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ORIGINAL

IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

WRITTEN OBSERVATIONS

submitted, pursuant to Article 23of the Statute of the Court of Justice of the European Union, by

THE EFTA SURVEILLANCE AUTHORITY

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Department of Legal & Executive Affairs,
acting as Agents

IN JOINED CASES C-585/18, C-624/18 and C-625/18

A.K. (Case C-585/18)
v.
Krajowa Rada Sądownictwa (Case C-585/18)

DO (Case C-625/18)
CP (Case C-624/18)
v.
Sąd Najwyższy (Cases C-624/18 and C-625/18)

in which the Sąd Najwyższy, the Supreme Court of Poland, in a matter concerning a request to suspend the enforceability of the resolution of the National Council of the Judiciary entitled '*Opinion of the National Council of the Judiciary of 27 July 2018 on the continued service of a judge of the Naczelny Sąd Administracyjny*', and in other two cases on an action to determine the employment relationship of a judge of the Supreme Court in active service, made a reference for a preliminary ruling to the Court of Justice of the European Union pursuant to Article 267 TFEU.

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1 Introduction: relevance to the EEA

1. The preliminary reference of the *Sąd Najwyższy* ("Supreme Court") raises questions of fundamental importance, not only for the legal order of the European Union, but also for the legal order of the European Economic Area ("EEA"). Although the legal order established by the EEA Agreement differs in many respects from the EU legal order and, notably, pursues a less far-reaching level of integration than the latter,[1] these differences do not, at any rate, extend to the very foundations and values on which both legal orders are based. To be more specific, both legal orders are based equally and fundamentally on the respect for the rule of law in all its emanations. As is affirmed in the Preamble to the EEA Agreement, the relationship between the EU, its Member States and the EEA EFTA States is based on "long-standing common values and European identity".[2]

2. Any doubts concerning the independence of the judiciary or unrestrained access to the courts in a Member State of the European Union may, potentially, and profoundly, affect the position of individuals and economic operators, not only from other Member States of the EU, but also from the non-EU States of the EEA seeking to assert their internal market rights before the courts in that EU Member State.

3. As regards the independence of the judiciary, it should be borne in mind that all national courts within the EU/EEA system operate in a European capacity when applying the law derived from the respective treaties and the EEA Agreement and that it is essential that they are able to fulfil their function having regard to the law only, and free from any direct or indirect external influence. As the EFTA Court has observed: *"[w]ithout an independent court, the purpose of the Agreement would be rendered nugatory and the EFTA States would fail to safeguard the protection of the rights of individuals and economic operators"*.[3]

4. Similarly, any restrictions on access to justice in areas falling within the scope of the EU Treaties and the EEA Agreement necessarily imply that it will be more difficult, if not impossible, for individuals and companies to enforce the rights conferred upon them by EU and EEA law.

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[1] Judgment of 10 December 1998 in Case E-9/97, *Erla María Sveinbjörnsdóttir,and The Government of Iceland*, paragraph 59.
[2] Second recital of the Preamble to the EEA Agreement.
[3] Order of the President of the EFTA Court of 20 February 2017 in Case E-21/16 *Pascal Nobile and DAS Rechtsschutz-Versicherungs AG*, paragraph 25.

5. It is for these reasons that the EFTA Surveillance Authority ("ESA") has decided to submit observations pursuant to Article 23, third paragraph, of the Statute of the Court of Justice.

2 The questions referred

6. In all three joined cases the Supreme Court asks (with reference to Article 267 TFEU read in conjunction with Articles 19(1) and 2 TFEU and 47 of the Charter of Fundamental Rights ("CFR")), whether a newly created chamber of a national court, which has jurisdiction to hear appeals of national judges in disciplinary matters, can be considered to be an independent court within the meaning of EU law,[4] where it is composed exclusively of judges selected by a national body, such as the *Krajowa Rada Sądownictwa*, the National Council for the Judiciary, (the "NCJ"), which is tasked with safeguarding the independence of the courts, and which is in turn composed of members who are not guaranteed to be independent from the legislative and executive authorities. If the answer to that question is negative, the Supreme Court enquires whether another chamber of that same court, which no longer has jurisdiction in relation to the case at hand, but which does meet the requirements under EU law for independence, should disregard the national provisions which preclude it from having jurisdiction.

7. In addition, in Cases C-624/18 and C-625/18, the Supreme Court requests the Court to clarify whether Article 47 CFR and Article 9(1) of Directive 2000/78[5] must be interpreted as meaning that, in a situation in which an appeal has been brought before a court of last instance on a matter falling under EU law and jurisdiction in respect of that matter has been conferred on an organisational unit of that court which is not operational, another chamber of that court, which has been seised of the appeal, must refuse to apply the provisions allocating jurisdiction to that unit in order to protect the EU rights involved.

[4] And by implication, EEA law - see Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA").

[5] Council Directive 2000/78/EC of 27 November 2000 *establishing a general framework for equal treatment in employment and occupation*, OJ L 303, 2.12.2000, p. 16. ESA notes, however, that its observations will be limited to the rule of law question raised.

3 ESA's submissions

3.1 Question 1 in Cases C-624/18 and C-625/18

8. This question essentially concerns access to justice and the principle of the availability of effective remedies in respect of the enforcement of rights under EU and EEA law. It is also the subject of Case C-537/18 *YV*, currently pending before the Court. Moreover, in setting out the reasons for its references in Cases C-624/18 and C-625/18, the Supreme Court indicated that "due to the dynamics of the situation regarding the filling of posts in the newly-created chambers" of that Court, the present question "may become irrelevant".[6] Accordingly, ESA will limit itself to very briefly reiterating the observations it made regarding this question in *YV*.

9. In its submissions in *YV*, ESA submitted that the proper functioning of the internal market presupposes the existence of an effective judicial system which is geared to ensuring the full application and enforcement of rights and obligations arising from the EU Treaties and the EEA Agreement. To the extent that jurisdiction has not been allocated to an operational (section of a) court within the national legal system in relation to a matter which falls within the scope of EU and EEA law, a gap in legal protection arises which, for the matter at issue, will amount to a denial of justice.[7]

10. ESA also emphasised that unequal conditions relating to the application and enforcement of EU and EEA rules across the States can have a disruptive effect on the operation of these rules and on the level playing field which they are designed to achieve.[8] Ultimately, fundamental differences in the way the EU and EEA law is enforced in the States can undermine the overall balance of benefits, rights and obligations which are inherent to the membership of both the EU and the EEA.[9]

11. In addition, where a court with exclusive jurisdiction to deal with a matter falling within the scope of EU and EEA law is not yet operational, there can be no cooperation with the European Courts as provided for in Article 267 TFEU and Article 34 SCA respectively.[10]

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[6] See point 8 of the Request for a preliminary ruling in Case C-624/18, page 5.
[7] Point 15 of ESA's submissions in Case C-537/18.
[8] Point 14 of ESA's submissions in Case C-537/18.
[9] Ibid.
[10] Point 16 of ESA's submissions in Case C-537/18.

12. On the basis of these considerations, and relying on the Court's judgments in Case 106/77 *Simmenthal*[11] and Case C-213/89 *Factortame*,[12] ESA concluded that even though the assumption of jurisdiction in a situation in which no court exists or has come into operation seems to go beyond filling a procedural gap (as was the case in *Factortame*), this nevertheless may be justified as a temporary solution where this is imperative for the protection of rights afforded under EU and EEA law. ESA, therefore, proposed that the Court provide an affirmative answer to the question.[13]

13. As the question raised in Case C-537/18 *YV* raises precisely the same issues as those raised in the first question in the present Cases C-624/18 and C-625/18, ESA therefore submits that the Court should likewise provide an affirmative answer in the present cases referred.

3.2 The questions common to Cases C-585/18, C-624/18 and C-625/18

3.2.1 Question 1 of Case C-585/18 and Question 2 of Cases C-624/18 and C-625/18: Independence of the judiciary and the NCJ

14. The Supreme Court's question on the independence of the newly created (disciplinary) chamber of the Supreme Court relates to the manner of appointment of the members of that chamber. In particular, it refers to the manner in which the NCJ – its appointing body – is constituted.

15. Under Article 186(1) of the Constitution of the Republic of Poland of 2 April 1997 ("the Constitution") the NCJ´s task is to "safeguard the independence of courts and judges". The composition of the NCJ is regulated in Article 187 of the Constitution. This article provides for a diverse membership, including appointees from the legislature, the executive and the judiciary. It also determines that the majority of the NCJ (15 of the 25 members) are to be judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts.

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[11] Judgment of 9 March 1978 in Case C-106/77, *Italian Finance Administration v Simmenthal S.P.A*, ECLI:EU:C:1978:49, paragraphs 22 and 24.

[12] Judgment of 19 June 1990 in Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others*, ECLI:EU:C:1990:257, paragraph 21.

[13] Points 21 and 22 of ESA's submissions in Case C-537/18.

16. As the Supreme Court explains at point 10, *in fine*, of its request for a preliminary ruling, the *Krajowej Radzie Sądownictwa* of 12 May 2011 ("Law on the NCJ")[14] provides that the judicial members of the NCJ are selected by their peers. However, following the legislative amendments of 8 December 2017 which included an amendment to the Law on the NCJ, the judicial members of the NCJ are now selected largely by the Polish Parliament (the *Sejm*). This change means that the majority of the NCJ (23 of 25) is now composed of members appointed by or representative of the legislative and executive authorities.[15]

17. The question referred by the Supreme Court is based on the premise that this new mechanism for the appointment of the NCJ, which in turn appoints judges to the Supreme Court, casts doubt on the independence of the newly created chamber of that court, which has jurisdiction in relation to appeals in disciplinary proceedings against members of the judiciary and which is (to be) composed exclusively of judges appointed under the new arrangements.

3.2.2 Independence of the judiciary: importance for EU and EEA legal order

18. The realisation of the objectives of the EU Treaties and the EEA Agreement depends to a large part on the vigilance of individuals and economic operators and on their willingness to assert the rights which they derive from the respective treaties before the national courts.[16] It is the national courts in the EU and the EEA which are the primary channels through which individuals and companies are able to enforce their internal market rights. When called upon to adjudicate on matters with an EU or EEA dimension, national courts act within the framework of European judicial cooperation and fulfil a duty entrusted to them jointly with the European courts to ensure that in the interpretation and application of the EU Treaties and the EEA Agreement respectively the law is observed.[17] In doing so, they give effect to the State's duty of cooperation, enshrined in Article 4(3) TEU and Article 3, first paragraph, of the EEA Agreement.

19. Although the terms of judicial cooperation established by Article 267 TFEU and Article 34 SCA differ in certain important respects, it is nevertheless clear that in both situations such

[14] Law of 12 May 2011 on the National Council for the Judiciary (*ustawa z dnia 12 maja 2011 r. o Krajowej Radzie Sądownictwa, consolidated text: Dz.U. 2018/389.)*
[15] See point 12 of the Request for a preliminary ruling.
[16] See the eighth recital of the Preamble to the EEA Agreement.
[17] Judgment of 27 February 2018 in Case C-64/16 *Associacao Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117, paragraph 33.

cooperation is founded on mutual trust between the participating courts. In both cases the European court which has been called upon to provide guidance to a national court on EU/EEA law must be able to rely on the requesting court to apply its judgment fully and faithfully to the case before it. It is only in this way that the objective of a uniform interpretation and application of EU/EEA law can be achieved and this, in turn, requires that the national courts concerned are able to apply the requested ruling in full independence and with regard for the law only. If a national court does not (appear) to operate in full independence, and may prove susceptible to external influence in giving effect to a judgment of either of the European courts, this *a fortiori* would pose a threat to the objective of uniform interpretation and application of EU/EEA law. In such a situation the very essence of judicial cooperation established by the respective Treaties would be undermined.

20. This is also why both the Court and the EFTA Court, in the criteria they employ in defining a "court or tribunal" within the meaning of Article 267 TFEU and Article 34 SCA[18] attach such importance to the independence of the judicial body concerned. It is only courts which meet the requirements of independence which are able to refer questions to the European courts, in the context of fulfilling their task of upholding the EU/EEA rights of natural and legal persons in the national legal order.

21. At the same time, it should be pointed out that the objective of ensuring a uniform interpretation and application of the law also serves to bring about equal market conditions for economic operators throughout the entire EEA. In that sense, it is instrumental in achieving "an overall balance of benefits, rights and obligations of the Contracting Parties" as affirmed in the fourth recital of the Preamble to the EEA Agreement. ESA submits that there is, therefore, a direct connection between guaranteeing the independence of the judiciary in the EU/EEA States and achieving the substantive objectives of the TFEU and the EEA Agreement.

22. Consequently, any measure affecting the independence of the judiciary in any of the EU/EEA States cannot be regarded as being purely internal to that State. On the contrary, maintaining respect for this fundamental principle of the rule of law is a matter of common concern throughout the EU and the EEA.

[18] For the EFTA Court, see judgment of 16 December 1994 in Case E-01/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 25.

3.2.3 Independence of the judiciary: basic principles

23. It should be recognised that the States are wholly competent to organise their judicial systems and the judiciary as they see fit. However, as is always the case in areas in which States enjoy (even exclusive) competence in respect of a given subject matter, this competence must be exercised in conformity with the basic principles of EU and EEA law. The European Network of Councils for the Judiciary ("ENCJ") states as a condition of its membership, that institutions are to be independent of the executive and the legislature and are to ensure the final responsibility for the support of the judiciary in the independent delivery of justice. In this context it is important to note that on 17 September 2018, the ENCJ suspended the Polish NCJ from the membership of the ENCJ.[19]

24. In that regard, it is clear that within the EU, the principle of the independence of the judiciary is firmly established both as an element of the rule of law, referred to as a fundamental value of the Union in Article 2 TEU, and as an essential prerequisite of the principle of effective legal protection, guaranteed by Article 19(1), second subparagraph, TEU. It has also been anchored in Article 47 CFR, as a corollary to Articles 6(1) and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). Moreover, respect for the fundamental values relating to the rule of law constitutes a condition for accession to the European Union (Article 49 TEU) which remains essential thereafter (Article 7 TEU). The Court, too, has clearly and emphatically confirmed these principles in its Judgment in Case C-64/16, *Associação Sindical dos Juízes Portugueses*,[20] and in doing has also emphasised that they apply not only at EU level, but also at the level of the Member States as regards the national courts.[21]

25. According to the Court's case law,[22] in order to preserve the independence of the judiciary guarantees must exist aimed at protecting the (members of) judicial bodies against any form of external intervention or pressure which may be liable to jeopardise independent and unbiased consideration and decision-making on the matter submitted to it for judgment. In

[19] See Position Paper of the Board of the ENCJ on the membership of the Polish Council for the Judiciary (KRS).https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/News/ENCJ%20Board%20position%20paper%20on%20KRS%20Poland.pdf.

[20] Case C-64/16 *Associacao Sindical dos Juizes Portugueses v. Tribunal de Contas*, cited above.

[21] Ibid, paragraph 42.

[22] Judgment of 19 September 2006 in Case C-506/04 *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, ECLI:EU:C:2006:587, paragraph 51 and in Case C-64/16 *Associacao Sindical dos Juizes Portugueses*, cited above, paragraph 44.

other words, a court must be able to function wholly autonomously, without being subject to hierarchical (or other) constraint or subordinated to any other body, other than the normal route of judicial appeal, and without taking orders or instructions from any external source. Furthermore, independence implies that the members of judicial bodies are impartial, in that they observe complete objectivity in relation to the matters coming before them for judgment and that they have no personal interest in the outcome of proceedings.[23] As the Court elucidated further: *"[t]hose guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it*".[24]

26. In addition, the EFTA Court has observed, in the context of assuring the lawfulness of its own composition, that it is vital not only that judges are independent and fair, but that they must also appear to be so. Maintaining judicial independence requires that the relevant rules for judicial appointments must be strictly observed. Any other approach could lead to the erosion of public confidence in the Court and thereby undermine its appearance of independence and impartiality.[25] The same considerations apply to national courts, whether or not they are acting in their capacity as European courts.

3.2.4 Independence: judicial appointment procedures

27. It may be inferred from the principles outlined in the previous paragraph that the procedures and arrangements which apply to the appointment of judges must comply with certain basic standards which are designed to ensure that the appointees are free from any connection to bodies which are external to the judicial function. The very notion of the independence of the judiciary refers precisely to the absence of any links to the other branches of government (i.e. the legislature and the executive). Indeed, in any democratic state founded on the rule of law, which presupposes the existence of checks and balances between the different branches of government, one of the major tasks of the judiciary is to ensure that the other powers operate within the bounds of the law, *inter alia* by reviewing the legality of executive decisions and the compatibility of legislation with the national constitution and

[23] Case C-506/04, cited above, paragraph 52.
[24] Case C-506/04, cited above, paragraph 53.
[25] Decision of the EFTA Court of 14 February 2017 in Case E-21/16 *Pascal Nobile and DAS Rechtsschutz-Versicherungs AG*, paragraph 16.

international obligations. Consequently, there is an obvious functional reason to ensure that any direct control of the executive or the legislature over judicial appointments is avoided.

28. This does not mean, however, that all involvement of executive and legislative bodies or other non-judicial bodies in judicial appointment procedures is to be excluded. However, any such involvement should be restricted and not impinge upon the principle of self-governance of the judiciary.[26]

29. This principle implies that all decisions which may have any effect on the independent and impartial functioning of a judge, relating, *inter alia* to appointment, remuneration, promotion, career development and disciplinary proceedings, should, without further safeguards, be taken *prima facie* within the realm of the judiciary, by judges for judges. In other words, however the involvement of the executive or legislative powers may manifest itself, in a national judicial system characterised by the existence of a national council for the judiciary, this may not undermine the elements of the selection procedure designed to guarantee that the outcome is the appointment of judges who are not beholden to the other branches of government.

30. From the perspective of the rule of law and the protection of human rights, it is clear that the reforms of 8 December 2017 should be regarded as a reduction of the level of functional independence of the Judiciary previously attained within the Polish legal system.

31. In that regard ESA reiterates the observations it made in Case C-522/18, *D.S.*,[27] that once a certain level of the protection of judicial independence has been attained, there should be no erosion of the guarantees adopted for that purpose (principle of non-regression[28]). In an area of such fundamental constitutional importance as the respect for the rule of law and, by extension for the independence of the judiciary, that level of protection should become the standard to which it must continue to hold itself in assessing subsequent adaptations. Indeed, it may be argued that this notion is reflected to a certain extent in Article 49 TEU,

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[26] ECtHR in *Oleksander Volkov v. Ukraine* (Application No. 21722/11), judgment of 9 January 2013, paragraph 112: "*Given the importance of reducing the influence of the political organs of the government on the composition of the [relevant judicial body] and the necessity to ensure the requisite level of judicial independence, the manner in which judges are appointed to the disciplinary body is also relevant in terms of judicial self-governance*."

[27] At point 16 of the Written Observations in case C-522/18, *D.S.*

[28] See, too, the (non-binding) European Charter on the Statute of Judges, point 1.1, drawn up in the framework of the Council of Europe.

read in conjunction with Article 7 TEU, in that the enforcement mechanism provided for in the latter article may be triggered where there is a sufficiently serious breach of the values laid down in Article 2 TEU to which the State concerned has committed itself not only at the time of accession, but also thereafter ("committed to promoting them"). It may also be read as forming the underlying principle of Article 53 CFR, to the extent the CFR must not be interpreted as restricting or adversely affecting human rights guaranteed by other instruments of international law.

32. In addition, ESA submits that the measures adopted in relation to the NCJ must not be seen in isolation from the other measures adopted in the context of the legislative amendments of 8 December 2017 with regard to the organisation of the judiciary in Poland.[29]

33. In the light of the foregoing observations, ESA concludes that in a national judicial system characterised by the existence of a national council for the judiciary where the membership of a body such as the Polish NCJ, which is tasked with selecting and proposing candidates for judicial posts to the executive power as the appointing authority, having previously been composed of a majority of manifestly independent judicial members, is modified so that it becomes composed in majority of members who have themselves been appointed by the executive and legislative powers, this connection to the executive and legislature is liable to cast doubt on the independence of the judges appointed according to this procedure. That is all the more so where the modification in the membership forms part of broader adaptations which have the effect of weakening judicial independence. The mere appearance of susceptibility to external influence may potentially undermine the confidence litigants must be able to have in the courts in considering cases brought before them in full impartiality and with sole regard for the law.

34. ESA therefore submits, that the first question in Case C-585/18 and the second question in cases C-624/18 and C-625/18 should be answered to the effect that, in circumstances such as those pertaining to the present references, a newly established chamber of a court of last instance of a State which has jurisdiction to hear an appeal by a national court judge and which is composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts, which, having regard to the systemic model

[29] See Cases C-522/18, *D.S.*, C-537/18, *Y.V.*, Joined Cases C-558/18 and 563/18, *Miasto Łowicz and Others*, Case C-668/18 *Uniparst*, and C-619/18, *Commission v. Poland*.

for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities, cannot be considered to be an independent court or tribunal within the meaning of Article 267 TFEU.

3.2.5 Question 2 of Case C-585/18 and Question 3 of Cases C-624/18 and C-625/18: Implications of a lack of independence

35. In its subsequent question in the cases referred, the Supreme Court enquires as to the consequences that flow from the finding that a newly established chamber in that court does not qualify as an independent court under EU law due to the procedure relating to its composition. More specifically, it asks whether, in such a situation, it is required, as a matter of EU law, to disregard the new legislative provisions conferring jurisdiction on the chamber concerned and itself assume jurisdiction.

36. In providing an answer to this question it may be useful to compare the situation in this case with the situation in Case C-537/18. In that case, the chamber of the Supreme Court which had exclusive jurisdiction to hear the appeal concerned was not yet operational, so that there was, *de facto*, no court to hear the case concerning the claimed EU right. As this effectively amounted to a denial of access to justice, ESA concluded, on the basis of the Court's case law in *Simmenthal*[30] and *Factortame*,[31] that the referring court had an obligation under EU law to disregard the national provisions of law concerned and assume jurisdiction in order to assure that a claim based on EU law was given due consideration.

37. The situation in the current case is different in that the chamber which is competent to hear the appeal apparently has now been constituted and is operational, but is composed of members who have been selected in a manner which – according to the referring court – does not guarantee their independence from the executive and legislative powers. The question submitted by the Supreme Court, therefore, relates to the latter's obligations under EU law to consider a claim based on provisions of EU law, where that claim has been brought before the competent chamber, but that chamber, in its view, does not qualify *de jure* as an independent court or tribunal within the meaning of EU law and, in particular, Article 267 TFEU.

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[30] Case C-106/77, *Italian Finance Administration v Simmenthal S.P.A*, cited above.

[31] Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others*, cited above.

38. The determination that a (chamber of a) court does not meet the requirements of independence does not in itself imply that, where cases have been brought before such a body, access to justice has been denied, as in the case of a non-operational body which has exclusive jurisdiction to hear the matter concerned. However, where individuals and economic operators seek to assert their rights, for example in appeals against decisions of public authorities, it is an elementary requirement of the rule of law that the case be heard by a body which is entirely impartial and in no way is linked to, or can be perceived as being linked to, the authority which took the decision under challenge. Nor may such a body have any kind of interest, whether direct or indirect, in the outcome of the case. Impartiality and neutrality *vis-à-vis* the outcome of a legal challenge must, therefore, be regarded as being constitutive elements of the act of imparting justice. To the extent that there is any doubt in respect of a judicial body fulfilling these criteria, there can be no question that such a body provides access to justice *stricto sensu*.

39. Besides the interest which private litigants have in the impartial and unbiased consideration of their disputes, the independence of national courts and their immunity from any external influence or pressure, particularly from the executive authorities, is essential to ensuring the uniform application of EU law (and EEA law) throughout the EU and the EEA. As was observed in point 18 above, the judicial cooperation procedure established by Article 267 TFEU and Article 34 SCA is based on mutual trust between courts at both the European and national levels. Uniform application can only be achieved if national courts are in a position to apply interpretative rulings of the Court independently and free from any considerations beyond the law. In this context, the role of courts of final instance is particularly important in view of their responsibility to provide ultimate guidance on the interpretation of the law within the national legal orders, which in turn explains why they are obliged under Article 267, third paragraph, TFEU to refer matters of interpretation or the validity of acts of the EU institutions to the Court.

40. In view of these considerations, ESA submits that it would be contrary to principles of guaranteeing access to justice and of ensuring the uniform application of EU (and EEA) law to leave a matter of EU (or EEA) law to be decided by a body which does not meet the requirements established by the European Courts for independence. Moreover, deficiencies in the independence of judicial bodies, even when they are not seised of cases raising issues

of EU (or EEA) law – in addition to being contrary to the rule of law in itself – are prone to foster the impression that courts ruling on EU (or EEA) law issues suffer from the same deficiencies and thus undermine the confidence of citizens in all courts. If such a situation does indeed exist within a national legal order, this leads to a gap in the legal protection of litigants, which subsequently raises the question whether EU law requires that a solution be found within the national legal order in order to remedy this gap.

41. In Case 106/77 *Simmenthal*, the Court decided that "*[..] a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means".* The Court also observed, in that same judgment, that *"[..] any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law*".[32]

42. Whereas both of these considerations from *Simmenthal* provide important guidance indicating that a national court is required to have competence to disregard any provision which may prevent EU law from having full effect in the national legal order, they significantly apply to "courts having jurisdiction" in relation to the matter to be decided. In the case at hand, the chamber of the court which has jurisdiction to hear the dispute concerned is unable to exercise that jurisdiction in a manner consistent with EU law, whereas for the referring court the opposite applies: it does meet the requirements for independence, but lacks jurisdiction and is thus unable to ensure the full application of the EU rights at issue.

43. In that regard a similar situation may be found in Case C-213/89 *Factortame,*[33] in which the national court was not empowered to give interim protection in respect of the EU rights

[32] Case C-106/77, *Italian Finance Administration v Simmenthal S.P.A*, cited above, paragraphs 22 and 24.
[33] Cited above.

which allegedly had been breached. Here the Court, relying on *Simmenthal* and the principle of cooperation laid down in what is now Art. 4(3) TEU, held that a national court was required to set aside a rule depriving it of the power to grant interim relief where the granting of such relief was necessary in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law.

44. ESA submits that even though the assumption of jurisdiction in a situation in which the competent court does not qualify as an independent court under EU and EEA law seems to go beyond filling a procedural gap (as was the case in *Factortame*)[34] this nevertheless may be justified as a temporary solution where it is imperative for the protection of rights afforded under EU and EEA law.[35] In this context, to refer to a phrase used by the Court in the (admittedly completely distinct) situation of inactivity of an exclusively competent legislative body, the national court assuming jurisdiction in this context could be regarded as acting as a "trustee of the common interest"[36] of ensuring the full application and effectiveness of EU law in the national legal order.

4 CONCLUSION

45. Accordingly, ESA submits that the Court of Justice answer the questions referred as follows:

Question 1 of Cases C-624/18 *CP* and C-625/18 *DO* should be answered in the affirmative.

Question 1 of Case C-585/18 *AK* and Question 2 of Cases C-624/18 *CP* and C-625/18 *DO* should be answered as:

> In a national judicial system characterised by the existence of a national council for the judiciary, a newly established chamber of a court of last instance of a Member State which has jurisdiction to hear an appeal by a national court judge and which is composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts, which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not

[34] Cited above.
[35] ESA in this instance draws a parallel in its arguments between the present question and the first question in Cases C-624/18 and C-625/18, which concern the situation where there is no operational or extant chamber able to take jurisdiction.
[36] Judgment of 5 May 1981, Case 804/79, *Commission of the European Communities, supported by the French Republic and Ireland (interveners), v United Kingdom of Great Britain and Northern Ireland* ECLI:EU:C:1981:93, paragraph 30.

guaranteed to be independent from the legislative and executive authorities, cannot be considered to be an independent court or tribunal within the meaning of EU law.

Question 2 of Case C-585/18 *AK* and Question 3 of Cases C-624/18 *CP* and C-625/18 *DO* should be answered as:

In such a situation a chamber of a court of last instance which does not have jurisdiction in the case, but meets the requirements of EU law for a court seised with an appeal may, as a temporary solution, disregard the provisions of national legislation which preclude it from having jurisdiction in that case.

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