., to pay compensation, according to EU law or based on the ECHR, and will also create wide-spread legal uncertainty – for EU citizens and investors – within the Polish jurisdiction.

161 See e.g., the preliminary reference from a German Court in case C-819/21 (refusal to recognise a Polish criminal conviction on the basis of Article 2 TEU in the light of the framework decision 2008/909).